



# **Law Society submission to the Independent Criminal Legal Aid Review**

May 2021



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# Law Society submission to the Independent Criminal Legal Aid Review

## Introduction

1. The Law Society is the independent professional body for solicitors in England and Wales. We are run by our members, and our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.
2. Our remit runs substantially broader than the direct interests of our members. Pursuant to our Royal Charter, the Law Society speaks out on matters of public interest, including access to justice and the rule of law. The crisis in the criminal justice system is a matter of profound public interest. If our members are unable to practice in criminal law for economic reasons, the criminal justice system cannot operate effectively in the public interest. To a very substantial degree, therefore, as with doctors and the health service, the interests of our members and the public interest align with each other.

## Executive Summary

3. Over 20 years of underfunding and cuts, exacerbated by increasing amounts of unpaid bureaucracy, system inefficiencies and backlogs have left the criminal justice system in chaos and criminal defence firms barely able to survive. As a result the number of firms exiting this market is increasing every year, bringing ever closer a potential scenario where the justice system can no longer function because there simply will not be enough criminal lawyers to provide access to justice for those accused of crimes by the State. This paper is intended to outline the key problems preventing the system from functioning and criminal legal aid firms from thriving; to provide an analysis of the market, and to suggest some potential solutions to some of the issues.

## Key Problems

4. In this section we explore the following issues which impact on the ability of crime firms to run profitable and efficient businesses:
  - *Underfunding:* There has to be an acknowledgement that unless the fees for criminal legal aid work are increased, any other solutions or system changes are unlikely to have any, or very little impact. *Ageing profession:* The population of crime solicitors is increasing in age, and largely due to the inadequate fees, very few young solicitors are willing to enter the profession.
  - *Reducing number of firms:* The number of crime firms is reducing year on year; 5% of firms have dropped out of the market since June 2020, on top of the near 40% drop in the preceding 10 years. If this continues there will not be enough firms to provide the service, particularly in rural areas which have been hit particularly hard.
  - *Competition from other organisations:* The CPS has in recent years launched recruitment drives, often targetting solicitors in defence firms. Although the CPS is also publicly

funded, the salaries it is able to offer are far higher than any that a defence firm could provide.

- *Law Society Financial benchmarking survey:* we have provided some data from our Law Management Section's annual Financial Benchmarking Survey, which provides a comparator with the generally accepted salaries in non legal aid firms.
- *Bureaucracy and unpaid work:* There is an increasing amount of unpaid bureaucracy and administrative work associated with the legal aid contract. This can take up a considerable amount of time which could otherwise be spent undertaking remunerative work.
- *Disparity between fees and work done:* The fee schemes have not been updated to bring them into line with current procedure and new processes. this effectively results in yet more unpaid work for legal aid practitioners.
- *Impact of underfunding of defence on wider justice system:* The underfunding of criminal legal aid defence practices does not only impact on their profitability and ability to survive in the market. If there are inadequate numbers of defence solicitors, or they do not have the necessary tools to do their job, this can have far reaching implications on the entire justice system.

## **The Criminal Defence Solicitors' Market**

5. We have provided an analysis of the criminal defence services market, which demonstrates that this is an unusual one that bears little relationship to most other markets within which the Government purchases services. Some of the features of this market that will make it very hard for it to absorb any further cuts, or to survive without increased investment:
  - The market is very fragmented;
  - There is no 'typical' model for a legal aid practice;
  - Legal aid firms are smaller than the average legal firm with an average of 7 qualified solicitors and turnover of £1.5m per year;
  - There is very little in the way of a market for privately paying clients;
  - The Government is effectively a monopsony purchaser. This means that if a firm wishes to undertake criminal defence work, it has no choice but to accept the price on offer from the Government;
  - The majority of micro firms are reported to have already reduced their overhead cost base to a minimum and have minimal scope remaining for further reductions;
  - Any commoditisation of back office processes may have already been implemented by the larger suppliers;
  - There is limited ability to capitalise on savings made in other areas by the nature of criminal legal aid work – which will continue to require face-to-face work.

## **Ideas for consideration**

6. There is no silver bullet to solve the problems facing the criminal defence profession. There needs to be significant additional investment in defence services if they are not to disappear completely in the next few years. We have also identified a number of other measures that we consider would contribute to alleviating the problems, and helping the Government to meet other policy goals in the criminal justice system. These include:
- Increase investment in criminal legal aid so that firms are able to be sustainable, and pay adequate salaries to their employees;
  - Introduce payments for the increasing amount of administrative work associated with the legal aid contract;
  - Increase numbers of trainees by funding traineeships in legal aid firms, and funding the SQE for those from more disadvantaged backgrounds;
  - Providing incentives within fee schemes for the right level of fee earner to conduct the work;
  - Consider introducing a 'standard fee' or other alternative fee scheme;
  - Establish an Independent Fee Review Board to review and set fees annually.

## **Key problems**

7. In this section we set out what we perceive to be the key systemic problems preventing criminal legal aid firms from achieving long-term sustainability. The evidence suggests that these problems, if not addressed, could lead to market collapse sooner rather than later.

## **Underfunding**

8. Not only has there been no cost of living increase in criminal legal aid rates since the 1990's, but there was an 8.75% cut to fees in 2014. As a result, crime firms have been suffering cuts in real terms, year on year, over the past 25 years or so, such that the fees that practitioners receive are worth in real terms a fraction of what they were 25 years ago. In the meantime the cost of living, house prices etc have skyrocketed. The table at Annex A shows what the fees should be had they been adjusted to take inflation into account.
9. Moreover, the failure to maintain fees in real terms means there is a widespread assumption among many practitioners that the future contains nothing but further cuts. This is counterbalanced by a view amongst others that the Government will finally recognise the scale of the crisis and take action to address it, but anecdotal evidence suggests that the number of lawyers who believe this is shrinking, as each year passes with no action being taken.

## **Ageing profession and shortage of young solicitors**

10. In practical terms this has resulted in an ageing population of crime solicitors; increasing numbers of defence solicitors leaving to join the CPS; and a dearth of young solicitors willing to go into criminal law.

11. Our Duty Solicitor Heat Map<sup>1</sup> from 2018 showed that in 5 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. Whilst the map only measures duty solicitors, this is a fairly good proxy for the whole of the profession, given that very few crime solicitors do not hold the duty solicitor qualification.
12. This could have a damaging effect on the criminal justice system, as members of the profession retire and leave a shortage of experienced practitioners, impacting on access to justice and on valuable police time, as they have to spend longer trying to find an available solicitor
13. It may be tempting to think that there are sufficient firms and crime solicitors in the system now, so there is no need to worry about supply, however in reality we are standing on a cliff edge. Unless action is taken soon, we will find ourselves facing a situation where entire swathes of the country have very few – or no - criminal solicitors left to represent people who may be facing extremely serious charges that could potentially lead to imprisonment or other penalties that could have a damaging and long-lasting impact on their lives.

### **Reduction in numbers of duty solicitors**

14. The diminishing number of duty solicitors has meant that 32 schemes - out of a total of 212 - now have seven or fewer duty solicitors on them – seven duty solicitors being the minimum number that requires each individual to be on duty one twenty-four hour period in every week. Seven of these schemes have three or fewer duty solicitors. Annex B lists these schemes, many of which are in rural areas and which already suffer from poor transport links, making it more difficult for solicitors from neighbouring schemes to fill the gaps.
15. It is worth bearing in mind what this means for those individual solicitors. Time spent on duty work out of hours is always in addition to the solicitor's work in standard office hours, and can often taken place during the night. This can have a significant impact on a solicitor's work-life balance and their health.
16. In terms of the administration of justice, this has major implications for a client's choice of solicitor, particularly in circumstances where there is a conflict of interest which further reduces the available pool. In some cases, this will require that a solicitor is brought in from outside the area at increased public expense.
17. We understand from solicitors on these 'at risk' schemes that some of the remaining scheme members are set to leave in the near future. For example when the current contract comes to an end, the Pembrokeshire scheme – which currently has seven members - will go down to five solicitors from two firms from October 2021, which is below the LAA's recommended requirement. This is in part due to one firm that will not renew its contract for financial and duty solicitor availability reasons. Other schemes are likely to lose members due to the closure of offices in those areas or the retirement of individual lawyers. This could leave a number of parts of the country with no duty scheme at all.
18. Many of the duty scheme areas are large – sometimes due to the closure and merging of police stations or courts – and the mostly unpaid time spent travelling adds to the impact on

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<sup>1</sup> <https://www.lawsociety.org.uk/campaigns/criminal-justice/criminal-duty-solicitors>

The 2018 heat map is currently being updated; the updated figures will be published this summer.

individual solicitors and on firm income. East Gwent is a prime example of this, as for several firms on its rota there is just under an hour's commute to the two main police stations in the area. When there are police investigations involving multiple defendants, we understand from firms on that rota that there is often a conflict of interest due to the low number of solicitors on the rota.

### **Reducing number of criminal legal aid firms**

19. The impact of the lack of any fee increase for over 20 years has also manifested itself in an increasing number of crime firms leaving the market:
  - In 2010 there were 1,861 criminal legal aid firms;
  - In 2019 there were 1,271;
  - In June 2020 there were 1,147<sup>2</sup>; and
  - The latest figures published in April 2021 show 1,090 firms<sup>3</sup>.
20. This indicates that 5% of firms have dropped out of the market since June 2020, on top of the near 40% drop in the preceding 10 years.
21. The Covid-19 pandemic has hit a lot of firms very hard, and a number of those who exited the market during 2020 may very well have fallen victim to the additional strains and difficulties placed on them by the pandemic. The ongoing drop in the number of firms shows no sign of abating, and indicates an accelerating trend where we are losing 5-10% of the firms in the market each year.
22. Once the furlough scheme has come to an end, unless crime work has increased to pre-Covid levels (which seems unlikely), many firms will be forced to make very difficult decisions. These will include whether to make staff redundant, in light of decreasing revenue, and maybe even whether to exit the market completely.
23. Once a firm has left the market it is highly unlikely that a new firm will enter to replace it, given the difficulty in making any kind of profit from this work. Once a firm has gone this generally means that there will be a gap in the market, as very few new firms are now entering the market to replace those that close.

### **Competition for staff from other organisations**

24. Other government-funded organisations such as the Crown Prosecution Service (CPS) and the Public Defender Service (PDS) are able to offer considerably higher salaries and benefits to both newly qualified and experienced solicitors than private criminal defence firms. This has resulted in many firms losing fee earners, particularly to the CPS which has recently launched a number of recruitment drives, in some areas actively targeting solicitors in defence firms.

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<sup>2</sup> Response by Alex Chalk to a parliamentary question asked by Karl Turner on 01 June 2020

<sup>3</sup> <https://questions-statements.parliament.uk/written-questions/detail/2021-04-12/179060>



25. Where a firm has invested time and money in training a solicitor, to then lose them to the CPS means it is unlikely they will be able to take on another trainee, given the cost and the difficulty in finding young solicitors who are willing to go into criminal defence work.
26. In addition to being unable to compete with the higher salaries, private law firms cannot hope to offer the same quality of life offered by those organisations which offer more in terms of employer pension contributions; paid holidays and fixed working hours; and not having to be on call overnight or at weekends when on duty.

#### *Case study 1*

*Caroline qualified as a solicitor in 2002 and spent 18 years in a criminal defence firm, working in the magistrates' courts daily, attending court and preparing magistrates' court trials: "At first the job was great, with a wide variety of work and the courts were busy with other defence solicitors. However, over the years, the legal aid being paid to defence firms has reduced greatly".*

*Due to the reduction in fees and courts being closed, the number of solicitors at the firm where Caroline worked reduced: "As people left to do other things, they were not replaced and there were less and less of us left in the profession".*

*"Having worked at the defence firm for 18 years, I did not receive a pay rise for 11 years, with the firm constantly reminding us of the legal aid cuts and that there was no money".*

*"Having now moved to the CPS, I feel that I have a better sense of job security.... the pay is also better than it was working for the defence and the pension scheme is also a bonus. I have only been at the CPS for 4 months, but I feel as though this was the right decision for me and I feel a lot more secure in my new position than I did as a Defence Solicitor."*

27. Annex C sets out some of the current starting salary rates for the CPS and PDS, and compares these with average salaries in a private criminal legal aid firm, which are normally around £20,000 per year for a new starter. Paid holiday and pension contributions (employer and employee) in private practice normally meet the minimum statutory requirements, but very few firms are able to offer much more than this.
28. Annex D shows the full range of salary levels for the CPS from 2018-2020, which are still higher than those that private criminal defence firms are able to offer. It is worth noting the significant increase for Crown Prosecutors between the two years, which exceeds any of the other fee increases.

### *Case study 2*

*A firm with two offices based in Bradford and Shipley; 55 employees in total with about 15 fee earners in the criminal team. The firm has lost four fee earners to the CPS in the last few years, with two in the past year. One with two years PQE was earning £30k per annum and doing mainly magistrates' court work. The other was earning £38k with 10 years PQE and was mainly doing POCA - Proceeds of Crime Act – work. Both have been given the role of Senior Crown Prosecutor:*

- The solicitor with two years PQE is now being paid £48k;*
- The solicitor with 10 years PQE is now earning 52k;*
- The CPS also offers a pension which equates to around a third of the salary on top of the above.*

*The firm has tried approaching various barristers' chambers to see if any young barristers want to do a 6-9 month secondment with the firm to fill the gap; this has not however been successful.*

## **Bureaucracy and unpaid work**

29. Another perpetual challenge of legal aid has been the amount of work that solicitors have to undertake for no remuneration at all. This is exacerbated by an increasing amount of unpaid bureaucracy in the criminal legal aid contract.
30. This includes form filling and the various audits and checks undertaken by the Legal Aid Agency, and in some cases the need to repeat administrative work because of the inefficiencies of the LAA systems. Whilst we understand the necessity to account for public funds, these audits can often take an entire day, or sometimes several days, and tie up fee earners' time, leaving them unable to undertake any fee earning work.
31. Firms also tell us that despite being professionals with their own ethical and regulatory code, their professional decision-making is frequently called into question by the LAA, and bills are often reduced. This results in yet more unpaid work bringing appeals against LAA decisions, and having to battle simply to get paid for the work they have done.
32. The numerous inefficiencies within the criminal justice system that impact on the income of legal aid firms do not need to be rehearsed in detail here, but include:
  - Release under investigation, which often means that a firm has to attend multiple times at the police station in cases which would previously have been concluded in a single attendance. Regardless of the number of attendances, the solicitor will only receive the single police station fee.

- Ineffective trials, particularly in the magistrates court due to lack of court time. This can mean advocates preparing cases, then sitting around for hours, only to be sent away with trials being further listed on days they may not be available for.
- Delays in the CPS providing evidence, which can often mean wasted trips to court and time spent waiting or trying to chase the evidence;
- Delays in phone or video conferences with clients who are detained in prison for which all of this waiting time is unpaid work;
- The backlog of cases in the Crown Court means that firms are undertaking the work but are unable to submit bills, as cases are not concluding. This has been exacerbated by the Covid pandemic, however even before this the backlog was significant.
- The means test can often create a significant amount of unpaid work for the solicitor; in particular collecting evidence of a client's income and trying to ascertain whether they are eligible for legal aid. Self-employed clients often have complex finances and do not always have the ready proof of income that the LAA requires. There is no indication at present that the review of the means test will reduce this unpaid bureaucracy, and if current proposals are adopted, may even increase it.
- The Defence Solicitor Call Centre (DSCC) has been dogged by problems both at its inception, and when the current company, HGS took over the running of the call centre in around August 2019. Many of these problems persist today, including duty calls going to the wrong firm, leading to a loss of income for firms. This leads to frequent calls for it to be abandoned, and replaced by a more efficient system. In 2011-2012 the Law Society undertook a piece of work on a possible electronic system, and submitted a paper on this to the MoJ<sup>4</sup>. It may be worth re-visiting this idea, or at least thinking about other alternatives to the current DSCC.

## **Disparity between fees and work done**

33. There is a growing disparity between the level of fees paid and the amount of work actually undertaken. This is partly due to the changing nature of evidence (see below) but also simply the fact that the fees have been fixed for so long that they have not kept pace with changes in procedure. This means that in almost every case undertaken there will be a considerable amount of work done on a pro bono basis.
34. There are also built-in disincentives against solicitors resolving cases quickly, as for the most part the fee schemes do not pay for the actual work undertaken, nor do they recognise the savings that can be generated by early resolution of cases. So for example, if a solicitor does a lot of work going through the evidence and advising the client, leading to a guilty plea, this work will end up being effectively unpaid. This is an area that needs to be urgently addressed in any new / revised fee schemes.

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<sup>4</sup> The paper can be provided on request.

## Absence of review of fee schemes

35. None of the fee schemes has ever been reviewed in light of changes to the nature of evidence or procedure, or other impacts on the investigative process. The system has thus fossilised and not adapted to the changing landscape in which defence solicitors are striving to do their job, making it ever harder for firms to make a reasonable income.

## Police station fixed fees

36. One example is the police station fixed fees. Since the time that these fees were set well over 10 years ago, there have been considerable changes in the landscape of police stations and custody suites. The designation of police station schemes as 'urban' and 'rural' dates back to when fixed police station fees were introduced in 2008. At the time the fees were based on average claims made in the previous year, and are therefore over 12 years out of date and in need of urgent reform.
37. In areas historically designated as 'urban', travel and waiting time was wrapped up in the fee. Since then however a number of police stations and courts in both 'urban' and 'rural' areas have been closed and duty schemes merged, in most cases requiring additional travel time for both solicitors and suspects. The solicitors servicing these schemes will receive no additional payment for the extra travelling time required.
38. It should also be noted that the average time a detainee spends in police custody has increased since the introduction of fixed fees. Recent research highlights increased delays in the time taken to process and deal with detainees, but any additional waiting time for the solicitor has not been factored into the fee. For example 'Authorising and Reviewing Detention: PACE Safeguards in a Digital Age' - a research paper by Dr Vicky Kemp<sup>5</sup> published in 2020 - notes the following:

*"In the late 1990s, the average length of time detainees were held in custody suites was six hours and 40 minutes..... Subsequently, based on analysis of over 30,000 custody records (drawn from 44 police stations in four police force areas), the average duration of detention in 2009 had increased to nine hours and 18 minutes".*

*By 2017 the report notes: "average duration of detention increasing on a monthly basis, and almost reaching 18 hours in June 2017.... nearly double the time identified in 2009, of just over nine hours".*

39. The report also refers to: *"increasingly long delays in the time taken to deal with detainees"*<sup>6</sup>

## Changes in nature of evidence

40. Since the bulk of criminal legal aid fees were set, the nature and amount of evidence that defence firms have to deal with has changed dramatically. In almost every case there are now large quantities of electronic evidence, including phone records, video evidence, social media posts etc, which can extend to hundreds of hours of work. The fee schemes have never been updated to allow for this new evidence. In fact the Litigators' Graduated Fee Scheme – LGFS - specifically excludes electronic evidence from what can be claimed for,

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<sup>5</sup> Kemp, Vicky (2020) 'Authorising and Reviewing Detention: PACE Safeguards in a Digital Age', Criminal Law Review

<sup>6</sup> *ibid*

leaving firms in the absurd situation of having to make a claim for 'special preparation' to cover the time taken to consider much of the substantive evidence in the case. Special preparation is discretionary and claims are often reduced by the LAA, leading to further unpaid work for the firm in making an appeal to a costs judge.

41. For example, prior to the onset of social media and mobile phones, a serious sex case would normally only involve a few pages of evidence; the bulk of the evidence being the statements of the complainant and the suspect. However nowadays such cases require extensive trawling through the suspect and complainant's social media accounts and mobile phone records. This can take a considerable amount of time, which is not adequately remunerated by the fees available under the crime contract.

### **Changes in procedure**

42. Most of the fee schemes were originally based on a relatively simple process, whereby the solicitor would attend the police station interview, the suspect would then be charged and given a date to appear in court. There are now far more complex processes in place which can extend the time between arrest and charge, and between charge and hearing date.
43. Suspects can be released under investigation ('RUI'), which can leave them and their solicitor – and anyone else impacted by the case - effectively in limbo, without knowing when the client will be called to appear in court. In some cases a suspect can be released under investigation for several months. Not only does this have a detrimental impact on both the suspect and any alleged victims or witnesses, but it also means that the firm has to be certain that that no further work is required before they can submit a claim.
44. Release on police bail can have a similar impact on the progress and swift resolution of the case. If the firm does close and bill the case, but then has to go back for a further interview, there is no simple mechanism for payment of the new work. Instead, you have to ask the LAA to recoup the original amount, and then resubmit a fresh claim. Many firms simply do not bother to claim for this additional work, as the bureaucracy involved in this process makes it not worthwhile.

### **Impact of underfunding of defence on wider justice system**

45. The impact of a reduction in the number of firms providing criminal defence representation – particularly in rural areas where transport links are poor – needs little elaboration. Those accused of serious crimes could find themselves unable to access a solicitor to represent them in a police interview or at court, risking a return to the pre-PACE<sup>7</sup> days of frequent miscarriages of justice. The other side of the coin is that there is the potential for people who are in fact guilty not being convicted for want of a fair trial.
46. It should be emphasised that the provision of legal representation to a defendant is not just in the interests of that defendant. It is also in the interests of the efficient running of the system, as represented defendants can usually be dealt with more promptly than defendants in person. Victims and witnesses also have an interest in being examined by an advocate who understands the law and the rules of evidence, who can focus on what is relevant, and

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<sup>7</sup> <https://www.legislation.gov.uk/ukpga/1984/60/contents>

who has duties to the Court, both in terms of their behaviour and in terms of not misleading the Court, which contribute substantially to the proper administration of justice.

47. An underfunded criminal defence market could also mean the government being unable to meet its statutory obligations to provide representation to those accused of a crime who are unable to fund their own defence<sup>8</sup>.
48. If criminal advice deserts arise as a result of firms dropping out of the market, the government will be obliged to fill those gaps using the PDS. This would clearly be a far more expensive option than trying to find a way of assisting the existing firms to become more viable.

## **The Criminal Defence Solicitors' Market**

49. The market for criminal defence solicitors is an unusual one, which bears little relationship to most other markets within which the Government purchases services. The reasons for this are explained more fully below.

### **The make-up of the market – firms**

#### **What does a healthy legal practice look like? Law Society Financial Benchmarking Survey and Pulse Survey**

50. The Law Society's Financial Benchmarking Survey for 2020<sup>9</sup> collected financial data from 145 law firms and organisations of varying sizes. Among the information calculated was the expected 'breakeven point' for a fee earner. This is defined as *"the fees a firm must generate per fee earner before any profit (sometimes also referred to as fee earner contribution) is earned"*. This is substantially more than simply the median cost of a fee earner, as it includes non-salary overheads, and for 2020 was calculated to be £112.69 per hour. This is over twice the hourly rates on which most criminal legal aid fees are based, and does not allow for any profit. From the table below<sup>10</sup> we can see that just under 90% of fees earned by a fee earner are used to cover their costs. In practical terms this means that for a firm to generate any profit, a fee-earner would need to generate around three times their salary to be viable.

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<sup>8</sup> Human Rights Act 1998, Article 6: [Human Rights Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/1998/42/section/6)

<sup>9</sup> [Financial Benchmarking Survey 2021 report | News | Communities - The Law Society](#) - provided separately to the Review.

<sup>10</sup> Ibid. Page 8

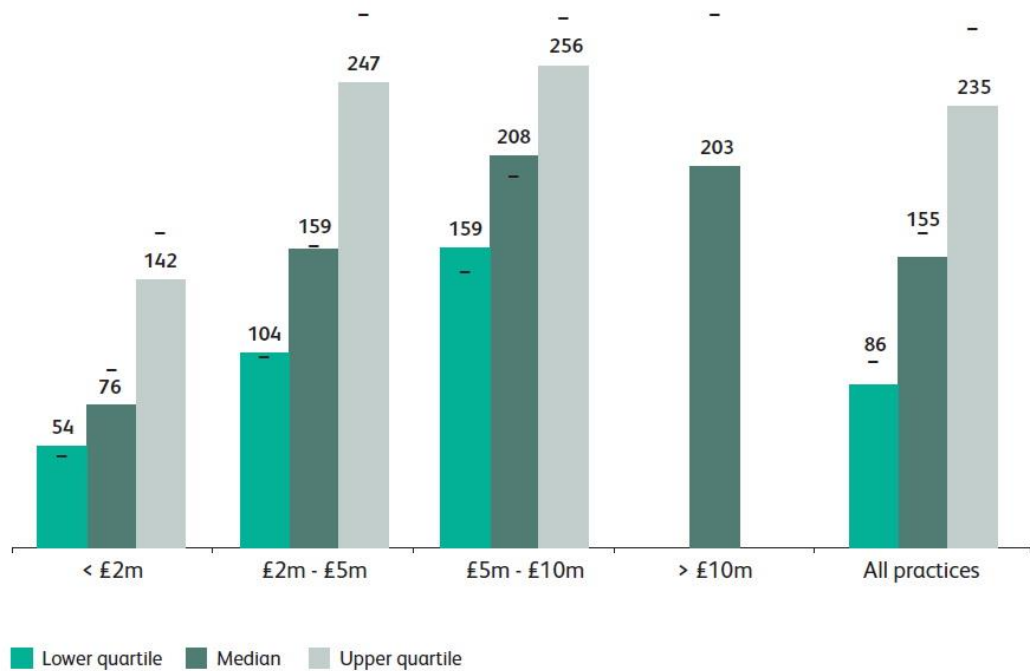
|  | 2020<br>£       | 2019<br>£       |
|--|-----------------|-----------------|
| Median fee earner cost, including notional salaries for equity partners (Figure 4.4) | 57,838          | 57,076          |
| Median support staff cost per fee earner (Figure 4.9)                                | 22,471          | 24,102          |
|  | 80,309          | 81,178          |
| Median non-salary overheads per fee earner (Figure 5.9)                              | 43,648          | 41,752          |
| <b>Breakeven point per fee earner</b>  | <b>£123,957</b> | <b>£122,930</b> |

Working on an average of say 1,100 chargeable hours per annum per fee earner, or 220 chargeable days per annum, this equates to the following:

|               | 2020<br>£ | 2019<br>£ |
|---------------|-----------|-----------|
| Cost per hour | £112.69   | £111.75   |
| Cost per day  | £563.45   | £558.75   |

51. The survey also noted that *‘overheads in many firms have already been cut back as far as possible and so further cuts may not be possible without having implications for efficiency’*.
52. The section in the survey on ‘Banks’ attitude to lending’ notes that *“certain factors could mean that lenders will become more reluctant to lend on an unsecured or floating charge basis, as the chances of recovering funds on a liquidation will be reduced”*. Such factors include:
  - the restoration of HMRC’s status as a preferential creditor, and
  - an increase in the ratio of borrowings to fee income for the firms in the survey, which is likely to be indicative of the profession as a whole.
53. The table below from the survey shows that the median profit per equity partner for firms with an income of less than £2m is £76,000. Most legal aid firms are likely to fall into the lower quartile, for which the profit per equity partner is £54,000. This is less than what can be earned by fee earners in commercial firms or even the CPS, and illustrates why even for equity partners it is barely worth undertaking this work, and why so many firms are closing their doors and turning their backs on legal aid work.
54. To be clear, the £54,000 figure referred to above has to cover the partner’s personal income; a return on capital; and any further investment in the firm required by the partners.

**Figure 5.1: Profit per equity partner (£'000)**

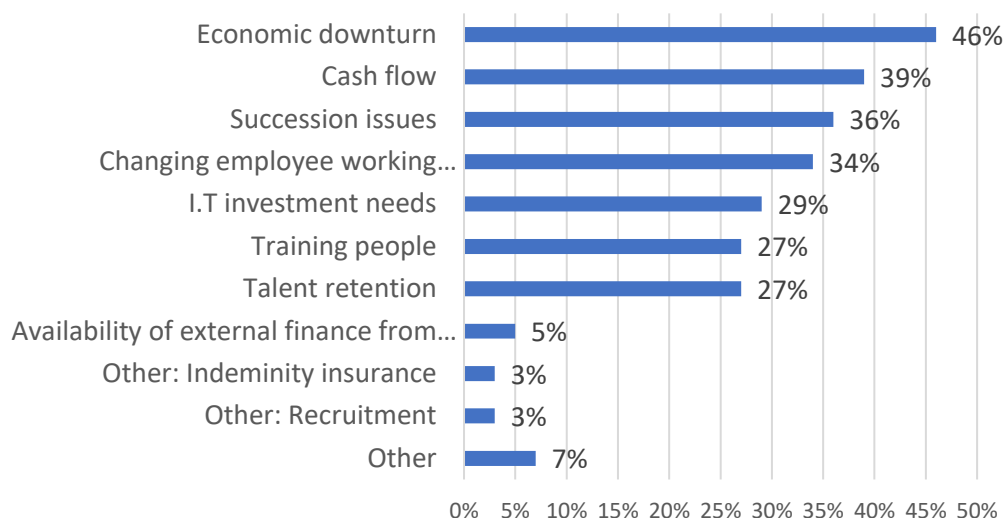


55. The table below shows the areas seen by small to medium firms as the main challenges they face over the next year; as reported in the Law Society's Law Management Section 'Quarterly Pulse survey'<sup>11</sup> for January to March 2021. 70% of the respondent firms are in the 'up to £2m' turnover bracket, and undoubtedly include a number of legal aid firms, but also other small firms undertaking non-legal aid work. It is to be noted that economic downturn and cashflow are the highest on the list of challenges.

<sup>11</sup> <https://communities.lawsociety.org.uk/law-management-news/quarterly-pulse-survey-january-to-march-2021/6001789.article>

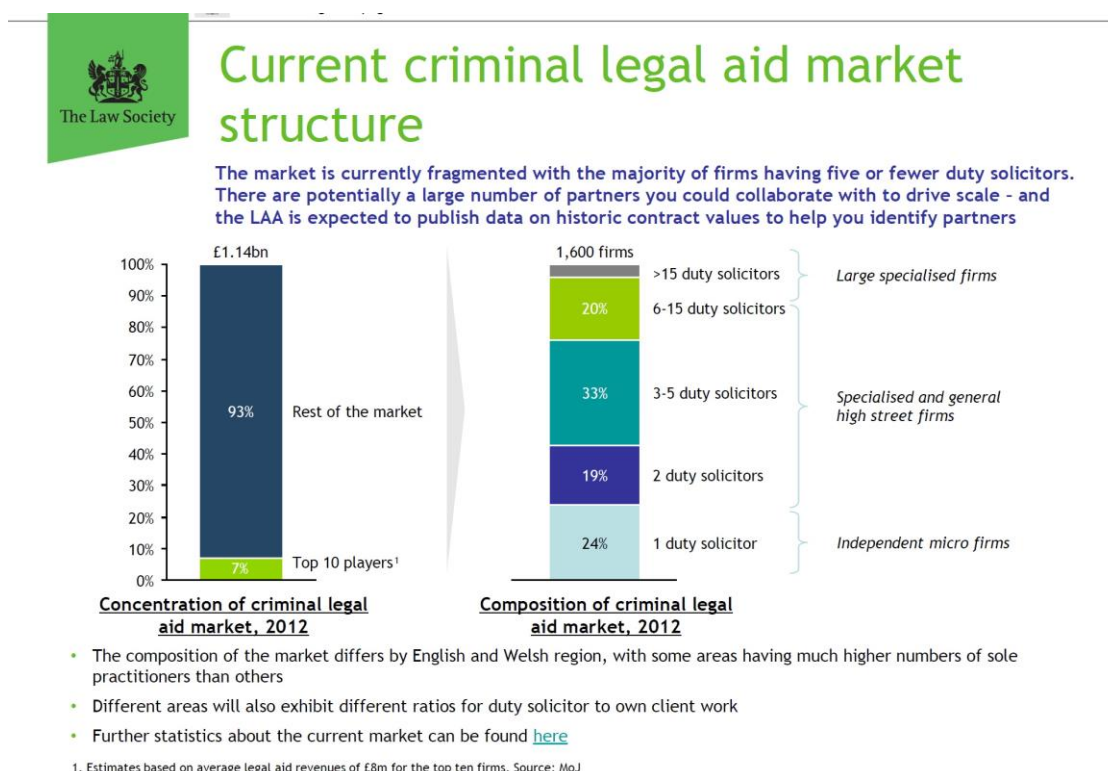


### Areas seen as major challenges for businesses over the next year



### What does a criminal legal aid practice look like?

56. The market is very fragmented. Analysis undertaken by the Law Society in 2014 indicated that the top 10 players in the market had about a 7% market share between them. There was a long tail of small firms, with over three quarters of them having five or fewer duty solicitors. While undoubtedly there will have been some change since then, we have no reason to believe that the position is markedly different<sup>12</sup>.



<sup>12</sup> <sup>12</sup> 'Responding to changes in the criminal legal aid market': Law Society of England and Wales, 2014.

57. The MoJ commissioned a report by PA Consulting in 2013<sup>13</sup> to investigate the robustness of the criminal legal aid market in light of possible fee cuts the MoJ was considering. Chapter 2 of this report explores the 'current financial position of firms engaged in criminal legal aid work'. As with the above report, there is no indication that the financial situation of criminal legal aid firms has improved since then, and is likely to be considerably worse. This report found the following:
- The criminal legal aid market is fragmented.
  - Legal aid firms are smaller than the average legal firm with an average of 7 qualified solicitors and turnover of £1.5m per year.
  - Firms are funded by a combination of capital from the partners and borrowings, normally from banks. Both of these sources of funding have come under pressure in recent years.
  - Reduced levels of liquidity reduce firms' ability to invest and ultimately can lead to insolvency.
  - In 2011 the median capital per equity partner was £70,000 however that was reported to have fallen to £40,000 in 2013. This is likely to be largely due to reduced profitability.
  - In the majority of firms, criminal legal aid work was carried out by senior practitioners, such as partners and senior solicitors.
58. Chapter 3 of the PA Consulting report concluded that it would be very difficult for firms to survive the cuts the Government was proposing. It identifies a number of factors that would have limited firms' options in trying to absorb a fee cut. These factors are still relevant and support the argument that firms have already made all of the economies that they can; there is simply nothing more that can be 'shaved off'. For example:
- The majority of micro firms are reported to have already reduced their overhead cost base to a minimum and have minimal scope remaining for further reductions;
  - any commoditisation of back office processes may have already been implemented by the larger suppliers;
  - 46% of practices have already outsourced IT infrastructure and development;
  - there is limited ability to capitalise on savings made in other areas by the nature of criminal legal aid work - which will continue to require face-to-face work.
  - a survey of 2000 firms found having 50% or more work in crime or immigration correlated to significantly lower productivity of 33% and 37% respectively compared to other firms (in other words, they have to do more unpaid work, as noted above); and

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<sup>13</sup> MINISTRY OF JUSTICE Assessment of the financial impact of the proposed fee reductions on criminal legal aid law firms (DRAFT) 6th August 2013: [PA Report \(justice.gov.uk\)](http://justice.gov.uk)

- the ability of incumbent legal aid providers to move towards new business models may be constrained by a lack of access to capital to invest in new models and supporting infrastructure.<sup>14</sup>
59. It might be asked, therefore, how come the market has not collapsed since the Government implemented the cuts. There is no comprehensive piece of work that will deliver a single answer to that question. From the evidence we have seen, we believe the answer is a combination of the following:
1. Some firms have not survived. We have noted above the shrinkage in the market.
  2. Some practitioners have remained in the market because they expect to retire relatively soon, and have accepted lower than market returns as an alternative to retraining late in their careers. The increasing difficulties in recruiting and retaining staff speak to the lower rewards that are now available.
  3. Some practitioners are working longer hours and doing more work personally rather than employing staff to share the burden
  4. Some practitioners have drawn capital out of their firms to make up for the reduced income, perhaps in the hope that if the firm survives for long enough, the Government will recognise the need to invest if this market is to survive.
  5. Even on the PA analysis, a few of the most successful firms were expected still to be able to make profits after the cut.
60. It will be recognised that these means of surviving in this market can only work in the short term, and will not suffice to sustain the market in the longer term. Continued year on year erosion of rates in real terms is guaranteed to cause the ultimate collapse of this market. The only questions are when, and whether we have already passed the point of no return.
61. There is very little in the way of a market for privately paying clients. There are a few exceptions to this rule, including motoring offences, historic sexual offences and white collar crime. All of these areas are highly specialised, with skills that do not readily translate to the general criminal defence profession. Outside these areas, there is insufficient private work to maintain a market, which means that the Government is effectively a monopsony purchaser. This means that if a firm wishes to undertake criminal defence work, it has no choice but to accept the price on offer from the Government.

## **The make-up of the market – individuals**

62. For the system to be sustainable, criminal defence firms have to recruit young lawyers. For lawyers more established in their careers, changing career path is possible but by no means easy. This is not an elastic market. Newly qualified solicitors, by contrast, have easily transferrable skills.
63. A recent report from legal recruitment company Douglas Scott, attached at Annex E, shows that in every region of the country, the top salaries in criminal litigation are substantially lower

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<sup>14</sup> Ibid. Section 3.1

than for any other field of law, in most cases not significantly above the top salaries for paralegals and legal secretaries.

64. This work has a strong vocational pull. For many years after legal aid rates started to be frozen in the mid-1990s, students and young lawyers still wanted to do this work, and were willing to tolerate the significantly lower salaries that could be earned because of the job satisfaction they could derive from the work.
65. However, as time passed and there were still no increases in remuneration, many of those who had chosen this path found that the vocational pull was no longer sufficient to offset the disproportionately low earnings they were able to command. Defence solicitors found themselves competing to keep staff in the face of recruitment drives from the Crown Prosecution Service, directly targeted at defence practitioners. The skill set required to work for the CPS is very similar to that required for defence practice. The salaries the CPS is able to offer exceed those most defence firms can offer. In addition, as noted above, the CPS can offer a far more attractive work-life balance than defence firms.
66. Meanwhile since around 2010, students emerge from University with debts measured in the tens of thousands of pounds. The need to have at least the prospect of a proportionate professional salary in the medium term became much more acute. Increasingly, students could see that there was no chance of this in criminal law, and have chosen not to enter this area in the first place.
67. A survey of law students conducted by the Young Legal Aid Lawyers' Group in 2019<sup>15</sup> showed that while a large number of respondents said that they have considered a career in criminal law, the majority said that they would not actually go into legal aid work because of the low fees, and the main reason that would make them reconsider this was 'better wages'.
68. Some of these issues are similarly evidenced by a survey of law students undertaken by Durham University in 2018 (the Durham Survey).<sup>16</sup> This shows that whilst 53% of respondents professed an interest in criminal law, a large number of these then listed various reasons why they would not in fact be pursuing this as a career, mainly related to low remuneration.
69. The Durham Survey also supports anecdotal reports, that some law students are being actively discouraged from going into criminal law, due to the difficulties they will face in earning a decent living, including the unlikelihood of being able to pay off their student debt easily.
70. The dilemma facing academics teaching criminal law is succinctly expressed in a study by academics at Cardiff University:<sup>17</sup>

*"For us, the challenges facing criminal defence (and the criminal justice system more broadly) raise an ethical dilemma in relation to those students who wish to pursue a career in*

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<sup>15</sup> [Soc Mob Report - edited.pdf \(younglegalaidlawyers.org\)](#)

<sup>16</sup> Provided separately to the Review team.

<sup>17</sup> Nicola Harris, Roxanna Dehaghani & Daniel Newman (2021): Vulnerability, the future of the criminal defence profession, and the implications for teaching and learning, *The Law Teacher*, DOI: 10.1080/03069400.2021.1872872. Link: <https://www.tandfonline.com/doi/full/10.1080/03069400.2021.1872872>

*criminal defence: without encouraging our students to enter the profession, we are in effect contributing to the demise of the profession; without “new blood”, the profession is most certainly going to perish in 10–15 years’ time, if not less. On the other hand, we feel reluctant to encourage our students to enter the criminal defence profession when we understand – through previous practice, through discussion with our colleagues and peers in the profession, and through our academic research and scholarship – that the profession offers few opportunities for social mobility and progression.”*

71. There can be significant costs in seeking to leave the market, both in terms of individual skills training and the costs of restructuring or closing a firm. Some lawyers face changing both their own skill sets and the entire basis of their firm, with no guarantee that they or their firm will succeed in a different area of law. The closer a lawyer is to retirement, the less economically rational it is to incur those costs rather than to remain in the market until the end of their career.
72. This is why we now have a situation where, as demonstrated by our heat map, there are counties in this country in which there are no lawyers under the age of 35 undertaking criminal duty solicitor work; a growing number of duty solicitor schemes have no lawyers under 50; and there are now over 30 duty solicitor schemes with fewer than seven lawyers on them, so that each lawyer is on duty for at least one full 24 hour period every week.
73. This is also why we now face a cliff edge when the current generation of senior criminal defence solicitors reach the end of their careers over the next 5-10 years.

## **The service**

74. The service provided by crime lawyers is unusual. To a large degree, it is a requirement that the service is provided in person, physically at the location where the client is. Indeed, it is currently a contractual requirement for firms to do so. In a normal market, the expectation would be that businesses would centralise and automate in order to achieve economies of scale. The Government’s own contractual requirements mean that such economies of scale are not available to the extent that they would be in many markets.
75. The experience of the pandemic begs the question whether services could be more centralised through the use of technology, so that those contractual requirements could be relaxed, but the evidence is not promising. For example, we and the police are agreed that for suspects in the police station, remote advice, while acceptable during the pandemic as the only realistic way of delivering any sort of advice, will generally not be suitable in normal conditions. Research from Fair Trials and Transform Justice highlights why face to face advice is usually necessary.<sup>18</sup> In the courts, for the more complex cases, there is consensus that face-to-face hearings are essential. For the less complex hearings, the experience of the pandemic is that physical hearings are a more efficient way of processing cases than video hearings. There seems little prospect that the need to provide the majority of services in person, locally, across the whole country will end any time soon, even if some proportion of that work can be handled remotely.

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<sup>18</sup> ‘Not Remotely Fair’: <https://www.fairtrials.org/publication/not-remotely-fair-access-lawyer-police-station-during-covid-19>

## Client choice and competition

76. Markets generally operate on the basis that the purchaser of goods or services has freedom to choose from whom s/he buys them. There is not a free choice for the client who needs criminal defence services, however, particularly for the first time client. A client who is detained in the police station cannot shop around. If they know of a solicitor already, they may be content choosing to use that solicitor. If they do not, they may have little alternative but to choose the duty solicitor.
77. If the client is not happy with the duty solicitor, they can instruct someone else, but once legal aid has been granted, a change of solicitors has to be approved by the Court. The reason for this is to guard against clients creating avoidable delay in proceedings by seeking to change solicitor late in the case.
78. There is plenty of competition among defence firms, but because the clients are not paying for the service, that competition is based on quality and reputation. Many clients are repeat offenders, and solicitors know that if they provide a good service, the client is much more likely to ask for them next time they are in trouble. If a solicitor provides poor client care or a poor quality legal service, clients will frequently choose to use a different solicitor on a future occasion.

## Ideas for consideration

79. It should be noted that the suggestions set out in this section have not been costed. We are however confident that any additional costs will be outweighed by the advantages to the justice system in having a sustainable and efficient criminal legal aid service, with adequate geographical coverage and sufficient incentives for young solicitors to want to enter this field. There will also be some counterbalancing savings to the public purse in increased efficiency savings, and a reduction in unrepresented defendants, who – as has been noted in various studies<sup>19</sup> - often increase the time spent on cases. Moreover, the costs have to be considered in relation to the costs the Government will face if this market fails. If for example the Government had to deliver the entire service through a salaried model, the evidence of the Public Defender Service demonstrates that this is likely to be substantially more expensive than making the current model sustainable. That is quite apart from the reputational harm that would be caused to the Government from a failing criminal justice system.

## Sustainable fee levels

80. One of the key aims of the review, as set out in the terms of reference<sup>20</sup> is:

‘To reform the Criminal Legal Aid fee schemes so that they:

- support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce. ‘

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<sup>19</sup> For example: [https://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL\\_Singles.pdf](https://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf)

<sup>20</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/946615/terms-of-reference.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946615/terms-of-reference.pdf)

Any definition of 'sustainable' must include the ability of firms to:

- cover their costs (i.e. not depend on borrowing);
- offer competitive salaries;
- make a reasonable<sup>21</sup> profit;
- be viable now, and for the medium term (i.e. c.5 – 10 years ahead);
- be able to attract new young lawyers into the system; and
- retain those lawyers within the firm – or at least within the sector – by means of realistic career progression.

81. None of this can be achieved without a significant injection of additional funding into the system. There are a range of ideas as to how that funding might be applied, which we explore further in this section.
82. In February 2014 the Otterburn Consulting Report<sup>22</sup> warned that most firms' finances were 'precarious', with an average profit margin of around just 5%. Just weeks after the publication of that report, the MOJ aimed to cut 17.5% from criminal Solicitor Legal Aid rates. In the end only half of that proposed cut (8.75%) was implemented, but this has never been reinstated, despite the fact that the cut was made on the basis of market reforms that were never made.
83. All of the above points to the fact that regardless of any changes to the procedural aspects of the fee schemes, the basic fees on which the schemes are based need to be increased to a realistic level, if any positive improvements are to be gained from the review.
84. In addition to this, annual uprating of the basic fees is essential if we are to avoid slipping back into the current situation, where criminal legal aid fees are significantly out of step with the amount of work they are intended to cover and the cost to firms of providing the service.
85. While we accept that those working within a publicly funded service cannot expect to earn similar fees to those solicitors in commercial law, it is noteworthy that the PDS and the CPS – both also publicly funded – are able to offer considerably higher fees than defence firms, including enhanced non-monetised benefits such as paid annual leave and better working hours. It would not therefore be anomalous if legal aid fees were at least brought into line with the salaries at those organisations.
86. As a result of this discrepancy in fees there is now a worrying 'brain drain', with lawyers moving from defence firms to the CPS in particular. This includes experienced solicitors who are very hard for legal aid firms to replace. This can also result in an equality of arms issue, with the CPS always being able to provide experienced solicitors to prosecute cases, while

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<sup>21</sup> Assuming an unincorporated structure, we would define 'reasonable profit' as an amount that delivers an income to the business owner commensurate with their seniority and skills as a lawyer; a reasonable commercial return on capital; plus a reasonable return on top of that to reflect the business risks they are taking.

<sup>22</sup> Previously provided to the CLAIR team

the defence may not always be able to do so, and in some cases the defendant may be unrepresented.

## Methodologies behind fees

87. There are various existing methodologies which could serve as a logical basis for uprating criminal legal aid hourly rates, many of which we have touched on earlier in this submission:

### 1. Solicitors' guideline hourly rates

The 'Solicitors' guideline hourly rates'<sup>23</sup> published in 2010 sets out guideline hourly rates for solicitors', listed by pay band and grade. While these are over ten years old, they still suggest hourly rates that for trainees and paralegals are twice that of legal aid rates for an experienced solicitor. For more experienced solicitors the rates are around three to eight times current legal aid rates. We appreciate that these are intended as private rates, however even if legal aid hourly rates were doubled they would still be considerably lower than these.

### Guideline hourly rates

| Pay band | Fee earner  | London grade 1 | London grade 2 | London grade 3 | National grade 1 | National grade 2 | National grade 3 |
|----------|---|----------------|----------------|----------------|------------------|------------------|------------------|
| A        | Solicitors and legal executives with over 8 years' experience                 | £409           | £317           | £229–£267      | £217             | £201             | £201             |
| B        | Solicitors and legal executives with over 4 years' experience                 | £296           | £242           | £172–£229      | £192             | £177             | £177             |
| C        | Other solicitors or legal executives and fee earners of equivalent experience | £226           | £196           | £165           | £161             | £146             | £146             |
| D        | Trainee solicitors, paralegals and other fee earners                          | £138           | £126           | £121           | £118             | £111             | £111             |

These are the guideline rates in effect from 2010. Find out [previous guideline rates for 1999–2009](#).

### 2. Law Society's Financial Benchmarking Survey

We have highlighted in the above section on the Society's 2020 Financial Benchmarking Survey the discrepancy between the hourly rates that a fee earner must generate before any profit is earned - £112.69 per hour - and current legal aid rates. As we have pointed out, these figures indicate that a fee earner needs to generate three times their salary for them to be viable – i.e. to bring in any profit to the firm.

### 3. Inflationary increases

<sup>23</sup> [Solicitors' guideline hourly rates - GOV.UK \(www.gov.uk\)](#)



Annex A sets out what the rates would be had they been adjusted for inflation. This would also provide a reasonable and justifiable basis for increasing legal aid fees. It should be noted that the methodology used to calculate these figures can vary, although the resulting figures are generally within a similar range.

#### *4. Other publicly funded salaries*

Annex C and D show the fees paid to CPS and PDS employees – who are also publicly funded solicitors – and the wide discrepancy between these and legal aid rates.

88. Based on the assumption that a fee earner needs to generate three times their salary to bring any profit into the firm, and to enable legal aid firms to pay their fee-earners similar salaries to the CPS for example, a calculation of viable hourly rates might look something like this:
- £48,077 (based on national starting pay for a Senior Crown Prosecutor) x 3 = £144,231, divided by 1100 (assumed number of hours worked) = £131.12. This is the nominal hourly rate needed for firms to be able to pay similar salaries to the CPS and PDS. This would of course increase with the experience of the fee earner.

### **Payments for administrative work**

89. The legal aid contract creates a large amount of unpaid bureaucracy which practitioners have no choice but to undertake. It would be a small but positive gesture if at least some of this work could be paid for. For example, obtaining financial information from clients for means testing purposes can be a time-consuming task, particularly where the client is self-employed, does not have a regular income, and/or has chaotic finances. At the time of writing, the current proposals from the MoJ's review of means testing envisage changes that would require additional time being spent by practitioners in collecting and assessing the client's financial information. This is a worrying development at a time when both the MoJ and LAA have committed to reducing bureaucracy for practitioners.

### **Independent Fee Review Board to review and set fees annually**

90. We have long believed that fees for publicly funded criminal defence work need to be set by an independent 'Fee Review Board' that will have responsibility for reviewing the fees periodically to ensure they are still appropriate.
91. There are numerous examples of other publicly funded professions whose fees are set by an independent body, such as NHS staff. It would therefore seem an uncontroversial means of restoring at least some parity between criminal defence solicitors and other professions that are paid out of the public purse.

## **Review the DSCC**

92. The Defence Solicitor Call Centre (DSCC) has experienced numerous problems since its inception, and adds additional layers of bureaucracy and an increased number of phone calls into the process of the police contacting the duty solicitor. In 2011 - 2012 we commissioned an analysis of the costs involved in introducing a fully automated system to replace the DSCC. At the time this seemed likely to be cheaper than the call centre model. Communications technology has of course moved on substantially since we developed that model, so there will almost certainly be more, better and cheaper solutions available. It may be worth revisiting a technological solution, or exploring other ideas for improving the way the DSCC works, or replacing it altogether with something more efficient.

## **Increase numbers of trainee**

93. As we have noted above, while many law students express an interest in criminal law, the low fees and the absence of any opportunity for real career advancement means that very few of them are likely to contemplate a career in criminal law. This has created a gap at the bottom end of the age scale. Where a crime firm has the means to take on a trainee, they often find it extremely difficult to actually keep that trainee at the firm. Many trainees will pursue a career in a better remunerated area of law after their training contract, rather than continuing in criminal law.
94. Changes to the training contract rules also mean that trainees are no longer required to do the same variety of work as previously, so there are also fewer trainees who have any reason to do a criminal law traineeship.
95. An initiative that may partly address this is a government funded training grant for those wishing to pursue a career in criminal legal aid. The Legal Aid Agency used to fund traineeships in legal aid firms, but this is one of the numerous cuts that has been made to funding provision in this sector. This would also help to encourage those from less well-off and potentially more diverse backgrounds to go into criminal legal aid work. At present the student loan that needs to be paid off after a law degree can be an insurmountable amount of money for anyone that does not have financial support from their parents.
96. Naturally the recipients of such grants would need to commit – if not to a lifetime's career in legal aid – at least to a minimum number of years working in legal aid at the firm that has trained them.
97. Another way of attracting young solicitors into legal aid work would be through the provision of government funding or loan product for those undertaking the SQE from a lower income background who want to take up a place in a legal aid firm. The SQE has the potential to level up access to a career in the law, creating more and different pathways to suit individual candidates from all backgrounds, in all specialisms, and all corners of England and Wales. At present, there is no government backed funding for freestanding SQE preparation courses or fees, some form of loan or funding for those who need it to meet the costs of the preparation costs and exam fees would enable all candidates to choose the route that best suits them based on preference, not the availability of loans or funding.

## **Incentives within fee schemes**

98. As set out previously, there are currently very few incentives within the fee schemes for firms to deploy more experienced fee earners in a case, and thus to ensure the highest quality service in the most serious cases.

### **Police station fixed fee**

99. An example is the police station fixed fee, which pays exactly the same fee regardless of the seriousness of the case; the amount of time spent at the police station, or the seniority of the fee earner who attends.
100. This means that in effect a firm will get proportionately more for sending a solicitor to a simple shoplifting case than a murder case. For example, in a serious murder case which may require the fee earner spending a long time at the police station, it is more economical for a firm to send a more junior fee-earner who will be on a lower salary than a more experienced fee earner. By contrast, it makes more economic sense to send a senior fee earner to undertake several small, separate offences such as shop-lifting that occur on one day and that will generate several fees.
101. Serious thought needs to be given to creating a fee scheme that incentivises more senior solicitors to attend the most serious cases, where high quality advice and experience are essential. This could be a scheme along the lines of the magistrates' court standard fee scheme (see section below for more detail on this), with fees increasing according to the seriousness / complexity of the offence and the seniority of the fee earner.
102. Related to this is the fact that when the fixed fee was introduced it was only expected to cover a single attendance. Since then, while some police station cases are still resolved within one attendance, many others now involve more than one attendance. If the fixed fee is to be retained, it should therefore be payable for each police station visit, rather than as a single fee for the whole case.

### **Very High Cost Cases (VHCCs)**

103. There is no incentive to use an in-house advocate (barrister or solicitor) in an individual very high-cost case contract, as the fees are considerably lower for employed advocates than those who are self-employed.
104. The individual case contract system for VHCCs is in urgent need of review. In 2014, when the MoJ attempted to impose a 30% cut on payments for VHCCs, the Bar refused to undertake any VHCCs. The deadlock was only resolved by a 'temporary' change to the scheme for VHCC individual case contracts that meant a higher rate being paid to self-employed advocates and not to employed advocates.
105. Whilst it was manifestly unfair to pay a much lower rate to employed advocates for undertaking exactly the same work as self-employed advocates, at the time the MoJ made it very clear that this was a temporary measure and would be reviewed in short order.
106. An alternative to this inequality has however never been sought, and for many firms the low rates paid to employed advocates make it barely worthwhile taking on these cases. The iniquity of this payment structure can be illustrated by one firm which took on a VHCC,

however the fee that would have been paid to their employed barrister would not even cover the amount of work he would need to undertake. The only solution was for the firm to make the barrister redundant, and then contract the advocacy work in the case out to him on a self-employed contractual basis. This does not serve the firm, the client or the taxpayer particularly well.

107. If the fee for self-employed advocates is considered to be the correct fee then this should be paid to all advocates, including those employed in solicitor's firms, who are undertaking exactly the same work. In any event a review of this fee scheme is long overdue.

### **Early Guilty plea**

108. Consideration needs to be given to incentivising early preparation. Where this results in an early guilty plea it can save considerable time and cost to the court, yet the solicitor is effectively penalised by receiving a much lower fee than if the case had gone to trial.
109. The amount of work required to resolve cases early on – and thus to save court time and money - needs to be recognised and incentivised in any new fee scheme. Care should be taken to avoid perverse incentives to unduly pressurise a client to plead guilty, however solicitors are already required to make clients aware of the 'early guilty plea' scheme which gives credit for an early guilty plea in cases where the evidence is clearly overwhelming against them. One idea for the fee might be to ask what proportion of the overall work would a solicitor expect to have done in order to get a guilty plea. The guilty plea fee could then be set as broadly that proportion of the fee for a fully contested case.

### **Youth Court fees**

110. Youth court work can be highly specialised, and requires a very specific skill set. Solicitors who undertake this work are generally specialists, yet there is currently no recognition of this in the fee schemes, nor any financial incentive to deploy an experienced fee earner on these cases. Consideration needs to be given to the best way to address this, which may include setting up an expert Youth Court panel, with augmented fees for those who qualify for the panel (much like the Children Law panel).
111. Issues that will need to be considered include how cases will be dealt with that arise in a rural area where there are no experts. A payment for a Panel expert to travel to deal with that case would need to be built into the contract, which could perhaps be limited to serious cases only.

### **Standard Fee' scheme / alternative schemes**

112. Crime practitioners that we have canvassed have indicated that the only one of the current fee schemes that actually has the potential to work reasonably well – provided the hourly rates on which the fees are based are increased – is the magistrate's court standard fee scheme – with the caveat that all of the hourly rates need to be uprated.
113. We believe that a similar scheme could be adopted for other areas of criminal work, with nuanced payments based on the type of case, the amount of work undertaken and the seniority of the solicitor.

114. The fee would essentially be based on the amount of time spent on the task, with a banded fee structure similar to the magistrates' court scheme.
115. We suggest nominal rates dependent on the seniority of the fee earner and the category of the most serious offence for which the suspect has been arrested. A list of offences for the differing categories would be agreed.

### **Crown Court work**

116. Litigation work in the Crown Court tends to be more complicated, however some form of standard fee scheme using fee banding based on various factors in the case could also potentially be a starting point for Crown Court fees. Most practitioners tell us that one of the key drivers of costs in a case is time. Attempts to set proxies have led to perverse incentives, and we understand there is no will on the part of government to pay for work actually done, rather than using an artificial measure. There are however ways to avoid the need to increase the administrative burden on the Legal Aid Agency by learning from those parts of existing fee scheme that do work. As we have suggested above, one option for the Crown Court would be to adopt the 'hybrid' scheme used in the magistrates' court whereby time spent is recorded, but practitioners are paid according to fee bands.
117. We have attached at Annex G a paper that we submitted to the MoJ in 2016, which sets out possible alternative ideas for remuneration for Crown Court litigation:
- Remuneration based on units of prosecution evidence.
  - Remuneration based on average trial length, with a greater emphasis placed on the "basic fee" for each offence class.
  - Fixed remuneration for 70% of all claims where the fee is based on a straightforward average of the fees paid historically.
118. The paper notes that<sup>24</sup> *'regardless of which eventual remuneration scheme is implemented, it is recommended that the amount of prosecution evidence is measured in terms of a standardised unit measure. This will be important when devising "escapes" and meeting the challenges arising from an ever-increasing digitised criminal justice system'*.
119. It should be noted that this paper was intended for discussion purposes only; we have attached it for consideration alongside other proposals, although we do think that there is merit in the idea of using 'units' as a measure of evidence in the Crown Court.

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<sup>24</sup> Law Society 2016 paper on LGFS: 'Crown Court Remuneration Scheme for Litigators – A review of various options for reforming the remuneration scheme for publicly funded Crown Court criminal defence litigation': Page 9.

## LIST OF ANNEXES:

ANNEX A: Tables showing what the criminal legal aid hourly rates would be now had they been adjusted annually for inflation.

ANNEX B: Duty Solicitor Heat Map detail.

ANNEX C: Comparison of CPS and PDS salaries with private practice salaries.

ANNEX D: Table of CPS salaries for all levels, from 2018 – 2020.

ANNEX E: 'Salary and Benefits Benchmark 2020' by Douglas Scott - attached separately

ANNEX F: Law Society 2016 paper on LGFS: 'Crown Court Remuneration Scheme for Litigators – A review of various options for reforming the remuneration scheme for publicly funded Crown Court criminal defence litigation'. (attached separately)

ANNEX G: List of relevant papers; research, etc.

## ANNEX A

Tables showing what the criminal legal aid hourly rates would be now had they been adjusted annually for inflation.<sup>25</sup> The adjusted figures were obtained by applying the inflation rate as it stood for each year, and adding it to the previous year's adjusted figure. For example, the 1996 figure was added to the 1997 inflation figure to arrive at the adjusted 1997 figure.

| Magistrates' court proceedings                      |                            |                  |                                |                        |
|---|----------------------------|------------------|--------------------------------|------------------------|
| <i>Class of work</i>                                | <i>1996 Rate in London</i> | <i>2020 rate</i> | <i>Inflation adjusted rate</i> | <i>Percentage loss</i> |
| Preparation   | £47.25                     | £45.35           | £89.36                         | 49.25%                 |
| Advocacy  | £56.50                     | £56.89           | £106.86                        | 46.8%                  |
| Attendance at court where counsel assigned          | £30.50                     | £31.03           | £57.68                         | 46.2%                  |
| Travelling and waiting                              | £24.75                     | £24              | £46.81                         | 48.7%                  |
| Routine letters written and routine telephone calls | £3.60 per item             | £3.56            | £6.81                          | 47.7%                  |

<sup>25</sup> Source: Legal Aid Practitioners' Group

Crown Court and Court of Appeal proceedings

| <i>Class of work</i>                                | <i>Grade of fee-earner</i>  | <i>1996 Rate in London</i> | <i>2020 rate</i> | <i>Inflation adjusted rate</i> | <i>Percentage loss</i> |
|---|---|----------------------------|------------------|--------------------------------|------------------------|
| Preparation   | Senior solicitor  | £55.75                     | £50.87           | £105.44                        | 51.75%                 |
|   | Solicitor, legal executive or fee earner of equivalent experience | £47.25                     | £43.12           | £89.36                         | 51.75%                 |
|   | Articled clerk or fee-earner of equivalent experience             | £34                        | £31.03           | £64.30                         | 51.75%                 |
| Advocacy  | Senior solicitor  | £64.50                     | £58.86           | £121.99                        | 51.75%                 |
|   | Solicitor   | £56.00                     | £51.10           | £105.91                        | 51.75%                 |
| Attendance at court where counsel assigned          | Senior solicitor  | £42.25                     | £38.55           | £79.91                         | 51.75%                 |
|   | Solicitor, legal executive or fee-earner of equivalent experience | £34.00                     | £31.03           | £64.30                         | 51.75%                 |
|   | Articled clerk or fee-earner of equivalent experience             | £20.50                     | £18.71           | £38.77                         | 51.75%                 |
| Travelling & waiting                                | Senior solicitor  | £24.75                     | £22.58           | £46.81                         | 51.75%                 |
|   | Solicitor, legal executive or fee-earner of equivalent experience | £24.75                     | £22.58           | £46.81                         | 51.75%                 |
|   | Articled clerk or fee-earner of equivalent experience             | £12.50                     | £11.41           | £23.64                         | 51.75%                 |
| Routine letters written and routine telephone calls |   | £3.60 per item             | £3.29            | £6.81                          | 51.75%                 |

## ANNEX B

### ***Duty Solicitor heat map detail from 2018:***

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

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

### ***Schemes with 7 or fewer duty solicitors – from April to September 2020 data.***

The data below is taken from the April to September 2020 duty solicitor rota. We understand that a number of these schemes will soon have even fewer solicitors due to the retirement of scheme members. One example is East Gwent which currently has 6 solicitors, one of whom is in his seventies and we understand will soon be retiring.

| Scheme   | Members |
|--|---------|
| Berwick & Alnwick  | 1       |
| Dolgellau  | 1       |
| Newark   | 1       |
| Southport  | 2       |
| Hinckley   | 3       |
| Teignbridge  | 3       |
| Worksop & East Retford (Police Station panel/Mansfield Court Duty) | 3       |
| Barnstaple   | 4       |



|   |   |
|---|---|
| Lavender Hill court and Wimbledon Youth court | 4 |
| Newtown (Mid Wales)                           | 4 |
| North Ceredigion / South Ceredigion           | 4 |
| Scunthorpe                                    | 4 |
| Swansea - West Glamorgan                      | 4 |
| Burton on Trent                               | 5 |
| Derwentside                                   | 5 |
| Durham and Chester le Street                  | 5 |
| Isle Of Wight                                 | 5 |
| East Gwent                                    | 6 |
| High Peak (Chesterfield/Stockport)            | 6 |
| Knowsley                                      | 6 |
| Mendip / Yeovil & South Somerset              | 6 |
| Swale   | 6 |
| Barrow In Furness                             | 7 |
| Grantham & Sleaford                           | 7 |
| Kidderminster                                 | 7 |
| Lancaster                                     | 7 |
| Mold & Hawarden                               | 7 |
| North Tyneside                                | 7 |
| Pembrokeshire*                                | 7 |
| Redditch/Bromsgrove                           | 7 |
| Skegness                                      | 7 |
| South East Wiltshire                          | 7 |

\* Pembrokeshire is due to reduce to five members by October 2021.

***Schemes with 3 or fewer duty solicitors - from April – September 2020 data***

| Schemes  | Members |
|--|---------|
| Berwick & Alnwick  | 1       |
| Dolgellau  | 1       |
| Newark   | 1       |
| Southport  | 2       |
| Hinckley   | 3       |
| Teignbridge  | 3       |
| Worksop & East Retford (Police Station panel/Mansfield Court Duty) | 3       |

## **ANNEX C**

### **Fee tables for Crown Prosecution Service (CPS) and Public Defender Service (PDS).**

#### **CPS**

Please see Annex D.2 for the full range of CPS salaries.

##### *Crown Prosecutor*

The entry grade for those with no experience of criminal law:

- National starting pay £38,000 up to a maximum £42,630.
- London starting pay £40,000, up to a maximum £44,660 .

##### ***Senior Crown Prosecutor***

Entry grade for those with criminal experience - it is this grade that mainly attracts lawyers from defence firms:

- National starting pay £48,077 up to a maximum of £55,610
- London starting pay £48,077 up to a maximum of £62,590.

#### **PDS:**

- Solicitors and duty solicitors: £32,539 to £43,098.
- Office Heads: £48,353 to £70,111.

#### **Private practice – criminal legal aid firm<sup>26</sup>:**

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<sup>26</sup> Source of salary data: Tuckers Solicitors; DPP Law Ltd; London Criminal Courts Solicitors' Association (LCCSA)

1. Firstly it should be noted that the individual may struggle to obtain employment – given the decreasing number of firms that are able to offer employment - and initially could be offered insecure consultancy arrangements.

- Starting salary: around £16k (or minimum wage) - £18k outside London; £20k - £23k in London
- Those with three to five years PQE and duty solicitor status: around £26k - £30k outside London; £33k-£35k in London.

2. Job adverts on this website - <https://www.law-staff.co.uk/> - for crime solicitors generally show a similar range to the above, with some salaries going up to £50,000 – we assume for highly experienced solicitors. Please see below for examples. It should be noted that the salary offered for ‘Associate/Senior Associate – Regulatory and crime’ is almost certainly not legal aid work; it is likely to be insurance led work or privately funded niche work. This serves to demonstrate how much higher private fees are compared to fees paid for legal aid work.

**Fee Earner – Crime**

Permanent , Grimsby North East Lincolnshire England Yorkshire , £20,000 - £50,000

**Fee Earner – Crime**

Permanent , Lincoln Lincolnshire England East Midlands , £20,000 - £50,000

**Solicitor - Actions Against The Police**

Permanent , London Greater London England South East , £36,000 - £37,000

**Duty Solicitor - Crime**

Permanent , London Greater London England South East , £30,000 - £45,000

**NQ Solicitor - Crime**

Permanent , London Greater London England South East , £23,000 - £27,000

**Associate/Senior Associate – Regulatory & Crime**

Permanent , Norwich Norfolk England East Anglia , £65,000 - £75,000

**Duty Solicitor – Crime (Part-Time)**

Permanent , London Greater London England South East , £30,000 - £40,000

**Duty Solicitor - Crime**

Permanent , Braintree Essex England East Anglia , £35,000 - £40,000

**Duty Solicitors/PSAR – Crime**

Permanent , London Greater London England South East , £25,000 - £40,000

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**Crime Duty Solicitor**

Permanent , Cheltenham Gloucestershire England South West , £30,000 - £40,000

**Crime Duty Solicitor**

Permanent , Swindon Wiltshire England South West , £30,000 - £40,000

**Crime Duty Solicitor**

Permanent , Oxford Oxfordshire England South East , £30,000 - £40,000

**Crime Duty Solicitor**

Permanent , Telford Shropshire England West Midlands , £30,000 - £40,000

**Crime Duty Solicitor**

Permanent , Borehamwood Hertfordshire England South East , £30,000 - £40,000

**Consultant Solicitor (with a client following)**

Permanent , London Greater London England South East , Fee Sharing

## ANNEX D

Attachment: Table of CPS salary levels from 2018-2020

## ANNEX E

Attachment: 'Salary and Benefits Benchmarker 2020' - Douglas Scott

## ANNEX F

Attachment: Law Society 2016 paper on LGFS: 'Crown Court Remuneration Scheme for Litigators' – A review of various options for reforming the remuneration scheme for publicly funded Crown Court criminal defence litigation.

## ANNEX G

### List of additional papers and research:

1. **'Vulnerability, the future of the criminal defence profession, and the implications for teaching and learning'** – (Provided to the Review team). This is a new report by academics at Cardiff University and explores the 'fee stagnations and funding cuts over the last 20 years' from the perspective of academics and law students, and how the collapse in the system impacts on the messages going to students, thus creating a downward spiral.  
<http://orca.cf.ac.uk/137828/>
2. **Law Society 'Justice on Trial' report:**  
<https://www.lawsociety.org.uk/topics/research/justice-on-trial-2019>
3. **Otterburn Legal Consulting report 2013/2014** (Provided to the Review team):  
This is a report by Otterburn Legal Consulting commissioned by the Law Society when the Government was threatening to make a 17.5% cut to crime fees, in two stages of 8.75% each. The report showed that the finances of many crime firms are fragile. Most do not have significant cash reserves or high excess bank facilities. A number of respondents expressed the view that their bank would be unwilling to extend further credit to them. The median net profit from crime alone after the 8.75% fee cut in 2014 was -3%. There is nothing to indicate that the situation for crime firms has improved in any way since that report was published, and it is likely to have become considerably worse since 2014.

4. **Justice Select Committee report on Criminal Legal Aid – July 2018:**

<https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/1069/1069.pdf>

**The Law Society of England and Wales**

**May 2021**