

## **CLAIR Submission:**

### **About YLAL:**

Young Legal Aid Lawyers ('YLAL') was formed in 2005 and has over 3,500 members. We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded.

YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

YLAL was set up and operates to pursue the following objectives:

- To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
- To increase social mobility and diversity within the legal aid sector.
- To promote the interests of new entrants and junior lawyers and provide a network for like-minded people beginning their careers in the legal aid sector.

YLAL has engaged with the Criminal Legal Aid Review throughout the consultation process. We have previously made submissions to the Ministry of Justice on matters relating to criminal legal aid, including a [response to the consultation on amending the Advocates' Graduated Fee Scheme](#), and a [response to the initial consultation on the Criminal Legal Aid Review Accelerated Areas](#) and a [response to the consultation on Remuneration for Pre-Charge Engagement](#). You can find this and other YLAL publications on our [website](#).

In this submission, we also refer to our most recent Social Mobility Report, '[Social Mobility in a Time of Austerity](#)', published in 2018.

### **Junior Lawyers in the Criminal Justice System**

YLAL is deeply concerned about the sustainability issues which are pervasive throughout the criminal defence profession. Decades of underfunding have led to unsustainable working practices and unfairly low levels of remuneration. This has meant that not only are young lawyers not attracted to criminal defence as an area of practice, but the defence profession is also haemorrhaging both junior and senior practitioners, who are moving to more sustainable areas of practice. These cuts have slowly but surely decimated the future of the profession and access to justice.

Publicly funded junior lawyers are at the coal face of criminal defence, representing clients who have criminal cases in the police station, magistrates' court, Youth Court, Crown Court and Court of Appeal. Junior lawyers spend much of their working lives in police stations, courts, and prisons.

Junior lawyers, like every other criminal lawyer, advise clients on the availability of criminal legal aid, the law, criminal procedure, evidence, disclosure of evidence, allocation and plea before venue, bail, appeals, sentencing, and so much more.

## Paralegals

Paralegals are the individuals who keep the cogs turning in the machines of the criminal defence system. They take client instructions, submit applications for legal aid, draft proofs of evidence and defence statements and advise on the law and sentencing.

Paralegal positions are highly sought after, as it is close to impossible to obtain a training contract without significant paralegal experience. Many graduates of the Bar Professional Training Course ('BPTC') also seek paralegal jobs whilst they are seeking pupillage.

Paralegal salaries in criminal defence firms are often between £17,000 - £20,000.

## Trainee Solicitors

In 2017, the Solicitors Regulation Authority (the SRA) reported that ***only 309 (2.9%) of 10,726 trainee solicitors were working in criminal law***<sup>1</sup>. This is data which will include trainee solicitors working at the Crown Prosecution Service, and those at firms without a legal aid contract, who do only privately paid work. The SRA collects data regarding the 'seats' which trainees complete during their training contracts - seats refer to the minimum of three areas of law in which a trainee solicitor must gain experience in order to qualify as a solicitor. The 309 trainees therefore appears to be a reference to an individual completing a seat in criminal law rather than qualifying into this area.

In August 2014, the Law Society abolished the minimum salary for trainee solicitors and instead made recommendations as to salaries. The Law Society now recommends that providers of training contracts should pay their trainees £22,541 in London and £19,992 outside London.

However, we remain concerned that this is a mere recommendation and it is not unusual for trainee solicitors to earn less than the recommended minimum.

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<sup>1</sup> Solicitors Regulation Authority, [\*Impact assessment of the deregulation of the prescribed SRA trainee minimum salary Post implementation two-year review\*](#) (November 2017) at 18

## **Pupil Barristers**

Prior to September 2019, the minimum pupillage award was £12,000. The minimum pupillage award, as of January 2021, is £18,960 for London and £16,601 for pupillages outside of London.

This increase in the minimum pupillage award has had a significant impact in respect of social mobility and diversity, as prior to this it would have been incredibly difficult for any individual to undertake pupillage without financial support from elsewhere. Even the current minimum of £18,960 in London means that many will be unable to afford to undertake pupillage.

It is not unusual for pupil barristers not to obtain tenancy immediately following their one year pupillage and therefore they will need to obtain a 'third six' pupillage, which can last for over a year, prior to obtaining tenancy at a chambers.

## **Newly Qualified Solicitors**

A newly qualified solicitor in a criminal legal aid firm is likely to earn £24,000 - £30,000. Newly qualified solicitors frequently attend magistrates' courts to advocate on behalf of their clients, in addition to representing clients at police stations and conducting litigation.

## **Junior Barristers**

Once qualified, junior barristers encounter different hurdles. Being self-employed means that junior barristers often exist on the brink, barely scraping by in their first few years of practice; whilst delays in being paid for work they have done - frequently due to late payment of bills by the Legal Aid Agency - mean that they may wait months for payment to be received. Many junior barristers rely upon financial support from third parties including partners and family in order to get through these first years of qualification.

### **The Criminal Legal Aid Independent Review:**

The Criminal Legal Aid Independent Review is intended to consider the criminal legal aid system in its entirety, to ensure that it:

- provides high quality legal advice and representation;
- is provided through a diverse set of practitioners;
- is appropriately funded;
- is responsive to user needs both now and in the future;
- contributes to the efficiency and effectiveness of the Criminal Justice System;
- is transparent;
- is resilient; and
- is delivered in a way that provides value for money to the taxpayer.

The focus of the Independent Review ('the Review') is on the long-term sustainability of criminal legal aid and the Terms of Reference set out five key themes which are resilience, transparency, competition, efficiency and diversity.

The Review will be considering how criminal legal aid operates within the wider criminal justice system, in particular, the overlap with the police, the Crown Prosecution Service ('CPS'), Her Majesty's Courts and Tribunals Service ('HMCTS'), and the Judiciary.

We welcome the Review and our organisation is keen to continue to engage with it, representing the voices of our members and advocating for the creation of a sustainable criminal legal aid system, promoting fair payment for work and a system which truly ensures justice and enables social mobility within the profession.

## **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 Police Station**

#### **The Fixed Fee**

There are a number of issues with the way that defence firms are paid for the work they complete at the police station.

The first issue will always be that the fixed fee is too low to properly compensate defence lawyers for the work done. Junior lawyers are often the ones who attend police stations to represent clients, whether during working hours or throughout the night and mean that junior lawyers are unfairly compensated for the hours they spend representing clients out-of-hours.

This disproportionately impacts those at smaller firms as, when on call, junior lawyers are only paid if they attend police stations for interviews. This can mean that police station representatives are on call and required to be available for significant periods of time but are not able to earn any overtime unless their 'own client' cases come in (i.e. those who request the firm specifically rather than those represented via the police station duty scheme).

The hurdles caused by the police station accreditation scheme and police station fixed fee are explored in more detail below.

### **Release Under Investigation**

Release Under Investigation ('RUI') was introduced by s.54 of the Policing and Crime Act 2017; the Act gained Royal Assent on 31 January 2017, with RUI coming into force in April 2017. RUI is an additional 'outcome' mechanism available to the police following an interview under caution (whether voluntary or not). This is in addition to the other main outcomes: No Further Action ('NFA'), bail (with or without conditions) and charge. In effect it puts the investigation into limbo, with no time limits or oversight.

Importantly, RUI was not debated at any stage during the Policing and Crime Bill. It is thus unclear whether or not RUI was actually intended by Parliament or whether it is a

significant unintended consequence of the Act's drafting. Although the 2017 Act provides statutory time limits and judicial oversight of extensions regarding bail, RUI attracts no such time limit, oversight or appeal procedure. This leaves it open to abuse.

Since the introduction of RUI, the use of bail has dramatically decreased across England and Wales; from 216,178 cases in 2016-17, to 43,923 in 2017-18. In 2017-18, 193,073 were RUI, including more than 93,000 suspected of violent and sexual offences.<sup>2</sup>

Our members report many examples whereby suspects have waited one or two years to find out they have been charged with serious offences. By the time those cases conclude after trial, there is a very real prospect of it taking four years, and possibly longer.

This negatively impacts not only our clients - the suspects who are attempting to continue their lives but are hampered by the threat of criminal prosecution hanging over them - but also the complainants or victims in these cases, who have to wait lengthy periods of time to find out if the perpetrator will be charged.

In respect of the impact upon criminal legal aid firms, this causes significant issues in terms of cash flow and the ongoing work requirements which come with chasing police officers for results on investigations and updating clients, all of which is non-chargeable work. This time chasing police officers and updating clients - which can take years - is included within the fixed fee.

Recently qualified solicitors are reliant on a combination of 'duty rota' clients, and 'own clients'. Given the significant delay between arrest and charge, it is extremely difficult to build an 'own client' network to supplement the duty rota.

With long delays under RUI, the defence is put in the invidious position of having to conduct this work speculatively (i.e. without knowing if there will be a charge and subsequent fee payable for court proceedings) in order to avoid the above prejudice to their clients.

In addition, by building up a large bank of unresolved and unbilled casework, RUI is causing a significant cash flow crisis for defence firms already under severe financial pressure. This is in effect a hidden tax on defence lawyers, further compounding decades of legal aid cuts and increasing risks to the sustainability of legal aid provision in England and Wales.

It is often junior lawyers and support staff who are given the responsibility of dealing with these tasks, thus further increasing the unchargeable work required of junior lawyers and meaning that they must work even longer hours to reach their chargeable hours targets.

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<sup>2</sup> Patrick Cowling, James Clayton, Melanie Newman, 'Scandal Brewing' As Thousands of Suspects Released (BBC Newsnight, 04 December 2019)

### **Preparation for First Appearance**

It is not the norm to obtain a grant of legal aid prior to the first appearance before the magistrates' court. Even if legal aid is granted, it is rare that the Initial Details of the Prosecution Case (IDPC) will have been prepared by the Crown Prosecution Service in advance of this hearing.

This comes as a complete surprise to those clients who are having their first experience of the magistrates' court. They will often call to ask for office appointments prior to their court hearing, only to be shocked when they are told that their representatives are highly unlikely to be able to obtain any evidence in advance of their hearing date, thus making a stressful situation for clients even more so.

Even when the IDPC is received in advance, it is not unusual to arrive at court only to be told that the charges will be amended, or that there are numerous other statements, or other evidence, in respect of the matter which have not been served upon the defence.

Due to this, there is very little preparation that can be completed prior to the first appearance, even in those unusual circumstances where IDPC is provided in advance.

### **Magistrates' Court Proceedings**

Where a case remains in the magistrates' court for trial, it will inevitably be plagued by delays in service of evidence and initial disclosure. Even where the defence have diligently chased for service and disclosure, it is not unusual for this to only be provided on the morning of trial, with the defence advocate only allowed a short period of time to take instructions prior to the trial commencing.

Financial thresholds for legal aid, particularly for magistrates' court proceedings, are far too low. These thresholds mean that many of those who are not eligible for legal aid funding do not have sufficient means to pay for a case privately.

### **Youth Court Proceedings**

Representing clients in the Youth Court is a highly specialised area of law with different procedures, aims, and sentencing outcomes.

Children who appear before our criminal courts are often highly vulnerable for other reasons in addition to their age. They are frequently looked after children or victims of modern slavery.

These children and young people will be impacted by these proceedings for the rest of their lives whether due to the conviction itself, or the traumatic experience of going through a criminal trial. They deserve representation from specially trained defence lawyers.

For example, a trainee solicitor could undertake a seat of their training in youth crime, as a distinct area of law, rather than training in general crime and then being sent to the Youth Court as soon as they have qualified.

### **Crown Court Proceedings**

Trials which are listed to take place in the Crown Court have significantly more structure and accountability built into the system in comparison to the Magistrates' Court.

The main issue afflicting the Crown Courts is the backlog, which is now almost 58,000 cases. It is worth highlighting that, prior to COVID-19, the backlog was already at 39,000. COVID has not caused this problem, simply compounded it.

Whilst there are many issues with the proxy-based Litigators' Graduated Fee Scheme ('LGFS') payments for Crown Court cases, which are discussed in more detail below, we would highlight in particular the difficulty of working within a fixed fee where the client has additional needs.

For example, where a client requires an interpreter, it takes double the time to take their instructions, and additional time must be spent obtaining translations of letters or documents. In addition to this, clients who have learning difficulties or mental health issues require additional time in order to ensure they understand the advice they are being given. In a similar vein, we would note that there is a significant burden involved in making appointments for legal visits where a client is remanded in custody.

We suggest that, if the system of fixed fees based upon proxies is to be retained, consideration should be given for uplifts being applied to these fees where the defendant has additional needs.

### **Court of Appeal Proceedings**

Following Crown Court proceedings, advice on appeal is bundled into the same fixed fee as the proceedings themselves. It is therefore rare that a client is provided with a written negative advice following a Crown Court trial.



Defendants may seek advice on appeal from alternative lawyers, which is funded under Advice and Assistance for Appeals and Reviews. Out-of-time appeal cases can go on for significant lengths of time, even years.

There is no system of payments on account in this class of work, which causes significant cash flow problems for firms not only in respect of chargeable work done, but also in relation to disbursements; for example, transcripts of trial proceedings, or expert reports. This means that either the firm must pay and operate at a loss for the years until the matter is concluded, or you must find an expert who is willing to work on a case whilst knowing they may not be paid for years.

Once an application for leave to appeal has been submitted to the Court, the LAA is no longer responsible for funding it; instead the determination on funding goes to the Registrar.

There is no legal aid available for proceedings before the Court of Appeal where the Single Judge has refused the application for leave to appeal and the applicant seeks to renew this application before the full Court of Appeal.

It is not unusual for applications which were unsuccessful at Single Judge stage to then go on to be granted leave. However, firms are required to prepare these cases pro bono, as the majority of clients do not have the resources to pay privately. This is another area of the justice system where criminal lawyers are forced to choose between working for free in order to achieve justice, or refusing to work for free and not act in the best interests of our clients.

The flat hourly rate which does not take account of experience means that firms are disincentivised from employing senior lawyers in these departments. Instead, the burden of work is given to junior members of staff such as paralegals.

### **The Criminal Cases Review Commission**

Applications to the Criminal Cases Review Commission are funded under the Appeals and Reviews class of work. This means that many of the same issues apply as for applications to the Court of Appeal.

One matter which is specific to CCRC cases arises due to the very long decision making process. It can take years for the CCRC to consider and make a decision on an application. This, combined with the lack of availability of payments on account means that firms need to bill the cases as soon as the application is submitted to the CCRC so as to avoid further significant cash flow problems.

This means that a file will be closed and billed pending a decision from the CCRC and that the matter must then be reopened at the point when the provisional statement of reasons is provided, which requires a fresh application for legal aid. This means clients may no longer be eligible for legal aid funding, meaning they are unable to properly challenge the CCRC's statement of reasons.

## **2. Do the incentives created by the current fee schemes and payments encourage sustainability, quality and efficiency?**

No.

Prior to CLAR, the last major review of fees came about as a result of Lord Carter's proposals in 2006 which provided the framework for the current criminal legal aid schemes.

Lord Carter decided to recommend a different approach in his report on the procurement of criminal defence legal aid services.<sup>3</sup> He had in mind payment of claims on a case-by-case basis, largely based on 'proxies' to deal with the complexity of cases of that kind, rather than the work needed or actually completed on each case.

Following on from Lord Carter's review, a statutory instrument, the Criminal Defence Service (Funding) (Amendment) Order 2007 was laid before Parliament to give effect to the decision to introduce the LGFS. The LGFS scheme came into effect on 14 January 2008.

The LGFS scheme graduates the fee for litigators in relation to Crown Court matters. It does so by incorporating a number of proxies, namely the type of matter (trial, guilty plea, re-trial etc.) offence type, trial length in days, the number of defendants represented and Pages of Prosecution Evidence (PPE).

Soon after, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was laid before Parliament in response to an alleged pressure on the legal aid budget. This formed part of a wider policy response to reduce the national deficit.

Reports by Oxford Economics<sup>4</sup> and Otterburn<sup>5</sup> were prepared on behalf of The Law Society, with the Ministry of Justice instructing KPMG<sup>6</sup> in relation to procurement and modelling. Nevertheless, despite the profession's objections, the [Criminal Legal Aid \(Remuneration\) \(Amendment\) Regulations 2014](#) were made and introduced under Part 1 of LASPO 2012, cutting litigators fees by 8.75%.

Fixed fees too often encourage a fast and cheap approach to criminal defence: there is little incentive to do a good job for your clients. In fact, it is financially unsustainable to do so. A race to 'efficiency' has unfortunately become a race to the bottom, where cases are piled ever higher in an attempt to ensure profitability. This is not sustainable even in the medium term, and criminal defence lawyers are at breaking point.

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<sup>3</sup> Lord Carter, [Legal Aid: A Market-Based Approach to Reform](#) (13 July 2006)

<sup>4</sup> Oxford Economics, [Forecasting Criminal Legal Aid Expenditure - A Report for The Law Society, The Legal Aid Practitioners Group, The London Criminal Courts Solicitors Association, The Criminal Law Solicitors Association and The Big Firms Group](#) (January 2014)

<sup>5</sup> 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)

<sup>6</sup> KPMG, [Procurement of Criminal Legal Aid Services: Financial Modelling](#) (11 March 2014)

## **Police Station Fixed Fees**

In terms of the police station, the fee ranges from £126.58 in Blackpool to £274.66 to deal with a matter at Heathrow airport. Broadly, the average fee is approximately £150 - £170 across England and Wales, whereas London, as may be expected, is approximately £200-230. The highest fee, at Heathrow, is an outlier: central London, for example, attracts a fee of £237.25.

At first glance, particularly from the perspective of a lay person, the fixed fee may not raise any concerns. However, it is important to remember these fixed fees are payable to the firm and not the individual attending. An individual across England and Wales may earn somewhere in the region of £50.00-70.00 per attendance, with a slightly higher fee in London of about £80.00-100.00.

The fixed fee, whether it be from a firm or individual perspective, is the same irrespective of the time spent in custody.

Whilst there are escape fees available, these are rarely claimed either because the matter falls just short of making a claim and/or the extra administrative burden of claiming the higher fee. The escape fee is set at three times the standard fee. As the escape fee means that only the fixed fee plus anything over the escape is payable, it is often not worth the additional burden of claiming for an escape fee.

To put this in context, if a police station fixed fee is £200, the escape threshold is £600. If a police station attendance is particularly lengthy (it would need to be around 12 hours of attendance to reach the threshold) then it may be possible to 'escape'. However, only anything over the escape fee is actually paid. This means if the total attendance time is £700, the firm is able to claim only £300 made up of the £200 initial fixed fee and the £100 which went over the escape threshold. This approach is unfair.

This system runs in contradiction to the way escape fees operate elsewhere in the legal aid system, such as in Legal Help, whereby once a case passes an escape threshold, the firm is paid for the work actually done.

The keystone of criminal defence is advocating on behalf of suspects in the police station. A criminal trial can be won and lost based on the advice in the police station. The task is intellectually demanding and draining; a legal representative must be alert from beginning to end.

Whilst some attendances are relatively straight forward, this does not necessarily mean that the 'quick' cases balance out the lengthy attendances and it is simply irrational for

police station representatives to be paid the same amount for a minor shoplifting allegation as for a murder, or a complicated conspiracy to commit fraud.

There is no allowance for unsociable hours within the fixed fee, meaning that the fee is the same whether it is 10.00am on a Wednesday morning, or 3.00am on a Saturday morning. We suggest that remuneration for unsociable hours should be implemented.

### **Magistrates' Court Fixed Fees**

Similarly, the 2014 Regulations outline the lower and higher standard fees in relation to Magistrates' Court matters. The fees payable in this respect are somewhat complicated, though there is nothing wrong in principle with the mechanism.

The fixed fee is essentially made up by 'building' the fixed fee via hourly rates, for example, in relation to preparation (£45.35) and advocacy (£56.89). The hourly rate, however, is misleading.

For a Category 1B case, the lower standard fee is £202.20 and the higher standard fee is £435.64. In order to claim the higher standard fee, the file must be 'built' by using the hourly rates, and achieve a total fee of £471.85 or more, in order for the file to bill for £435.64. If it fails to do so, or falls just short, the case will bill for the lower standard fee.

Cases can be billed as a non-standard fee, where hourly rates are paid for the work completed. However, this is relatively unusual, albeit this will have been impacted due to the sheer quantity of hearings being listed and further adjourned during COVID-19, which will likely increase the number of non-standard fees being claimed.

The majority of firms who have survived the decimation of criminal legal aid have had to adopt a 'quantity strategy' to ensure the firm is able to continue practising in this area. This means that fee earners have been required to take on larger and larger caseloads with less time to spend on each individual case.

Again, it is worth emphasising that fixed fees are payable to the firm, and billing figures contribute to an individual employee's billing figures. However, for context, if a solicitor was self-employed as a consultant, or a junior barrister were to contemplate what sort of fee they might attract for conducting a trial, the protocol for London<sup>7</sup> is perhaps a good starting point. The highlights are £50.00 for a First Appearance, £75.00 for a half day trial, and £150.00 for a full day trial.

On this basis, if a firm instructs a junior barrister to attend a first appearance, and to conduct a half day trial, their total fee would be £125, meaning that the firm may only

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<sup>7</sup> [2019 Revised Protocol for the Instruction and Payment of Counsel in Magistrates' Courts Cases within the Greater London Area.](#)

make £75 on the case, unless it reaches the higher standard fee or above, which may not be possible if this is a relatively straightforward matter.

Notwithstanding the difference between the fixed fee and the hourly rates, and ultimately how the case is billed, it is worth highlighting the drastic percentage loss when comparing the 1996 and 2020 rates. In many examples, the rates would be doubled if it were adjusted for inflation<sup>8</sup> Inflation in the criminal legal aid context is by no means a silent killer that has crept up on defence firms across two decades. It is an obvious cut and cannot be ignored.

We ask that both the hourly rates and the fixed fees be significantly increased and then be index-linked to inflation to ensure that, at the very least, these fee levels are maintained in the future.

### **Graduated Fees: LGFS and AGFS**

The Litigators' Graduated Fee Scheme ('LGFS') was designed with a broad 'swings and roundabouts' approach in mind. Whilst some cases will make a loss, others will make a profit and, in theory, balance each other out in the long run.

The stagnation of fees and impact of inflation has meant that more and more cases are falling into the loss-making category. In addition, the LGFS fixed fees do not take account of the fact that more and more cases include digital evidence including telephone downloads and cell site analysis.

In terms of the infrastructure of the LGFS, we appreciate that proxies are a helpful tool for calculating fees and reducing administrative burdens which are capable of crippling firms due to the extensive unchargeable work which can be involved.

It is the fees themselves which are the root cause of the unsustainability. Whereas some cases will attract a significant fee, the vast majority of Crown Court cases - those which make up the most significant proportion of criminal litigators' caseloads - have such low fees that many will not break even. In order to be a viable fee scheme, the LGFS must attract sustainable fees for all Crown Court work.

The same can be said in respect of the Advocates' Graduated Fee Scheme ('AGFS'). The AGFS was introduced by the Legal Aid in Criminal and Care Proceedings (Costs) (amendment) (No.2) Regulations 1996. The original scheme was designed to graduate payment of advocates conducting standard cases in the Crown Court. However, most cases were instead remunerated on an ex post facto basis, i.e. payment after the work has been done.

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<sup>8</sup> Karl Turner MP, [\*Coronavirus and the Criminal Justice System – Saving Access to Justice\*](#) (03 July 2020), Annex B

Today the latest scheme – known as AGFS Scheme 12 – remunerates advocates by graduating the fee based on the offence type and trial length. There is no longer a Pages of Prosecution Evidence (PPE) proxy. The fee comes in two parts; the initial brief fee and the daily refresher. Again, the fees largely do not fairly reflect or pay for the work done.

The LGFS and AGFS are complex infrastructures and a complete overhaul would be a significant undertaking. However, at the very least, an increase in the fees will have a practical impact upon practitioners, firms, and the profession in general.

In addition to the reports on the Disclosure of Evidence in Criminal Cases,<sup>9</sup> followed by a detailed report on ‘Criminal Legal Aid’<sup>10</sup> by the Justice Committee, the summer of 2018 was significant for criminal legal aid. The High Court published its judgment in relation to The Law Society’s judicial review of The Lord Chancellor regarding the LGFS and PPE:

‘This is another claim for judicial review of a decision by the Lord Chancellor to reduce the amount of money made available as legal aid for defending people accused of crimes. The decision challenged in these proceedings has reduced fees payable under a scheme called the Litigators’ Graduated Fees Scheme under which most of the work done by “litigators” (typically solicitors) in preparing the defence of persons prosecuted in the Crown Court is paid.’<sup>11</sup>

Whilst The Law Society was successful in its judicial review, this was merely a reversal of an unsustainable status quo. Amongst the many issues that this case highlighted, one key point to note is that legal aid is under constant attack. It is difficult for firms to plan for the future and have viable business models given the history of criminal legal aid, particularly over the last two decades, is utterly plagued with legislative change and savage cuts.

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<sup>9</sup> House of Commons Justice Committee, [\*Disclosure of Evidence in Criminal Cases\*](#) (HC 859, 20 July 2018)

<sup>10</sup> House of Commons Justice Committee, [\*Criminal Legal Aid\*](#) (HC 1069, 26 July 2018)

<sup>11</sup> [\*The Queen on the Application of The Law Society v The Lord Chancellor and Secretary of State for Justice\*](#) [2018] EWHC 2094 (Admin) (03 August 2018)

**3. 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?**

Yes.

There are many inefficiencies in interactions between agencies. Two key issues which are often overlooked is the difficulty in communicating with Magistrates' Courts and prisons.

Magistrates' Courts now have centralised administration centres, meaning that it is impossible to telephone and speak to a person based in a specific court. Whilst email correspondence is generally helpful, some matters are urgent and require communication with the court itself, which is simply impossible unless you are contacting the court cells directly.

Prisons are incredibly difficult to communicate with. Prior to the pandemic, many prisons steadfastly refused to accept correspondence by email, instead asking that hard copy letters be posted for communications with the Offender Management Unit or Governor. Almost no departments in prisons will accept telephone calls; the only exceptions are generally Safer Custody (which is usually a voicemail service) and occasionally legal visits.

Legal visits are now almost entirely only bookable via email. It is no criticism of those working within the prison, as we appreciate they are inundated with requests, but there tend to be very lengthy delays in prisons responding, and when are offered, it is not unusual following email confirmation for the time slot to be gone.

An online booking system for legal visits would save significant time, both for defence lawyers and the prisons themselves.

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

No.

Simply put, criminal legal aid is suffering from a crisis in recruitment, succession, retention, diversity and sustainability.

There is very little data on junior lawyers such as paralegals, trainee solicitors, pupil barristers, or recently qualified solicitors or barristers. This is particularly so in respect of paralegals who are not subject to any oversight by a regulatory body. It is not unusual for graduates of the LPC or BPTC to experience a significant struggle in finding employment as a paralegal and, following this, for them to work as a paralegal for three years prior to obtaining a training contract or pupillage.



Partially due to a lack of finances, few training contracts or pupillages are being offered, which results in a bottleneck at the point of entry to the profession. As a result, many would-be criminal lawyers move to different areas of law where there are more opportunities to obtain training contracts or pupillages.

There is stark evidence in respect of the publicly funded criminal bar. CLAR's data sharing agreement shows that 45% of the 370 barristers that left in 2019 were under 12 years' call. It follows that, irrespective of whether the next generation pursue a career as a criminal legal aid solicitor or barrister, many of those currently working in the profession are leaving due to the unsustainability of this as a career choice.

Overall, the average age of a criminal legal aid duty solicitor is high (particularly outside London) and the number of firms and duty solicitors has reduced. Research suggests the sector is barely profitable.

Consequently, the criminal legal aid market struggles to recruit, attract and retain the next generation of lawyers. The profession needs a rich tapestry of lawyers - true access to justice relies on representation that is diverse - but it can only achieve that by being profitable and sustainable.

The changes being implemented in the route to qualification as a solicitor - the Solicitors Qualifying Examination - will compound the issues of access to the profession. See YLAL's responses to the consultation on the SQE [here](#).

### **Police Station Representative Accreditation Scheme ('PSRAS')**

Becoming an accredited police station representative is arguably an essential requirement to work in criminal defence. It enables anyone who is able to advocate on behalf of suspects to earn the fixed fee for the firm, and indeed earn a living themselves. The course itself consists of a written exam, a portfolio split into two sections, as well as the Critical Incidents Test. An exemption applies to the written exam for LPC/BPTC graduates.

Part of the issue, particularly if you are based outside of London, is supervision. For Part A of the portfolio, the candidate must observe a Duty Solicitor for two cases, followed by the candidate advising a suspect at the police station whilst the Duty Solicitor observes them for two cases. The candidate is only able to represent 'own clients' (i.e. those who request the firm specifically rather than those represented via the police station duty scheme) and the cases must be summary only (i.e. triable only in the magistrates' court) or triable either way (i.e. can be heard in either the magistrates' court or Crown Court).

The deadline for completing the portfolio is very tight. The candidate has three months to complete Part A from the moment they do their first case. Unless the candidate is being

supervised within a firm that has a healthy 'own client' base, it can be very difficult to complete within the timeframe, and that is without the extra difficulty of matching diaries.

In terms of cost, for all three aspects of the course, Datalaw charges £590+VAT for the assessments, not including any training. For a course including training, the cost is £1,070+VAT.<sup>12</sup> Whilst the majority of firms will pay for the assessments, it will almost certainly be on the proviso that the employee must pay it back unless they remain employed for a certain period of time following their accreditation; and there is no guarantee that a firm will pay for the training required or even for the assessments themselves.

Qualification as a police station representative enables lawyers to earn overtime by representing clients in police stations out of hours. This can make a significant difference to the financial circumstances of junior lawyers. However, the ability to earn overtime should not be seen as an alternative to paying proper salaries in the first instance.

Being 'on call' frequently means being available throughout the night and over weekends, on top of usual office hours. It is not unusual for paralegals or trainee solicitors to do a full day's work followed by a whole night on call, and still be required to commence work again at 9am the following day. It leads to pressure being put onto junior lawyers to work excessively long hours in order to earn a reasonable living.

### **Magistrates Court Qualification ('MCQ')**

The MCQ is an additional course which a solicitor must complete. Adding together the PSRAS and the MCQ enables a solicitor to be added to the duty rota. The MCQ consists of a 25 case portfolio and an advocacy assessment. Financially, this is likely to set a solicitor or the law firm back £1125.00 for the assessment of the portfolio, advocacy training and the advocacy assessment.

There is a financial incentive for the firm to pay as it ultimately results in an additional duty slot on the rota, which will in turn generate duty client work. For the individual on the rota, the prospect of generating client work from the rota may enable greater leverage insofar as salary is concerned.

We are concerned that many newly qualified solicitors are rushing to obtain their duty qualification due to the increase in pay which comes with Duty Solicitor status, or being pressured by their firms to undertake the duty qualification when they do not yet feel comfortable with doing so, due to the increased revenue they can bring in for the firm.

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<sup>12</sup> Datalaw, Police Station Representatives Accreditation Scheme (PSRAS), <https://www.datalawonline.co.uk/accreditation/sone#psras>

## **Duty Solicitors**

Duty solicitors have reduced by 29% when comparing the October 2016 duty rota to the April 2020 duty rota. To add to the rather bleak picture, The Law Society undertook research into this area in 2018 and found that the average age of a duty solicitor is 47 years old and in many areas of England and Wales it is significantly higher. The data highlights that in five to 10 years' time there could be insufficient criminal duty solicitors in many regions, leaving individuals in need of legal advice unable to access justice.

This could have a catastrophic effect on the criminal justice system, as members of the profession retire and leave a shortage of experienced practitioners, impacting on access to justice.

Currently, some areas are particularly affected:

- In Dorset, Somerset, Wiltshire, Worcestershire, West Wales, Mid Wales, over 60 per cent of the solicitors are aged over 50.
- In Norfolk, Suffolk, Cornwall and Worcestershire there are no criminal law solicitors aged under 35, with only one in West Wales and Mid Wales, and only two in Devon.
- In a significant number of regions less than 10 percent of solicitors in this field are under 35.

One explanation for these shortages is that prior to the accelerated CLAR items, publicly funded criminal defence had been systematically decimated over the course of decades, with solicitors having received no increase in rates since 1998. Combined with other cuts to the system, and the levels of debt incurred by students looking to pursue a law degree and training contract, many lawyers no longer see a viable career doing this work; it is difficult to attract and retain new members of the profession.

The salary of a duty solicitor could be anywhere between £25,000 and £35,000. By way of comparison, a Senior Crown Prosecutor at the CPS attracts a salary of around £50,000 in addition to the other benefits such as no 'on call' police station attendances, parental pay, and a pension.

## **Criminal Legal Aid Firms**

In a report commissioned by the Law Society in 2014, it was concluded that the overall profitability of criminal departments was six percent.<sup>13</sup> In 2010, there were 1,881 firms

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<sup>13</sup> 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) at 21

with a criminal legal aid contract. In February 2019, this figure significantly reduced to 1,271. Between 2019 and June 2020, 124 further criminal legal aid firms collapsed - and this was before the impacts of the coronavirus pandemic were felt, placing further pressure upon law firms.<sup>14</sup>

As of 12 October 2020, there are currently 1,136 firms who hold a criminal legal aid contract. This means over the last decade there has been an almost 40% reduction in publicly funded criminal defence firms.

During the course of the pandemic, many firms furloughed a large proportion of their staff. With the full ramifications of the pandemic yet to be felt, the end of the furlough scheme in September 2021 is likely to be an interesting time for criminal defence firms and lawyers.

### **The Solicitors Qualifying Exam**

Currently the most popular route to qualification is via a qualifying law degree or a Graduate Diploma in Law, followed by the Legal Practice Course ('LPC') and a two-year training contract with Professional Skills Course.

The Solicitors Qualifying Exam ('SQE'), proposed and designed by the Solicitors Regulatory Authority ('SRA'), was approved by the Legal Services Board on 28 October 2020. This will be introduced from 1 September 2021, with the first exam sitting in November 2021, as the new route to qualification as a solicitor. The SQE will eventually entirely replace the old route to qualification by 2032 following a transitional period.

Under the SQE candidates will need to complete a degree in any subject (or equivalent), two years of qualifying work experience ('QWE'), and pass the SQE; a series of exams divided into two stages. The standalone cost of sitting the SQE exams will be £3,980, which is separate to and not included in the costs of any preparation courses undertaken.

SQE1 is made up of two multiple choice exams lasting 10 hours in total. Each exam has 180 'single best answer' multiple choice questions, designed to assess functioning legal knowledge through the identification and application of legal principles to client problems, transactions, and professional ethics. SQE2 is an assessment of practical legal skills, involving a series of 16 oral and written tasks, lasting a total of 14 hours.

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<sup>14</sup> The Law Society Press Release, [120 criminal firms have collapsed with more to follow – Law Society demands more from government proposals](#), 17 June 2020.

The two years of qualifying work experience ('QWE') can be completed before, during, or after, the SQE and must be signed off by a solicitor. This can be undertaken in up to four different organisations and may include experience such as volunteering in a law clinic.

We are concerned that the lack of consistency or overarching responsibility for the supervision of a 'trainee' risks leading to a failure to ensure proper training to those who are seeking to qualify as a solicitor. We believe that it is important to uphold the quality and standards of the profession and the lack of oversight regarding the QWE and the completion of the required competencies is concerning. This will impact the quality of the solicitors joining the profession.

Further, we are apprehensive that the system of QWE is ripe for abuse by unscrupulous employers who may take employees on as paralegals, assuring them that this will count towards their QWE without having to sign a formal and regulated training contract. We are concerned that junior lawyers will find that their QWE is not signed off when expected and there will be no uniform route to enforce the qualifying period or take an independent decision as to its adequacy.

We are concerned that the new SQE system of QWE may lead to individuals completing extended periods of unpaid work in an attempt to qualify as a solicitor but with no oversight or regulation by the SRA to ensure that QWE is properly treated as such or that the firm or organisation has any duty towards the individual who is undertaking such QWE.

In addition, the changes to the route to qualification mean that the burden of training will fall solely on the firm to ensure that candidates are able to gain sufficient experience in the area of law in which they seek to qualify.

The burden this will place upon legal aid providers is immense and this may present an insurmountable obstacle for many legal aid providers. Corporate and commercial firms have the means to commission specialist courses for their trainees. For example, the 'City Consortium Solicitor Training Programme' has been set up by six leading firms in collaboration with BPP University to provide a specialist SQE preparation course specifically designed for their trainee solicitors.

This approach is simply not an option for the majority of criminal legal aid firms, particularly the small firms who will suffer significantly due to the shift of the training burden to providers rather than legal training institutions.

We believe that SQE will have a detrimental impact upon the sustainability of the sector and the recruitment of new solicitors, particularly in those areas of law which have been particularly affected by cuts to legal aid, such as criminal defence. We believe that this will severely impact the diversity of the profession and decrease social mobility, particularly due to the high cost of qualification and the lack of protection from unscrupulous

employers who may take advantage of those who are desperate to obtain QWE in order to qualify as solicitors.

These issues will further exacerbate the pre-existing bottleneck of those seeking to qualify as criminal defence solicitors.

**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?**

Yes.

Our members, particularly those who are crime practitioners, are in precarious financial situations, with many needing to rely upon external financial support to allow them to continue in their careers. This is not acceptable. Professionals should be able to afford to survive on the money their work earns.

YLAL has previously surveyed its members practising in criminal defence in respect of sustainability. Over a third of respondents stated that they rely upon financial support from sources other than their work; for example, from family or partners. Of those that relied on it, 60% stated they would not be able to survive in their career without this external financial support.

**Women in the junior legal aid sector**

In YLAL's Social Mobility Report 2018,<sup>15</sup> nearly four out of five respondents to our survey were female (78%). These figures suggest that a higher proportion of those entering the legal aid sector generally are female.

In response to a survey in March 2020, one woman described her experience at the junior end of the legal aid profession as follows:

'The level of remuneration is simply not enough to make this a feasible career choice - it is not possible to earn a reasonable salary, given the extensive student fees I have paid, the seven months of unpaid work experience I had to complete before I was able to get a paralegal job, and the fact that it has taken three years of toil to get me to the point where I earn a living wage. It is so frustrating to have a job I love be decimated by cuts to the extent where firms have to adopt a 'fast and cheap' approach to criminal litigation, meaning that I exist in a constant state of

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<sup>15</sup> [YLAL Social Mobility Report, 13 March 2018](#)

guilt for not being able to do enough for my clients, due to being given a caseload which is too large for any person to reasonabl[y] cope with. This is not a system within which firms can care about the wellbeing of junior lawyers and this is an unsustainable position. In terms of future sustainability, it is incredibly frustrating that I will probably never be able to [afford] a mortgage, unless I find a partner who will be able to support me financially. As a professional woman in 2020, I should not have to rely upon a partner to subsidise my wages, nor should I have to choose between a family and a career, although having both is simply not [an option] on the remuneration I am likely to receive for at least the next 5 years, if I remain in criminal legal aid.’

### **Challenges facing young legal aid lawyers**

In its Social Mobility Report 2018,<sup>16</sup> YLAL found that there were three main challenges to entering and remaining in the legal aid profession. Two challenges are particularly relevant:

1. low salaries combined with high debt; and
2. stress, lack of support, and juggling legal aid work with other responsibilities.

These two challenges are also the biggest. When asked to identify the biggest professional challenge facing them, 34% of YLAL members said it was being underpaid (making it the biggest challenge), while 21% said that it was stress (making it the second biggest challenge).

Regarding the second challenge – stress – some of the responses suggested that stress is due in part to low pay, exacerbated by uncertainties around whether and how much legal aid lawyers can expect to be paid for the work they do:

‘Unfortunately, I no longer work in legal aid. The junior criminal bar became too much; the financial anxiety was overwhelming. Working ten hour days when you didn’t know if you were going to be paid or not became too much.’

We found that these challenges were more acute for people in three groups:

- a. people with mental health and physical disabilities;
- b. people with caring responsibilities; and
- c. people from lower socio-economic backgrounds.

### **Disabled people**

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<sup>16</sup> [YLAL Social Mobility Report, 13 March 2018](#)

In its Social Mobility Report 2018, YLAL found that disabled people (13% of respondents) face particularly acute stress, due to low pay combined with the challenges of dealing with their disability:

‘Long hours, emotionally tiring work and low pay were combined with worries about financial problems, caring for your young children or dealing with mental health and physical disabilities.’<sup>17</sup>

The heavy workloads and lack of remuneration for work done may exacerbate underlying mental health problems. One respondent to our CLAR survey in March 2020 said:

‘I used to enjoy the role but as more leave the work life balance is decreasing to plug gaps of fewer solicitors. Clients are increasingly difficult expecting a level of service which isn’t funded and there is a huge chasm between what the courts / regulators / law expect us to provide for clients and what is actually available or comes at the cost of longer hours. Much of the job is hindered or frustrated by cuts to eg mental health services etc. It is a constant battle which has had huge impacts on my mental health. There is a lack of opportunity to progress past duty qualification and not a sustainable lifestyle!’

### **People with caring responsibilities**

Those with caring responsibilities also face particular difficulties. One respondent quoted in our Social Mobility Report 2018 described their work as:

‘...a massive, pernicious balancing act, that I fear will have an adverse effect on my son.’

Another said:

‘I would not return to private legal aid practice, as it is too stressful and too difficult to make enough money to survive. I am about to have my first child and I would not be able to work the hours that are required to try to make a living from legal aid.’

It should be noted that caring responsibilities fall disproportionately on women. For example, the Office for National Statistics in its report ‘Living longer: caring in later working life’ (March 2019)<sup>18</sup> found that almost one in four (24%) female workers care, compared with just over one in eight (13%) male workers.

### **People from lower socio-economic backgrounds**

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<sup>17</sup> [YLAL Social Mobility Report, 13 March 2018](#) p.45

<sup>18</sup> [Office for National Statistics, Living longer: caring in later working life, 15 March 2019](#)



In YLAL's Social Mobility Report 2018, we found that the biggest challenge was low pay. This finding is further supported by responses to our survey in March 2020. When identifying what factors were most likely to make them leave criminal legal aid practice, all but one respondent cited 'financial reasons'. Our Social Mobility Report 2018 found that low pay was especially problematic for those without independent financial support. We noted that:

'Though there are numerous discussions within government and society in general of issues such as inclusivity for potentially disadvantaged or minority groups - including the disabled, parents, carers and those from LGBTQ community - there are greater difficulties for those who wish to become legal aid lawyers and fall into the above groups and / or do not have the requisite financial support.'<sup>19</sup>

When identifying which factors were most likely to make them leave criminal legal aid practice, all but one respondent to the survey of our crime members in March 2020 cited financial reasons (the one exception said they did not want to leave and would try to make it work). One respondent said:

'I will only ever leave criminal defence if I cannot afford to live. Sadly, with salaries as low as they are, I will probably have to think of changing my career path sooner than I want.'

In addition, we found that low pay presents the greatest difficulty for those without independent financial support. Respondents described having to rely on family support—support which may be unavailable to those from less advantaged backgrounds:

'Low salaries prevent those without access to independent wealth from entering the profession if they want to work in legal aid. I am only able to afford working at my current salary as I live with family and pay a very low rent. Without this support I would not be able to work in legal aid.'

'I am paid £17,000 in London. I had to move for work; my family live in Nottingham. I pay out for rent, food, travel to work, my phone and Internet and there is nothing left. It's depressing. I didn't buy a 39p pack of sweets the other day because it was 'extravagant'. I cannot live on my salary; my parents have to help me out. The money side of things is really soul destroying. Firms are paying peanuts because they can.'

This is reflected right from the beginning of juniors' careers, when they are students considering their future areas of work.

As one of YLAL's student members said:

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<sup>19</sup> [YLAL Social Mobility Report, 13 March 2018](#), p.11.

‘[D]uring the course of my studies I have noticed the same response when I have stated my aspiration is criminal law – “that isn’t good money,” or “worst paying part of the law.” I of course was not sway[ed] by this, but I am sure many people are. It is not a myth that criminal legal aid is sparse, and there is a high demand [to work for] free over time. This, if repeated enough times will sink into a student and prevent them following the legal path they desire.’

The lamentable state of the criminal legal aid system is well-known, and is acting as a significant deterrent to potential entrants to the profession before they even conclude their studies.

**5. Does the present structure of Criminal Legal Aid meet the needs of suspects, defendants, victims and witnesses?**

No.

The criminal justice system does not currently meet the needs of any of those involved in it. The systematic decimation of criminal legal aid over the past 20 years has taken a toll upon the experience of suspects, defendants, victims and witnesses. It has also had a significant impact upon the wellbeing of criminal defence lawyers particularly those who are most junior.

**6.1. Some working practices within the Criminal Justice System have changed due to the Coronavirus pandemic, are there any new working practices you would want to retain, and why?**

Yes

No

Please state your reasons.

N/A

**6.2. 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?**

Solicitors firms will be best placed to comment upon the systems put in by the Ministry of Justice in relation to hardship payments as these do not directly impact upon junior

lawyers. However, junior lawyers are often the first to be considered when redundancies are being considered and with firms collapsing, there is less opportunity available for junior lawyers, making it even more difficult for junior solicitors to get started in the profession.

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

Our response to this question is set out throughout the consultation submission.

**8. 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.**

Whilst we are not in a position to submit our own data set, we ask that the Review gather data in relation to paralegals working with the criminal legal aid sector, and of police station representatives.

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

N/A