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I am a legal academic. My research examines the work of lawyers, access to justice and legal aid in criminal matters. I recently carried out a research project examining the impact of cuts to criminal legal aid on the work of defence lawyers, based upon detailed anonymous interviews with 29 criminal defence litigators and advocates across the England and Wales jurisdiction.¹ Such work is not generalisable/representative of all criminal legal aid lawyers, but it is a useful illustration of problems. I teach Criminal Law to Law degree students and Graduate Diploma in Law students (for those progressing to a legal career with degrees in other subjects) at my university. I am also the Course Leader/manager for the Graduate Diploma in Law course at my university.

¹ Thornton, 'Is Publicly Funded Criminal Defence Sustainable? Legal Aid Cuts, Morale, Recruitment and Retention in the English Criminal Law Professions' (2020) 40(2) *Legal Studies* 230
<https://doi.org/10.1017/lst.2019.31>

Thornton, 'The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study' (2019) 46(4) *Journal of Law and Society* 559
<https://doi.org/10.1111/jols.12179>

1. 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).

The main issue is that the current fee system encourages practitioners to prioritise (arbitrarily) some kinds of work over others. The clearest example is prioritising Crown Court work, or viewing it as the most important, with the other things on the above list as, at best, cashflow assistance and, at worst, loss-leader or pro bono. Obviously, it is appropriate that more complex work, requiring greater expertise, is paid more, but the perception of some defence lawyers is skewed too far by the fee system in favour of Crown Court work in practice. Some clients in these non-Crown Court areas may of course later become Crown Court clients (either in the same case, as it progresses, or in future), but that leads to a further set of arbitrary incentives in favour of cases or clients which look like they will or may become Crown Court cases or against those clients who, for example, have never been in trouble before and are unlikely to be again.

2. 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.

No. A number of examples came out of my research suggesting issues in all three of those areas. The clearest are below. I must emphasise though, that simply addressing these (or indeed any other incentives which other respondents might point out) is unlikely to be effective on its own (see Q7 below).

- The general prioritisation of Crown Court work over other areas.
- At magistrates court level, the type of crime
 - More serious crimes mean a client is more likely to be granted legal aid (due to the “merits test” for legal aid)² and therefore there is less risk that initial work will not be remunerated, or not lead to the more financially worthwhile later casework. This is not an issue for Crown Court work, as the Legal Aid Contract states the merits test is automatically passed for work at this level.
- The type of client
 - At magistrates court level, different clients can also be more or less of a risk in terms of whether the “merits test” for legal aid will be passed. At all levels, different clients can also be more or less of a risk (or just a “hassle”) of failing (or failing to prove) that the “means test” (low income requirements) for legal aid is passed. This means, for example, that a client with a terrible criminal record, on a suspended sentence (highly likely to go to prison, therefore easy to prove merits test) claiming benefits (easy to prove means test) is preferable to a client who has no criminal record and more complex financial arrangements (e.g. the self-employed).
 - Different clients can also be more attractive if they are more frequently in trouble (ideally serious trouble). Like any business, there is an incentive to prioritise those “customers” who may be arrested and charged in future (potentially involving, more

² s17 Legal Aid, Sentencing and Punishment of Offenders Act 2012

lucrative, serious Crown Court offences), rather than those who are unlikely to use the service again.

- Equally, clients who commit frequent and simple relatively trivial offences can also be attractive. E.g. admitted (guilty plea) breaches of the same or similar antisocial behaviour or other court orders over months or even years by the same client can be dealt with quickly. In those sorts of circumstances, the fixed fee can represent good remuneration relative to the work required.
- Taking instructions and prison visits.
 - Some litigators feel that these are both unpleasant and time-consuming and therefore the kind of work to be avoided where possible, as “not worth the fee”. Some advocates find that they therefore have to spend time on the first day of a trial taking these instructions instead.
- Particularly some advocates feel that, for a weak prosecution case, having a full trial ending in a not guilty finding is financially preferable to them making a “no case to answer” argument (which, if successful, would end the trial early, after only the prosecution evidence).

All of these incentives are arbitrary. None encourage sustainable, quality or efficient work. I expect there are others I have not mentioned/spotted. It is also true though, that they are only going to have great influence if defence lawyers’ margins are tight. Therefore, rather than focusing on modifying the payment structure and incentive schemes (which may itself create new, unintended, incentives in other areas to replace them), sustainable funding levels also need to be present.

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

Please explain the reason for your response.

Generally, no. There are three issues to this.

First, whether firms and chambers are inclined to offer entry level positions (paralegal jobs, training contracts and pupillages) at all. Whilst all of these do still exist, for financial reasons there was clear reluctance to offer them from partners and heads of chambers I interviewed. Generally, training contracts and pupillages were viewed as an investment (both directly and, in terms of senior staff needing to spend some of their working hours supervising trainees, indirectly) for the future, rather than an employee or tenant who would contribute very much to the business initially. Tight margins make that investment harder to justify.

Second, whether students apply for these roles. Interviewees told me that they struggled to attract many applicants, but not to the extent that jobs went unfilled. Their concerns were more about the quantity and quality of applicants applying. That is a concern for the administration of justice in general, but not necessarily in terms of sustainability of the criminal legal aid career. Similarly, in my own anecdotal experience as a lecturer, there are clearly some students who remain very committed to criminal law and legal aid at university, but equally, many more are put off by concerns about workload, work-life balance and pay. Having invested so much in their university tuition, many students not unreasonably think in terms of what return their career will give them on that “investment” and helping them pay off their student debts etc. Many legal careers *can* offer such returns, but criminal legal aid is not felt to be an attractive prospect in that regard.

That said, some students (including some of my own) clearly do secure roles in criminal legal aid. However, there is a third sustainability problem: whether newly qualified lawyers stay doing criminal legal aid. My study identified both recently qualified barristers and solicitors who, having completed pupillage/training contracts in criminal legal aid, clearly had no intention of staying. Whilst some went into other careers entirely, many simply planned to go into other areas of law. Using their trainee/pupillage time and sometimes the first few years afterwards as a springboard into other work was not uncommon. Indeed, it appeared to work out very well for some personally (but not so well for the sustainability of criminal legal aid as a profession). The other, similar, phenomenon that I observed in some of my interviewees was very strong diversification into other areas of law (sometimes private criminal defence, sometimes prosecution work and sometimes civil law), retaining only a very small amount of criminal legal aid work out of a sense of duty or interest. The problem with that is, firstly, it is debateable whether someone doing a minority of criminal legal aid cases can genuinely be described as having a “career” in criminal legal aid at all. At some point, we have to accept that criminal legal aid is not someone’s “career” if they are receiving the majority of their income from (and spending the majority of their time on) other practice areas. Secondly, research suggests that specialist lawyers tend to provide better advice than generalists.³

I think this is the biggest sustainability challenge. The interviews I carried out suggest there could be quite a large proportion of criminal legal aid lawyers who prop the system up for a bit, but do not have what could sensibly be described as a sustainable “career” in it. I wonder whether there is a sense that “it’s the early years, I’m establishing myself, it will get better” and then it starts to look like it never does by the time they get to e.g. their late 20s, at which point they leave or mostly diversify out of criminal legal aid practice. All of my interviewees mentioned that it was financial stress or the ways of working which that indirectly encourages (such as the arbitrary, and, for many, perceived to be unfair/frustrating, incentives identified in mine and, no doubt, others’ responses to Q2 above) which moved them away from criminal legal aid work.

4.2. 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?

Please state your reasons.

Yes. The Law is an expensive profession to qualify into. In addition to a degree, the year-long Legal Practice Course (LPC) or Bar Training Course is a large investment and must be self-funded. Non-Law graduates must also fund the year-long Graduate Diploma in Law (GDL) course. Going forward, the new Solicitors Qualifying Examination (replacing the LPC and GDL/Law degree) must be self-funded (just under £4000). Most students will also need to fund a preparation course for that new exam, which will have its own substantial costs. Scholarships etc. can help some from worse-off financial backgrounds, but not all. Likewise, master’s student loans also help, but do not cover everything. In other areas of law these investments can pay off later with a high salary. Criminal legal aid currently cannot offer this. Similarly, firms and chambers on tight margins are not in a position to

³ Moorhead, ‘Lawyer Specialization – Managing the Professional Paradox’ (2010) 32(2) Law & Policy 226.
<https://doi.org/10.1111/j.1467-9930.2009.00315.x>

cover these training costs to future trainees/pupils (unlike commercial law firms or some government legal departments, for example).

There is also the issue of aspiration. If (as I mentioned in Q4.1) fewer recently qualified lawyers are inclined to stay in the criminal legal aid profession very long, it starts to look like something which is not achievable to young people. As one of my interviewees put it (themselves from a Black background) “the role models have gone”.

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

Fundamentally, the system requires greater funding. Without sufficient funding, simply rearranging *how* that money is paid out risks creating a set of different, but equally arbitrary, incentives. Apart from my own research, this effect can be seen from earlier comprehensive research carried out in Scotland⁴ and England and Wales⁵ into the impact of the change towards payment by fixed fees. In both of those studies, defence lawyer behaviour changed to match the new incentives, but not necessarily in ways which were efficient or in the interests of justice. The temptation to follow the sorts of inefficient and inappropriate incentives identified by myself and other respondents in Q2 above is greater when fees are lower and margins are tighter. My expertise is not in accountancy, but others have suggested that margins *are* tight for quite some time. In 2014, Otterburn Consulting (for the MoJ and Law Society) found that on average criminal legal aid firms had a 5% profit margin.⁶ This was just prior to an 8.75% fee cut being introduced.

Equally, throwing money at the problem is insufficient on its own. The system needs to aim to avoid putting defence lawyers in positions whereby a given piece of work can be viewed as unimportant or not worth doing. Precisely how that is done is best left to practitioner respondents to discuss. Paying hourly rates for work done is one option, but that carries administrative burdens for all involved and may lead to inefficient working. I would suggest considering greater itemisation/graduation to fixed fees than currently, to take account of extra work done.

⁴ E.g. Stephen and Tata, *Impact of the Introduction of Fixed Fee Payments into Summary Criminal Legal Aid: Report of an Independent Study* (2007)

⁵ E.g. Fenn et al., ‘Standard Fees for Legal Aid, an Empirical Analysis of Incentives and Contracts’ (2007) 59 *Oxford Economic Papers* 662

⁶ Otterburn Legal Consulting, ‘Transforming Legal Aid: Next Steps. A report for the Law Society of England and Wales and the Ministry of Justice (February 2014). Available at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/otterburn-legal-consulting-a-report-for-the-law-society-and-moj.pdf>