

## **Independent Review of Criminal Legal Aid: Call for Evidence**

**A Response by**

**The Chartered Institute of Legal Executives (CILEX)**

**[May 2021]**



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## 1. Summary of Recommendations

- 1.1. The disjointed approach to reform of the criminal justice system has, thus far, prevented holistic overhaul of the sector; an approach that is fundamental for driving sustainable change long-term. (Para 3.1, 3.5)
- 1.2. This is witnessed with respect to financial resourcing, against which CILEX reiterates the need to focus equally on the remuneration models adopted at all stages of case progression. (Para 3.2)
- 1.3. Similarly, in resourcing the system with qualified practitioners, it is clear that there is a need to better mobilise those able and willing to resource the system. Establishing a dynamic, diverse, and driven workforce will safeguard against attrition and an exodus of talent from the sector, allowing for the proper functioning and future sustainability of the sector. (Para 3.3)
- 1.4. Inconsistent resource distribution across the prosecution and defence has seen incentives weighted in favour of the Crown Prosecution Service; compromising the system's ability to effectively service both parties to a proceeding. (Para 3.4)
- 1.5. In maintaining a healthy supply of practitioners to resource the system, and in rebuilding the pipeline of new entrants, firms require appropriate payment and incentive to sufficiently invest in their staff. (Para 3.6-3.7)
- 1.6. Mechanisms for securing legal aid work, alongside shortages in practitioner supply, can often act to exclude smaller firms from entry to the market. (Para 3.7-3.8)
- 1.7. Barriers of entry, cash flow problems and the heightened impacts of COVID-19 on financial longevity have rendered the criminal legal aid market less viable for firms to operate within. (Para 3.9)
- 1.8. Greater consistency and integration of processes across the various stakeholders to the criminal legal aid system would help to streamline services and improve efficiency in the sector. (Para 3.10-3.11)
- 1.9. Smarter deployment of criminal legal aid resources to cater for growing demands would also help to ease pressures on the system (Para 3.12). For example, changes to the Duty Solicitor Model so that duty lawyers are integrated as salaried appointments could have benefits in practice. (Para 3.13)
- 1.10. CILEX does not believe that criminal legal aid represents a sustainable career path for practitioners. This is not solely due to funding considerations, but wider issues of barriers to entry and progression, coupled with unfavourable working conditions. (Para 3.14-3.18)
- 1.11. Similarly, more nuanced barriers act to disincentivise firms from the market, including excessive auditing and administrative requirements that increase overheads for unremunerated activity. (Para 3.19)
- 1.12. Systemic issues combine to have a negative impact on suspects, defendants, victims and witnesses, including the rise in RUIs and general trends of undercharging. These contribute to a real lack of justice in seeking timely resolution for victims and suspects accused of crime. (Para 3.20-3.22)
- 1.13. The benefits of remote/hybrid working models, and new technologies, should be retained post COVID, with legal aid processes and requirements updated to reflect these new working practices. (Para 3.23, 3.27, 3.28)

- 1.14. Reforms must be sensitive to the disconcertingly low levels of morale witnessed in the criminal legal aid sector. As financial and workload pressures threaten to push out the limited workforce still operating in the system, CILEX foresees a very worrying landscape for criminal legal aid provision. (Para 3.24-3.26)

## 2. Introduction

- 2.1. The Chartered Institute of Legal Executives (CILEX) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEX represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. This includes more than 1,250 practitioners specialising in Criminal Law.
- 2.2. As it contributes to policy and law reform, CILEX endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.
- 2.3. The below response includes contributions from CILEX practitioners operating in the criminal legal aid market.

## 3. Responses to Specific Questions

**Q1. What do you consider are the main issues in the functioning of the Criminal Legal Aid System? Please highlight any aspects or stages of the criminal justice process relevant to your response (including in the police station; preparation for first appearance; proceedings at the Magistrates' Court; proceedings at the Youth Court; preparation for trial at the Crown Court or any subsequent proceedings)**

- 3.1. A critical issue that has undermined the proper functioning of Criminal Legal Aid to date, and the reform efforts made thus far in the sector, lies in the disjointed approach taken to resourcing the criminal legal aid system and tackling issues therein. In order to truly overhaul the sector to deliver sustainable, effective and quality services, it is therefore necessary for solutions to be focused across various stages of case progression, but with the overarching framework and service models of criminal legal aid in mind.
- 3.2. This fragmented approach has been witnessed within many of the attempts to resolve underlying funding issues across the sector in recent years, motivated by the wider implications felt from cuts imposed by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012.
  - 3.2.1. For example, multiple efforts to recalibrate the AGFS and LGFS fee schemes evidence a concentrated focus on resourcing the tail end of case progression, seeking to bolster financial longevity in instances where cases have already been escalated up through the courts. A failure herein for reforms to recognise that the inception of these cases begins, at the outset, from the police station, threatens the stability of the entire system for both parties at the very first hurdle.
  - 3.2.2. This was noted in the delivery of the Criminal Legal Aid Review throughout the course of 2019/2020, in which the five accelerated measures, whilst welcome in seeking to address some of the deficiencies in the criminal legal aid sector, overlooked the need for funding increases to be addressed holistically with the aim of securing the aspirational "fair pay for work done" at all stages of the

criminal law process, including earlier stages of representation and investigation (such as police station work).

- 3.2.3. Against the backdrop of COVID-19, emergency legal aid provisions similarly overlooked the need for greater support and resourcing towards earlier stages of case handling; with response measures from the Legal Aid Agency focusing on enabling interim claims for some Crown Court matters only.
  - 3.2.4. Indeed, practitioners have highlighted general trends that have exacerbated these tensions as delays and reductions in summary only charging, alongside increased charging of either-way and indictable offences that are subsequently sent to the Crown Court, creates heavy administrative demand at the earlier stages of case progression. Notwithstanding these trends for concentrating workload towards the front-end of the case lifecycle, the absence of changes to fee rates have rendered the remuneration in place at the Magistrates' Court representation stage insufficient to justify the added administrative burden.
- 3.3. This disjointed approach is not only felt within aims to bolster the financial resourcing of the criminal legal aid system, but also with respect to the resourcing of the system with suitably qualified and experienced legal aid practitioners that are able to deliver this work.
- 3.3.1. CILEX notes persistent barriers in this regard, restricting the ongoing development of individual practitioners in seeking career progression within the criminal legal aid system. As the professional association and governing body for Chartered Legal Executive lawyers, this is particularly evident to CILEX in the context of CILEX practitioners; and includes barriers of entry on both sides of the fence: including for Crown Prosecutor Roles (career development in the prosecution) and to the Criminal Litigation Accreditation Scheme (CLAS) (career development in the defence):

**Barriers of entry to Crown Prosecutor Roles:**

CILEX Criminal Advocates, and CILEX Associate Prosecutors, are explicitly barred from entry at the Crown Prosecutor level on the basis that their training as 'specialists' in one area of law is insufficient to equip them with wider knowledge and expertise in aspects of the law that they are unlikely to use within the role.

For CILEX Criminal Advocates and CILEX Associate Prosecutors working in the CPS<sup>1</sup>, this has the practical effect of denying these practitioners of any route to becoming a Crown Prosecutor without cross-qualification as a solicitor, an issue reported to CILEX as often driving these individuals out of criminal law practice.

These restrictions also harm the pipeline of talent that is required by the CPS to meet the demands of the criminal justice system, particularly at the present

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<sup>1</sup> There are currently 221 CILEX members working within the Crown Prosecution Service and 179 CILEX Associate Prosecutor Members.

moment when the backlog in Crown Courts stands at over 50,000 cases and over 400,000 in the magistrates' court.<sup>2</sup>

**Barriers of entry to acquiring CLAS accreditation:**

A similar dynamic exists in the context of the CLAS accreditation scheme; a mandatory precursor to entry as a Duty Lawyer (as mandated by the Legal Aid Agency (LAA), and the only route of entry therein.

By virtue of the Police Station Representatives Accreditation Scheme (PSRAS), which enables non-solicitor legal professionals to become 'Accredited Representatives' (and therefore advise and assist people at police stations under legal aid financing), there are a number of CILEX Advocates who are able to carry out this work. However, these individuals still require a solicitor supervisor under the terms of the LAA Standard Crime Contract, embedding greater inefficiencies and dependencies in the delivery of these services.

CILEX believes that the knowledge and competence gained training as a CILEX Practitioner should be recognised in the qualifications and competence required to be a supervisor under the Standard Crime Contract and enable these individuals to act under their own authority.

However, one of the requirements (contained within the LAA's Standard Contract) for rising to 'supervisor' level is that individuals must have accreditation under The Law Society's Criminal Litigation Accreditation Scheme (CLAS). In order to gain CLAS accreditation, individuals must have the PSRAS 'Accredited Representative' status and have passed the Magistrates Courts Qualification (MCQ). CILEX argues that the CILEX Advocacy Qualification is sufficiently comparable to the requirements for the MCQ for them to be 'passported' into the CLAS scheme; however, The Law Society have since refused to amend the scheme to recognise this fact. Historically, the MoJ has not been amenable either to the suggestion that CILEX Regulation develop a comparable accreditation scheme to deliver that assurance.

Not only does this make it hard for CILEX Criminal Advocates to work independently in criminal legal aid, driving them out of the sector, but it further limits the opportunities and career growth for those seeking to defend the accused under legal aid financing.<sup>3</sup>

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<sup>2</sup> HMCTS Case Management Data: January 2021: see [here](#) (Last accessed on 15<sup>th</sup> April 2021).

<sup>3</sup> This is witnessed against the backdrop and experiences of CILEX practitioners, including for example one senior practitioner, who, as an Accredited Police Station Representative and partner of his firm, is still expected to have a supervising solicitor in order to remain on the list of representatives (a pre-requisite that his Solicitor partner is not held to). This has not only had a knock-on impact on his own ability to operate independently but has created further barriers in practice for new entrants to the sector. As such, restrictions were placed upon his ability to 'supervise' a student through the accreditation process, with dispensation eventually granted on three bases, taking account of his level of experience in criminal legal aid defence work. Whilst the student did successfully go on to complete

- 3.4. As a result of inconsistent resource distribution across the criminal legal aid system and a fragmented approach to reform thus far, additional concerns arise with respect to the conditions witnessed within the defence sector vs the prosecution. This includes growing evidence suggesting that greater expectations are placed upon defence practitioners, alongside a disproportionate allocation of funding in favour of the prosecution (such as the additional £85 million worth of funding announced for the CPS in August 2019).<sup>4</sup>
- 3.4.1. These inconsistencies in resource allocation have been noted to see career prospects weighted in favour of the prosecution and a generally leaching away of practitioners from defence practice; particularly in the wake of financial instability as generated by COVID-19.
- 3.4.2. Anecdotal evidence from CILEx practitioners have indicated a gradual departure of talented professionals away from the defence sector, as they become more and more attracted to the higher wages and greater job security offered by institutions such as the Crown Prosecution Service in comparison to the private sector.
- 3.4.3. These changes emerge alongside a gradual reduction of new entrants to the defence market; apparent both pre-pandemic and as reduced fee incomes exacerbated by COVID-19 result in reduced recruitment across the board, evidencing future threats to sustainability.
- 3.4.4. CILEx is extremely concerned that further disincentives will continue to arise in this respect, with political rhetoric seeking to categorise the legal profession into 'lawyers' and 'lefty lawyers'/'do-gooders'<sup>5</sup>; favouring certain pockets of the profession, whilst discrediting others.
- 3.4.5. For the proper administration of justice, and in the interests of rule of law alongside fundamental human rights, such as the right to a fair trial, it is essential that public funding allocations, that public legal education and that public access to legal services and legal aid is administered in an equitable manner that does not unduly favour certain classes of proceedings or categories of party over others.
- 3.5. In order to drive substantive and sustainable change, reforms to the criminal legal aid sector require *systemic* solutions; a focus on the system as a whole, as opposed to various initiatives targeting only parts of the puzzle. Sensitivity to various reform projects already underway for the reimagining of the Criminal Legal Aid system and how these intersect and interplay with each other is thereby necessary. For example, work on pre-charge engagement conducted earlier this year, whilst focused on a specific element of the criminal law process, could not and should not be evaluated in isolation from wider reforms and more generalised

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the Accreditation process, the delays and efforts faced in doing so, undermine wider efforts for rebuilding the pipeline of providers in the system.

<sup>4</sup> See: <https://www.cps.gov.uk/cps/news/cps-response-additional-ps85m-funding> (Last accessed on 22nd April 2021).

<sup>5</sup> Boris Johnson, *Keynote Speech*, 6<sup>th</sup> October 2020 (Accessible here: <https://www.conservatives.com/news/boris-johnson-read-the-prime-ministers-keynote-speech-in-full>)



resourcing needs underpinning the criminal justice system as a whole (both in terms of monetary requirements and workforce requirements as outlined above).

**Q2. Do the incentives created by the current fee schemes and payments encourage sustainability, quality and efficiency? Please explain your answer and specify which fee scheme or payment you are referring to.**

- 3.6. When looking to the current fee schemes and payments in criminal legal aid, it is important to recognise that this framework operates through a mix of firm-based allocation (in which legal aid firms are allocated legal aid work through LAA contracts, acquired by tender), and practitioner-based allocation (in which roles such as duty lawyers<sup>6</sup> and the allocation of duty slots operate on an individual basis). As a result, there is a co-dependency established between firms and practitioners; practitioners need the firms to generate work, and the firms need the practitioners to secure the contracts. In order for the system to effectively leverage its workforce and encourage sustainability, quality and efficiency therefore, it is important that firms are paid appropriately, and incentivised, to invest in their staff so that the workforce is able to get the training they need to meet the standards of any applicable accreditation standards. Similarly, those standards need to be openly available to all individual practitioners to pursue, so that there isn't a disproportionate bargaining power by either party (firm or individual).
- 3.7. However, the existing margins of Criminal Defence firms, whereby income is largely generated through payment from the LAA, is insufficient to establish a balanced relationship, with it being near impossible for small firms to recruit junior staff and/or invest in their training/supervision. This situation puts further economic pressure on firms, with anecdotal research suggesting that there are so few Duty Lawyers/CLAS qualified practitioners remaining, that those with experience may be using their "duty" status as a bargaining tool to demand higher salaries. This is perhaps understandable when the practicalities of those roles are often necessitating out of hours work, overnight at the police station, followed by full days in court during the next working day. Small firms, often the most diverse, are in particular disadvantaged by this situation, not having the same ability that larger firms might have to cope. As well as placing further financial pressures on criminal defence providers, the impact of this outcome is to make recruitment and retention of "duty" lawyers very difficult in practice; reducing the available financial reserves that would ordinarily be used by practices to invest in the recruitment and development of more junior staff.
- 3.8. The situation has more general repercussions for the legal aid sector: it has in some areas resulted in certain firms being overloaded but, because the LAA contract has in recent times been repeatedly extended rather than put out to tender, smaller and

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<sup>6</sup> Commonly referred to as 'duty solicitors': a term that CILEX is hesitant to adopt due to the misapprehensions this can endorse in the sector by inferring that these positions may only be assumed by solicitors; overlooking the qualifications and standing of numerous CILEX practitioners who occupy this role.

more flexible firms with some capacity to assist the market, are unable to step in and share that burden. The payments process, as well as levels, therefore, need fundamental reconsideration. For example, given the tight margins in this work, for many firms the fact that payments are made in arrears, but all expenses incurred up front, is becoming increasingly problematic.

- 3.9. Indeed, COVID-19 has exacerbated this problem as firms struggle to retain existing staff, and by proxy their legal aid contracts, with little to no margin for future-proofing a steady legal aid workload through training and development. In contrast, surviving firms have been left to bear enormous financial losses from COVID-19, with ongoing uncertainty around the terms of the new LAA contract starting 2022. Legal Aid firm partners are having to bridge losses due to reduced work volumes and meet ongoing practice costs. As partners, they have not been able to furlough themselves through the pandemic nor have their firms been eligible for Self-employed business relief due to historic 'profits' (from which they have derived no real benefit as they were reinvested into the business).

- 3.9.1. Anecdotal reports from CILEX members and CILEx Regulation-regulated firms have highlighted that the market is simply not seen as attractive enough to invest in, particularly when factoring in the considerable demands placed on all suppliers by the Standards Criminal Contract.<sup>7</sup> Indeed, it is noteworthy that there are as yet no CILEx Regulation-regulated firms operating in the legal aid sector. This may be partly due to the current barriers to entry detailed above; for example, the pre-requisites for CILEX practitioners to be supervised by a Solicitor, restricting their ability to set up as sole practitioners.

**Q3. Are there any interactions between different participants within the Criminal Justice System, or ways of working between participants (for example, the Police, the CPS, and the Courts), that impact the efficiency or quality of criminal legal aid services?**

- 3.10. Lack of collaboration and consistency in how the various bodies to the criminal justice system interact can create inefficiencies in practice and has been exacerbated in the response measures witnessed to COVID-19 in the context of integrating solutions such as cloud video platform (CVP roll out).
- 3.11. Issues arise with respect to localised approaches to ways of working across the court estate and police stations and differing standards that are adopted around how a case should progress. For example, towards the beginning of lockdown and remote working conditions (April 2020), CILEX practitioners reported a lack of consistent uptake across police stations in accommodating for CVP linkups, compromising the effectiveness of these systems in safeguarding public health. Since then, we have been receiving feedback that whilst the situation has improved in police stations, receptiveness to remote hearings in the courts (especially the

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<sup>7</sup> There are currently 21 CILEx Regulation-regulated firms in existence, none of which operate in legal aid.

magistrates' courts where majority of CILEX advocates operate) has declined. This has manifested in a number of ways, including disproportionate expectations placed upon the defence (as compared with the prosecution) for justifying the need for remote attendance before the courts. By proxy, inconsistent standards are established across the legal aid system, with varying impacts to legal processes and the administration of justice as applies to both parties to the proceeding.<sup>8</sup>

3.11.1. This is against a backdrop where there remain problems with related extant systems such the CJS Secure Email System. The negative economic consequences on firms cannot be underestimated: the extra unnecessary administration and chasing generated by non-functioning systems meant to, for example, enable liaison with the courts, is all unremunerated activity taking time away from remunerated work as well as adding in inefficiencies.

3.11.2. These inconsistencies in ways of working are subsequently at risk of entrenchment into workplace processes and systems. For example, CILEX Criminal law practitioners are currently facing logistical barriers due to compatibility challenges between the CVP systems used within the prison services and those used within the courts.

3.12. As with any centralised network with various outlets (such as the framework adopted by the court estate and police stations), there does need to be a degree of flexibility and leeway for localised ways of working; however, to ensure cohesion and efficiency across the criminal justice system, greater integration of, and communication between, various stakeholders to the process is also necessary.

3.12.1. Herein more effective deployment of legal aid resources across various stakeholders is needed. For example, the gradual relocation of legal aid work from local centres to locations that are geographically much further away, has had the impact of inconveniencing all attendees to a criminal legal aid hearing.<sup>9</sup>

3.13. One particular solution that may help to better integrate processes and enable more effective deployment of staff/resources, could lie in the recalibration of the Duty Solicitor Model such that the role of duty lawyers is integrated as salaried appointments based on consistent case management from the police station, as opposed to remuneration paid on a case-by-case basis. The potential benefits herein would not only improve interactions within the varying participants of the criminal justice system, allowing for more effective deployment of resources across criminal legal aid than the current Duty Solicitor Call Centre is able to deliver, but

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<sup>8</sup> For example, CILEX practitioners highlight varying approaches adopted by HMCTS in the CVP system within the Magistrates Court: some allow advocates to appear via CVP automatically, others require advance permission from the court in question; some refuse to allow appearance by CVP at all, others require applications before the magistrates prior to hearing; some require specific detailing/reasons to justify CVP use (such as the presence of an underlying medical condition) whilst others allow only advocates, and not defendants, to join remotely via CVP. Meanwhile there is a general inability to use the facility in the case of defendants appearing on bail.

<sup>9</sup> For example, occasional courts formerly (pre-COVID) heard at High Wycombe, have since moved to Milton Keynes, and then subsequently onto the Oxford Magistrates' Court.

would also have the added benefit of establishing known fixed costs. In turn, any ulterior incentive for duty solicitors to work at pace would be removed, and the risk of bidding wars faced by firms in appointing new Duty Solicitors, reduced (as reference in paragraph 3.7 above).

**Q4. Do you consider that Criminal Legal Aid work, as currently funded, represents a sustainable career path for barristers, solicitors or legal executives?**

**1. Please explain the reason for your response to question 4 (above).**

**2. Are there any particular impacts on young lawyers, lawyers from particular socio-economic backgrounds, or on the ethnic or gender diversity of the profession, to which you would wish to draw attention?**

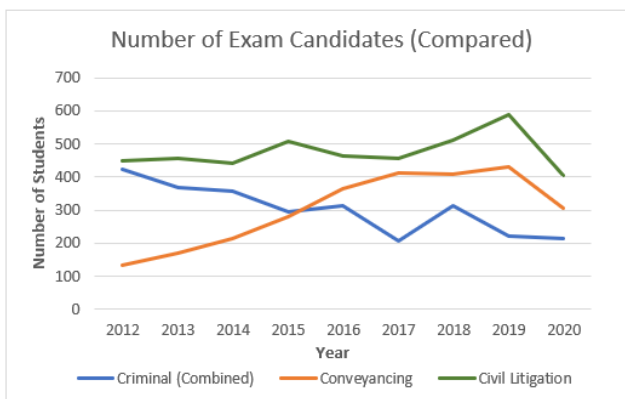
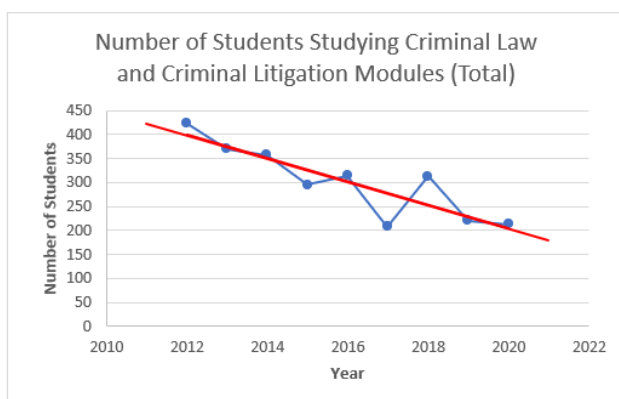
3.14. CILEX does not believe that criminal legal aid work as currently funded represents a sustainable career path for CILEX practitioners. This is on the basis of data trends witnessed against two key variables for sustainability: **entry** (the percentage of new entrants to the market) and **retention** (the percentage of leavers in the market).

3.15. **Entry:** In the context of entry, it is clear from data trends of incoming students and young lawyers electing to study CILEX Criminal Law and Criminal Litigation modules over the last decade, that there has been a steady decline in the number of CILEX practitioners choosing criminal law practice as their long-term career path. Indeed, this downward trend is very much consistent with systemic issues identified across the sector.<sup>10</sup>

3.15.1. Comparing this trajectory with other pockets of the industry, such as the conveyancing and civil law sectors (where there has been a general upward trend), highlights that the issue is acute to the criminal justice system; with the impacts of COVID-19 on entry rates in 2020 across the profession exacerbating these underlying concerns, as sustainability of the supplier base is increasingly threatened.

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<sup>10</sup> Law Society & Bar Council, *Summary Information on Publicly Funded Criminal Legal Services*, (Feb 2021) (accessible: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/960290/data-compendium.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf))



3.15.2. That said, CILEX data does suggest that there is latent interest for working in criminal law which has not been maximised under the current framework. This is evidenced by the discrepancy between those 3,193 CILEX practitioners who have undertaken CILEX criminal law/litigation modules as part of their specialist accreditation pathway, and yet only 1,287 who are currently active in the sector.

3.15.3. The likely reasons for this lack of uptake upon entry should not be mistaken as solely limited to funding considerations. Rather, future considerations that shape individual decision making, such as the long-term prospects of career progression and career development that CILEX practitioners can hope to have in pursuing this career path may well contribute to this fall-through rate.

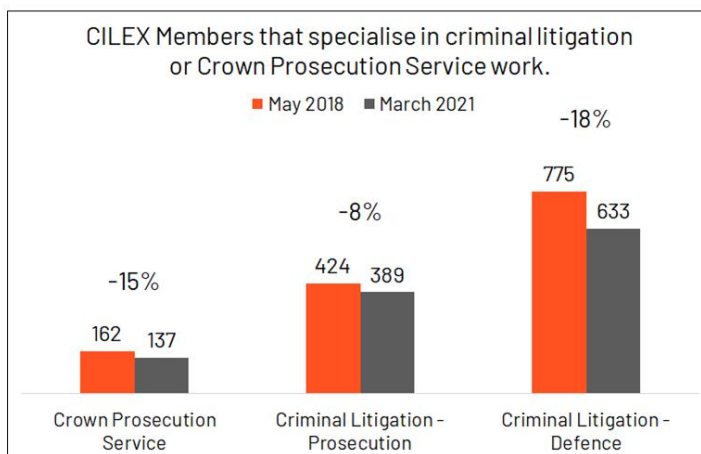
3.15.3.1. As seen above (para 3.2.1), for CILEX practitioners, choosing to enter the criminal legal aid sector means confronting the reality of limited career progression with capped earning potential and limitations on the level of contribution that individuals can make; all of which have acted to drain any remaining goodwill from the system and create a disincentive to others to follow into it.

3.15.3.2. These acute barriers posed to CILEX practitioners is magnified in light of the diversity that this route to qualification could generate within the profession. By offering an 'earn as you learn' model, the CILEX route to qualification removes the prerequisite of a university degree while maintaining high standards of competency and professional conduct expected of a legal professional. The result is a widely accessible and cost-effective route to authorisation as a specialist lawyer in one or more practice areas. Subsequently, the CILEX route has demonstrably opened up access to the legal profession to many who may have otherwise been disadvantaged in pursuing a career in law: our latest equality and diversity statistics covering the whole CILEX membership demonstrate that 76% of members identify as women, 15% identify as associating with a BAME

ethnicity, and only 5% have been recorded as having attended a fee paying or independent school.<sup>11</sup>

3.15.3.3. Having these pathways blocked at later stages of career progression is, for CILEX, counterintuitive to the overall ambitions of the sector in creating a more diverse justice system, undermining the concept of equality of opportunity and the establishment of a meritocratic legal profession.

3.16. **Retention:** Similarly, data trends of the overall CILEX membership demographic, have noted a general reduction in the number of members operating in criminal practice (and occupying roles such as that of Associate Prosecutor) over the last few years alone.



3.17. These data trends are particularly notable in the context of CILEX, as a provider of *specialist* pathways of entry to qualification as a legal practitioner. This is because, unlike in the case of Solicitors or Barristers, where there is greater flexibility to change practice area later in your career; for CILEX practitioners, the decision to specialise starts from the outset of education and training and limits migration to other fields of law later in life. Consequently, CILEX practitioners who elected to specialise as criminal lawyers will have done so with the primary intention and commitment to make criminal law their primary career path. Choosing then to leave this pathway later on in life, is testament to the unfavourable working conditions and remuneration rates witnessed in the sector.

3.18. Once again, it would be overly reductionist to assume that this departure has been solely prompted by funding considerations. Rather, workplace conditions witnessed in the sector have had the real-life impact of alienating certain individuals from this line of work, reducing the diversity of providers in the market.

3.18.1. For example, the current Police Station “Duty” model differs per geographical area with some “duty” slots running for 24-hour periods (e.g., 09:00 until 09:00), and others running for only a proportion of this time (e.g., 17.30 until 09:00). Not only does this create vastly unstandardised working practices across the country; but in all circumstances, the expectation remains for Duty Solicitors to

<sup>11</sup> See Annex 1 for diversity data on those CILEX practitioners operating in criminal law practice.

operate outside of usual working hours and often for a longer 'shift' period/pattern than would be typically witnessed in other professions.

3.18.2. These lengthy working hours have generally led to dissatisfaction for those already in the sector, with the unsocial hours expected of an individual during any of the current "duty" timeframes making it an unattractive sector of the profession for new entrants (particularly those with caring and other family commitments), creating further barriers to diversity and retention.

3.19. From a wider firm-based perspective, barriers and disincentives that have acted to push providers out of the market are also more nuanced than funding. For example, there is a concern that the present structure of criminal legal aid, in which excessive requirements around auditing and compliance are placed on legal aid firms, can work to undermine the sector's ability to stay resilient and attribute greater focus on business-critical activities such as meeting the needs of clients. Whilst CILEX acknowledges the importance for quality assurance, firms can often be subject to audits from, amongst others: Lexcel consultants, Peer Reviewers, Contract Managers and the LAA, facing a total of 3-5 audits per year. These undertakings all require (unremunerated) preparation, time and administration, taking resource away from the business of actual service delivery, and lowering morale as the perceived admin burden acts as a disincentive for prospective providers to enter the sector, particularly smaller firms with limited resource.

**Q5. Does the present structure of Criminal Legal Aid meet the needs of suspects, defendants, victims and witnesses? Please explain your answer.**

3.20. Systemic issues combine to have a negative impact on suspects, defendants, victims and witnesses: A reduction in police numbers, coupled with year-on-year declines in detection rates, decreased arrest rates and increased voluntary attendances have all compromised the ability for the current criminal legal aid system to adequately meet the needs of those involved, diminishing justice for victims of crime and those accused of it.

3.21. Delays prevalent at the investigation and pre-charge stages at police stations has resulted in an increase in defendants Released Under Investigation (RUIs) for indefinite periods of time, often for months or even years. This has exacerbated backlogs in the system and compromised access to justice for suspects, defendants, victims and witnesses as the prospect of a timely resolution is undermined.

3.21.1. CILEX practitioners have indicated that part of the delays witnessed at the investigation and pre-charge stages can be attributed to the lack of available legal aid funding, with knock on impacts for practitioners in seeking to orchestrate earlier building of defence cases.

3.22. A final note of concern highlighted in this regard is with respect to the present structure of Criminal Legal Aid and the interests of justice “Widgery Criteria” test to determine eligibility at the Representation Stage. Herein, it is noted that the application of the test often excludes public funding at the Magistrates Court from those not expected to receive custodial sentences, creating undue pressure and influence to resolve cases at an earlier stage and the disincentive of escalating cases up to the Crown Courts. In fact, the practice of undercharging and a migration of cases to lower courts seems to be general trend, with knock on impacts risking a real lack of justice for victims who may see perpetrators of crime either not charged or charged with a more minor offence; for suspects who may be denied the right to be tried by jury, and for witnesses, who might be required to relive their experiences and provide evidence years after an alleged crime.

**Q6. Some working practices within the Criminal Justice System have changed due to the Coronavirus pandemic.**

**1. Are there any new working practices you would want to retain, and why?**

3.23. The benefits of technology in catering for remote delivery of legal aid provision has been noted by CILEX practitioners as a welcome change that enhances greater efficiencies in the system.

3.23.1. For example, police station interviews, where practitioners are able to attend via remote means for the complete process (i.e.: pre-interview, during interview and post interview consultation), and where the quality of service provision can be ensured (including for example appropriate annotating of files), have multiple benefits for a sector relying on a skeletal workforce to meet rising demand. This is because, with the exception of certain cases (e.g. vulnerable suspects, serious indictable only offences etc), these technologies allow for more effective resource allocation across the country with practitioners able to complete a greater volume of interviews in a more diverse geographical area during their duty slot. In turn, there is an expected cost saving to the public purse, such as a reduction in travel costs and parking disbursements claimed by providers. The same is noted with respect to Prison Video Link facilities.

3.23.2. On a practical note, it is also recognised that the implementation of systems such as the Cloud Video Platform (CVP), has come at great expense to the public purse. Retention of these systems, and expansions therein to secure their long-term utility would therefore seem sensible. One of the ways in which this may be best achieved, is in better streamlining protocols and policies around use and uptake (as per para 3.11 above) and strengthening interoperability between the various systems.



**2. *Is there anything you wish to highlight regarding the impact of the pandemic on the Criminal Legal Aid System, and in particular whether there are any lessons to be learned?***

- 3.24. It would be remiss not to reference the significant lack of financial support provided to practitioners during the pandemic, exacerbating the already evident historic funding issues present for years beforehand. This extends to both remuneration levels and methods of payment, with practitioners continuing to be remunerated largely in arrears whilst forced to meet overheads and outgoings in advance of reimbursement. As a result, many providers have sustained noticeable losses and accrued significant debt over this period, with financial and working pressures concentrated on a limited pool of providers to supply and service the sector.
- 3.25. Greater awareness and sensitivity from stakeholders of these circumstances has often been missing, with logistical issues such as last-minute changes instituted to court venues, processes and timetabling having left providers unable to forecast workloads and effectively implement new processes for case management. As a result, providers have often struggled to allocate the appropriate staff to provide the necessary services, whilst also unable to predict the market in making best use of government support measures such as the Furlough Scheme in managing costs and overheads.
- 3.26. Whilst the longer-term impacts of the pandemic on future sustainability of the profession is still unclear, CILEX is sensitive to the noticeable reduction in morale across the profession; a factor that should not be underestimated for the impacts this may have on the existing supply base and future pipeline of new entrants to the criminal legal aid system. For CILEX, this certainly paints a very worrying picture for future sustainability.

**Q7. What reforms would you suggest to remedy any of the issues you have identified?**

- 3.27. The transition to remote/hybrid working as a result of COVID-19 has highlighted greater flexibility in the delivery of criminal legal aid service provision with the potential of generating additional benefits to legal aid firms currently facing cashflow difficulties, such as a reduction in overheads.
- 3.27.1. As noted in paragraph 3.23 above, retention of remote service facilities where suitable in the interest of justice, would help to maximise on this flexibility, creating a more attractive workplace for new entrants and existing practitioners, and helping to better mobilise criminal legal aid resources.
- 3.28. That said, processes and requirements within the criminal legal aid system are still in need of upgrading to effectively recognise these shifts in working patterns. For

example, anachronistic requirements for securing an LAA contract, still necessitate that firms have a physical office. Addressing these outstanding provisions so that they are better able to acclimatise to a post-COVID working world, could take pressure off the system, especially for smaller practices, and help to facilitate greater innovation and efficiencies in the delivery of criminal legal aid.

**Q8. The Review will be conducting other exercises to gather data on the profitability of firms undertaking Criminal Legal Aid work and the remuneration of criminal defence practitioners. However, we would also welcome submissions on this subject as part of this call for evidence?**

3.29. CILEX has gathered, and is in the process of gathering, more granular data on the issue of profitability and financial remuneration offered in the field of Criminal Legal Aid. We would be happy to share and discuss these findings in due course with both the requisite teams at the Ministry of Justice and the Independent Review Panel to explore what this may mean for the wider system.

**Q9. Is there anything else you wish to submit to the Review for consideration? Please provide any supporting details you feel appropriate.**

3.30. CILEX is sensitive to the importance of data in helping to drive forward solutions for the proper functioning of a criminal legal aid market that is able to deliver sustainability, quality and efficiency. As such, we hope that the above graphs (relating to entry and retention of providers) coupled with the datasets and information on diversity (contained in Annex 1 below) may be jointly useful for the Review to consider when looking to reform of the Criminal Legal Aid System.

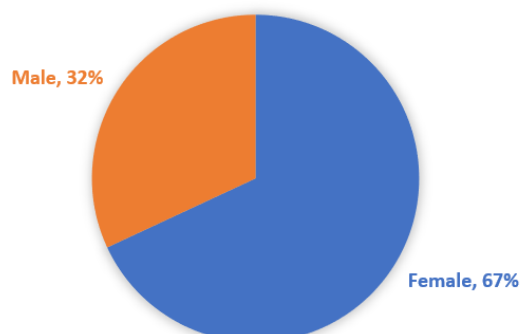
**For further details**

Should you  
require any  
further  
information,  
please contact;

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Head of Policy  
  
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## **Annex 1: Composition CILEX Practitioners working in Criminal Law.**

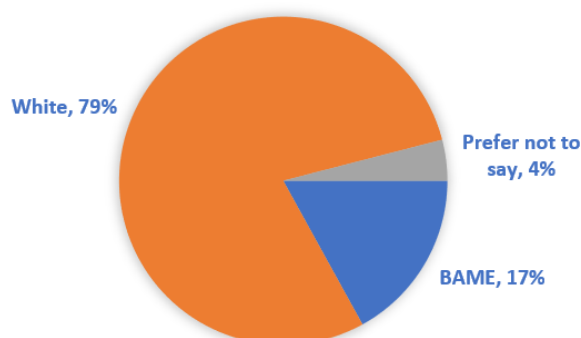
### **GENDER**



### **Gender**

67% of CILEX members practising in criminal law identify as female. Whilst this is lower than the average proportion of total CILEx members working in all practice areas (76%), it is higher than the proportion suggested within solicitor counterparts (51%) and barrister counterparts (30%).<sup>12</sup>

### **ETHNICITY**

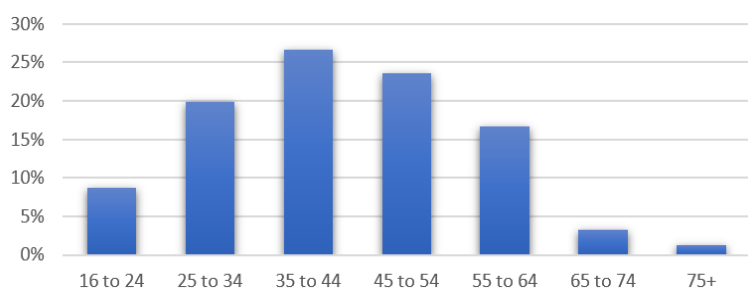


### **Ethnicity**

17% of CILEX members practising in criminal law identify as of BAME ethnicity, encapsulating the following categories:

- Asian or Asian British,
- Black or Black British,
- Mixed.

### **AGE OF CRIMINAL PRACTITIONERS**



### **Age**

The largest demographic of CILEX members practising in criminal law are within the age bracket of 35-44, mirroring that of solicitor counterparts.<sup>13</sup> However, with an average age of 44 years, this proves to be lower than across all duty solicitors, reported at 47.<sup>14</sup> In fact, 56% of CILEx members in this sector are under 45.

<sup>12</sup> Law Society & Bar Council, *Summary Information on Publicly Funded Criminal Legal Services*, (Feb 2021) (accessible:

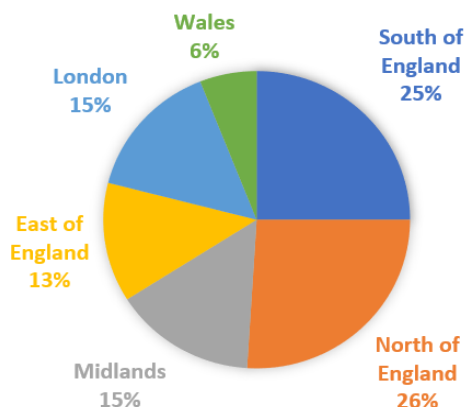
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/960290/data-compendium.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf)),

<sup>13</sup> See footnote 12; page 24, para 77.

<sup>14</sup> Law Society analysis of the LAA Duty Solicitor Scheme data, cross referenced with the Law Society's Criminal Litigator Accreditation Scheme membership data from 2017-2018 (here:

<https://www.lawsociety.org.uk/en/campaigns/criminal-justice/criminal-duty-solicitors>)

## CRIMINAL PRACTITIONERS BY REGION



### Geographical Spread

CILEX members practising in criminal law are relatively evenly distributed across England and Wales.

Combined regions in the North and South of England have around a quarter of CILEX practitioners each, while the East of England, London and the Midlands are served in almost equal proportions. This lays in contrast to other qualified criminal practitioners who operate predominantly in the London area.<sup>15</sup>

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<sup>15</sup> See footnote 12; page 50, para 122.