

# **The Legal Services Board's response to the Call for Evidence for the Independent Review of Criminal Legal Aid**

---

7 May 2021

## Executive summary

1. The consequences of a criminal charge are far reaching. For a defendant, it can mean a loss of liberty. For a victim, it may offer some closure or comfort where there is a conviction, or it may result in further suffering where a person is not charged with an offence, or when a defendant is found not guilty. An effective criminal justice system underpins the rule of law, and criminal legal aid ensures that a citizen is not unduly limited from accessing legal advice or representation. It also helps the courts to operate efficiently by ensuring that defendants, who may otherwise represent themselves, have the benefit of legal advice at the time of entering a plea, at sentencing and during the criminal justice process. An effective system also ensures that the public, and especially victims, have confidence in the process. In this way, an effective, efficient, and well-functioning criminal legal aid system is an essential public service.
2. As the oversight regulator for legal services, it is appropriate for us to assess and comment on the impact of public policy on our regulatory objectives. We also have relevant evidence and insights that we hope can assist the Review in its work, including:
  - The range of issues that perpetuate an image of a criminal justice system in crisis including: a perception of chronic underfunding, concerns about the sustainability of the duty solicitor scheme, increases in unrepresented defendants, and a perception of an inefficient system in need of reform. There also regulatory issues at play, including: concerns about the quality of criminal advocacy, the sustainability of the market, competition concerns and the growth in technology-enabled, unregulated services for certain offences
  - Covid-19 has added to the existing pressures on the criminal justice system, including the mounting backlog in the Crown Court and Magistrates Court that may undermine people's ability, and confidence, in accessing justice. The impacts of the pandemic are still unfolding,

including on criminal legal aid providers, and more evidence is needed to understand the impacts on the criminal legal aid sector

- The challenges that people face in understanding what legal services are on offer and in comparing the quality of different providers Our work offers evidence of the importance of public-facing information on the legal services market that is easily available and accessible, and the value of co-designed, public-facing platforms, such as Legal Choices, as a useful way of increasing transparency
  - [The findings from our recent widescale call for evidence on ongoing competence](#), which found a significant mismatch between what the public assumes is in place to ensure the ongoing competence of legal professionals, and what regulators are actually doing at the moment. We want to see a renewed focus from regulators on ensuring ongoing competence throughout a legal professional's career, and we are developing policy proposals on ongoing competence that we will consult on later in 2021
  - The opportunities, and risks, that technology offers in increasing access. Technology is continuing to transform how legal services are designed and delivered, but there are unresolved questions on whether it should be used in certain situations, such as remote jury trials, and how to mitigate against the risks of digital exclusion for legal aid users
  - The importance of everyone playing their part in dismantling the barriers to a diverse and inclusive profession, including those that operate in the criminal legal aid system, and regulators.
3. In '[Reshaping Legal Services: A sector-wide strategy](#)', we identify a series of challenges that the sector needs to overcome if it is to better meet society's needs. We group these challenges under three strategic themes - fair outcomes, stronger confidence, and better services. A well-funded, effective, and efficient criminal legal aid system is essential to the rule of law and is important in delivering the fairer outcomes, stronger confidence and better services that society needs. This can benefit individual users, legal professionals and the wider public. Our evidence and insights suggest that the criminal legal aid system is not operating as effectively as it could be, for the

public and for professionals. Appropriate remuneration for professionals is an important part of an effective criminal legal aid system. Reforms to the criminal legal aid system, along with wider changes in the legal services sector, can help to guarantee and protect access to justice for those in need.

## About the LSB

4. The Legal Services Board (LSB) oversees the regulation of legal services in England and Wales. We are an independent body created by the Legal Services Act 2007 ('the Act'), and we are independent from both the legal profession and government.
5. Our core functions include overseeing the regulators' performance, setting the annual fees that practitioners pay them and approving changes to their rules and other arrangements. We ensure that regulation of legal services is carried out independently of the organisations that represent providers. We also collect evidence on legal needs and the operation of the market.
6. In all our work, we consider how best to promote the eight regulatory objectives set out in the Act.<sup>1</sup> We believe that it is appropriate and important for us to assess and comment on the impact of public policy on the regulatory objectives. In the context of criminal legal aid, all the regulatory objectives are relevant. Changes to criminal legal aid may either enhance, or conversely, be detrimental to the achievement of these objectives. For example, any changes to criminal legal aid can impact on the ability of people to access justice. Similarly, legal aid fees may promote competition in the provision of legal aid services or be detrimental to competition.
7. Our response offers evidence and insights from our wider research into the legal services market and from our ongoing policy work. We hope that this assists the Review, and we will continue to provide evidence and insight in support of the Review and its ongoing work.

---

<sup>1</sup> The eight regulatory objectives are: protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; protecting and promoting the interests of consumers; promoting competition in the provision of services; encouraging an independent, strong, diverse and effective legal profession; increasing public understanding of the citizen's legal rights and duties; and promoting and maintaining adherence to the professional principles.

# Submission

## Context

8. The Independent Review of Criminal Legal Aid ('the Review') is focused on the long-term sustainability of criminal legal aid in England and Wales. The Review is considering the Criminal Legal Aid System in its entirety, and is specifically seeking 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.

9. On 29 March 2021, the Review launched a [Call for Evidence](#) seeking comments and evidence against nine questions. We have tailored our response to the areas that we can offer the most relevant evidence and insight on, including:

- the main issues in the functioning of the criminal legal aid system, including regulatory issues
- the transparency of the criminal legal aid system, including how quality is measured and ensured
- diversity within the criminal legal aid system that promotes fairness and improves service quality.

10. Our submission draws on a range of evidence, including the State of Legal Services 2020 Report,<sup>2</sup> research conducted with our Public Panel<sup>3</sup> and the Covid-19 dashboard that we have developed to help regulators and policy makers understand the demand for legal services and the health of the market.<sup>4</sup> We also offer insights from our ongoing policy work on ongoing competence, technology and innovation, consumer engagement and diversity and inclusion.
11. The ability of people to access legal services when they need them is a fundamental principle of the rule of law, and relies on the financial, and non-financial barriers, to access being addressed. An efficient and effective criminal legal aid system also signals the importance that society places on the ability of those without means to access justice when faced with the most serious consequences. Adequate funding is an important part of enabling access, both for the public and for professionals. Beyond this, issues of complexity, legal capability and service design also need to be tackled. By removing complexity, simplifying processes, and actively educating people about their rights and the legal system, access to justice can be protected, and guaranteed, for those in need.

## **The main issues in the functioning of the criminal legal aid system, including regulatory issues**

12. In November 2020, we published our [State of Legal Services 2020 Report](#) ('the Report') which offers an in-depth review of the sector following ten years of independent regulation. This Report concludes that despite the achievements of the last decade, the legal needs of many citizens are not being met.

---

<sup>2</sup> Legal Services Board, '[A reflection on ten years of regulation: The State of Legal Services 2020](#)' and '[Evidence Compendium The State of Legal Services 2020](#)' (November 2020)

<sup>3</sup> Legal Services Board Strategy Development, '[Public Panel Research report August 2020](#)', and '[Quality indicators in legal services: A research report for the Legal Services Board](#)' (January 2021)

<sup>4</sup> This dashboard is intended to be interactive and we continue to iterate it as new and/ or updated information becomes available. [Coronavirus impact dashboard](#).

13. The Report highlights a range of issues that perpetuate an image of a criminal justice system in crisis, including:

- conclusions by the Justice Select Committee in 2018 that under-funding of the criminal justice system threatens its effectiveness, undermines the rule of law and tarnishes the reputation of the justice system as a whole<sup>5</sup>
- concerns that the duty solicitor scheme is not sustainable, and that this is impacting on the number of people receiving advice from a duty solicitor while at a police station<sup>6</sup>
- increases in people defending themselves<sup>7</sup> and concerns about the ability of these people to adequately represent themselves. Research by the Ministry of Justice found that: unrepresented defendants were considered less able to participate effectively in the process; cases had longer hearings and case progression was slower; fewer early guilty pleas; and concerns about the effect upon witnesses, with particular worries about defendants undertaking cross-examination, including of their alleged victim<sup>8</sup>
- concerns about the 'innocence tax' - acquitted defendants who paid for legal representation can claim back fees under legal aid rates, but there is concern that these rates have been set too low<sup>9</sup>
- industrial action over fees schemes for advocates (and judicial review of the parallel scheme for litigators) linked to concern about the well-being of barristers and fears over the sustainability of the independent referral bar and criminal law solicitors
- inefficiencies and poor performance in parts of the system against a backdrop of financial pressure. Issues include delays and cases not

---

<sup>5</sup> House of Commons Justice Committee, '[Criminal Legal Aid: Twelfth Report of Session 2017-19](#)', para. 10 (July 2018)

<sup>6</sup> For example, a House of Commons Insight article notes that the number of providers of police station advice covered by legal aid has fallen by 20% since 2011/12 and that the number of people receiving telephone advice from a duty solicitor while at a police station has fallen by more than 40%. This is despite the fact that levels of recorded crime have risen. See House of Commons Insight article, '[Is the criminal justice system fit for purpose?](#)' (15 January 2020)

<sup>7</sup> See for example: The Guardian, '[Jump in unrepresented defendants as legal aid cuts continue to bite](#)' (24 Nov 2019)

<sup>8</sup> Ministry of Justice, '[Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspectives](#)' (2019)

<sup>9</sup> See for example, '[Ditch 'innocence tax' in criminal courts, government urged](#)' (25 November 2019)



going ahead as planned or collapsing on the day of trial, with significant regional variation. The HMCTS Reform programme promises to deliver ambitious changes to how courts and tribunals operate, including introducing new technology and working practices, but there are concerns that the programme will not be delivered in the time available<sup>10</sup> and on its impact on access to justice<sup>11</sup>

- court closures raise concerns about access to justice, particularly as those who attend court tend to rely on public transport
- the Lammy Review which found disproportionality in outcomes throughout the criminal justice system, with youth justice identified as the biggest concern
- reports on widespread failures in the disclosure of evidence by the police and CPS, with the collapse of a number of cases and consequent miscarriages of justice
- concern about falling prosecutions for rape which has led the Victims' Commissioner, Dame Vera Baird, to describe the level of prosecutions as so low that 'what we are witnessing is the de-criminalisation of rape'<sup>12</sup>
- questions about the future of the magistracy, at a time when the population of magistrates is ageing and fewer magistrates are being recruited
- concerns about low judicial morale due to pay, workload, working conditions and other issues.

14. The Report also highlights a number of regulatory issues including:

- concerns about the quality of advocacy following the collapse of the Quality Assurance Scheme for Advocates. We consider this in more detail at paragraph 24 in relation to our ongoing competence policy work

---

<sup>10</sup> See for example the [report from the National Audit Office, 'Early progress in transforming courts and tribunals'](#) (9 May 2018)

<sup>11</sup> House of Commons Committee of Public Accounts, '[Transforming courts and tribunals, Fifty Sixth Report of Session 2017–19](#)', (20 July 2018)

<sup>12</sup> See for example: The Guardian, '[We are facing the 'decriminalisation of rape', warns victims' commissioner](#)' (14 July 2020)

- more advocates competing for less work as a result of the growth in the number of advocates and falling numbers of prosecutions, and market dynamics posing particular challenges for the self-employed bar. For example, the duty solicitor scheme acts as the main gateway to an advocate and gives solicitor firms a commercial advantage. There is also a trend in solicitors firms keeping more work in-house
- anecdotal evidence of disguised referral fees and “touting for business”
- operation of the “cab-rank” rule, most recently in relation to industrial action over fees.<sup>13</sup> Under the BSB’s code of conduct, the cab-rank rule applies to legal aid work, but the Criminal Bar Association adopted the position that the legal aid rates did not constitute a proper fee and balloted its members on proposed action in response
- the emergence of unregulated services that utilise technology to help people contest cases, usually involving lower-level offences, like parking tickets.<sup>14</sup>

15. Covid-19 has exacerbated many of the existing issues facing the criminal justice system, with many cases now taking longer to come to trial, which can impact on defendants and victims confidence in the process. In April 2020, we created a [Covid-19 dashboard](#) to monitor the effects on the professions and on access to justice. [In February 2021, we published a blog highlighting some key findings](#), including the significant increase in outstanding criminal cases. The backlog of cases in the Crown Court was up by 48% in the year from November 2019 to November 2020, and by 34% in the Magistrates Court.

16. We have also sought to understand the impact of the pandemic on regulated lawyers. So far, and as lockdown measures begin to ease, [emerging data](#) suggests that the sector has remained broadly stable with the overall numbers of regulated lawyers in line with pre-pandemic trends. Information on the numbers of barristers is not yet available. In addition, the full effects of the

---

<sup>13</sup> See for example: BBC, ‘[Barristers end industrial action over cuts to fees](#)’ (12 June 2018)

<sup>14</sup> See for example: The Guardian, ‘[Chatbot lawyer overturns 160,000 parking tickets in London and New York](#)’ (28 June 2016)

pandemic are still unfolding and it is not yet clear what impact the removal of government support, such as furlough payments, will have. The emerging picture also masks the impacts on different parts of the sector, including legal aid firms. We report on data which suggests that legal aid firms have struggled, with over 70 offices closing since April 2020. We welcome the launch of the Legal Aid Census 2021 by the Legal Aid Practitioners Group (LAPG),<sup>15</sup> and we hope that it can offer a clearer picture on the impacts of the pandemic on legal professionals. We are committed to supporting the legal services sector in its recovery from the pandemic and we will continue to develop our understanding of the impacts.

17. The range of issues that need to be addressed suggests that the criminal justice system is not working as well as it could be, for professionals or for the public. We welcome this Review as an important step in helping to ensure that the criminal legal aid system is functioning well for professionals and for the public.

## **The transparency of the criminal legal aid system, including how quality is measured and ensured**

### *Quality indicators*

18. In December 2020, the CMA published its progress [review](#) of its 2016 market study of the legal services sector. While the 2020 progress review found that some progress has been made on price transparency, it concluded that there has not been enough progress on other issues, including transparency of the quality of provider, and the introduction of 'quality indicators'.
19. While many of the recommendations from the CMA are more suited to areas such as conveyancing and wills and probate where there is an increased propensity for people to shop around, and/or for more standardised

---

<sup>15</sup> The Legal Aid Census 2021 is being undertaken by academics at Cardiff and Newcastle University in collaboration with the Legal Aid Practitioners Group (LAPG) and the Westminster Commission on Legal Aid.

products/pricing, our policy work on quality indicators and consumer engagement offers insights that may be of relevance to the Review.

20. We believe that users should have access to information on quality so that they can make an effective choice. We conducted qualitative [research with 69 consumers as part of our Public Panel research on Quality Indicators](#). This involved an exercise based on four scenarios (moving house, divorce, making a will, redundancy). Participants felt that choosing a provider in legal services was harder than in other sectors, partly because they found limited readily available information and little consistency in how information on service quality is presented between providers. The difficulty that people face in understanding what services are on offer may also be true for those who rely on criminal legal aid and is an area that the Review should consider exploring through dedicated research.
21. We also know that the stress and anxiety caused by legal issues can impair a person's ability to make decisions. This is as relevant to victims as it is to criminal legal aid users, where the consequences of a conviction may be life-limiting. While we do not have specific data on criminal legal aid, our research into other areas of law suggests that people find it hard to assess providers' service quality. This is often due to limited and inconsistent information, and an expectation that the stress of the legal issue itself makes decisions harder.
22. One way to equip people with the information they need to participate effectively is through targeted information. [Legal Choices](#) is a website run by legal services regulators in England and Wales. It offers independent information about legal issues and the different types of lawyers or services that can help a person to resolve a legal issue. This is an example of how public-facing information on the legal services market can be made available. There may be value in exploring how similar initiatives can be co-designed and delivered to criminal legal aid users.

23. Lawyers help to keep us safe, protect our liberty, enforce our rights. This role is never more apparent than in criminal proceedings where the quality of advocacy can have serious consequences, such as a loss of liberty or further suffering for victims. When the public use legal services, and particularly in the context of criminal proceedings, they need to know that the professionals helping them are competent – not just upon qualification, but throughout their careers. As well as protecting people from harm, this is about public trust and confidence in legal services.
24. While users can usually observe ‘service quality’, such as promptness, courtesy, administrative efficiency, they are not usually able to assess the technical quality of work. This means that they rely on there being checks in place to provide that quality assurance. However, unlike other professional service sectors, there is no regular, formal assessment of legal professionals during their careers beyond requirements for continuing professional development. Our ongoing competence project is considering whether this status quo is sustainable and if the current approach is effective in protecting consumers’ and the public interest.
25. In January 2020, we launched a call for evidence to help us understand the current approaches to assuring competence across the legal sector and beyond and to gain clarity on gaps in the system, or areas of concern. We recently published summary of [the information](#) we received from this call for evidence. Some respondents raised concerns about the quality of criminal advocacy, including:
- a 2018 independent report, commissioned by the BSB and SRA, into [Judicial perceptions of the quality of criminal advocacy](#) found that advocacy practitioners were considered to be competent generally, but that standards were declining in relation to core skills such as case preparation and ability to ask focused questions. The biggest barrier to high quality advocacy was said to be advocates taking on cases beyond their competence

- Council of the Inns of Court (COIC) referred to past research on the quality of criminal advocacy, including the Jeffrey (2014) and Smedley (2010) reports, which recognised this same barrier. COIC pointed to Smedley's remarks about the reductions in legal aid funding and their impact on the distribution of casework and the quality of advocacy. Smedley found that in order to keep financially afloat, practitioners 'will take on work beyond their competence, rather than have no work at all.'
- The 2014 Jeffrey report, [Independent criminal advocacy in England and Wales](#), also raised concerns with advocates taking on cases beyond their level of competence
- Transform Justice, in its 2019 report [Criminal defence in an age of austerity: Zealous advocate or cog in a machine?](#), said that while there is no 'hard evidence' that the standards of defence advice and advocacy are declining or improving, 'the systemic barriers to achieving good advice and representation are getting higher.' Transform Justice's research also found that most lawyers agree 'lousy firms' exist and that many defendants felt there were poor barristers practising. In terms of the consequences, 'poor, or simply mediocre, defence advice and advocacy' *had* huge impacts, with defendants potentially 'entering the wrong plea, getting convicted when they were innocent and receiving a much more punitive sentence than their offence merited.'
- CILEx Regulation and the BSB commissioned research on youth justice in 2015 which found that the quality of advocacy for youth justice was highly variable. It recommended specialist training for those practising in youth court and increased remuneration.

26. Our work on ongoing competence spans the whole legal sector and our approach has been to assess, in a holistic and sector-wide way, the effectiveness of current ongoing competence arrangements. So far, our work has confirmed that while there are rigorous checks on entry to the profession, there are few checks on individuals' competence throughout their careers and that legal regulators typically do not have the tools or processes available to respond to concerns about competence. While we are pleased that some

regulators, firms, chambers, circuits, and individuals in the legal services sector have adopted methods for testing competence, these are not used routinely, tend to have limited coverage, and may not be targeted to the risks to users. There is also a clear misalignment between the current provision in the sector and what the public expects in terms of checks on competence for legal professionals over time.

27. As oversight regulator for the legal services sector, we want to set clear and consistent expectations for all legal regulators to ensure that they have appropriate and proportionate measures in place to assure the ongoing competence of legal professionals. We want to see a renewed focus from regulators on ensuring ongoing competence that is proportionate to the risks posed to users. While we consider that additional targeted interventions by regulators may be needed where there are concerns about an increased risk of harm to users, there is a general need for more effective ongoing competence arrangements across the legal sector. Our evidence suggests that criminal advocacy is one area where there may be an increased risk of harm.

28. Regulators are best placed to implement, and oversee, effective arrangements that set, and maintain, standards of competence for legal professionals. We intend to develop high-level expectations that all legal regulators should:

- set out the standards of competence that legal professionals should meet at the point of entry and throughout their careers; and
- have mechanisms in place to:
  - identify legal professionals who are failing to meet those standards;
  - identify areas of increased risk to consumers;
  - respond when legal professionals fall short of the standards of competence; and
  - provide appropriate protection when there is an increased risk of harm.

29. We are currently testing our key themes and emerging conclusions with the LSB Public Panel, a standing group of members of the public who we engage with to inform policy developments. As we finalise this research, we will share the findings with the Review team as we believe they will be relevant to assuring the quality of criminal advocacy.
30. Changes to regulatory standards and expectations can increase costs and other burdens on providers, and we will continue to ensure that any proposed changes are necessary and proportionate and that the potential impacts are properly assessed and considered. We currently plan to formally consult on proposals in this area from October to December 2021.

## **Competition within the market, including how users can be empowered to make informed choices**

### *Technology and innovation*

31. Pre-pandemic, legal services providers who provided legal aid services were no more likely to use technology than other providers.<sup>16</sup> This has changed, with technology now an increasing feature of how legal services are designed and delivered. Government initiatives, such as the HMCTS Reform programme, are cementing the role of technology in public services. The Covid-19 pandemic left little option but for a wider range of justice services to be delivered using technology.
32. The ability of legal professionals to adapt to new ways of working during the pandemic is laudable, but there are concerns that it has added to existing pressures on legal aid providers.<sup>17</sup> There are also questions about the use of technology in different situations, such as remote hearings for jury trials. As the full effects of the pandemic continue to unfold, questions need to be

---

<sup>16</sup> Legal Services Board, [Technology and Innovation in Legal Services – Main Report](#) (November 2018)

<sup>17</sup> House of Commons Justice Committee, [‘Coronavirus \(Covid-19\): the impact on the legal professions in England and Wales: Seventh Report of Session 2019-21’](#) (22 July 2020)



resolved about where technology should continue to be used, and where it should continue to be used to offer choice in how services are accessed. It is also important that any use of technology does not augment the existing pressures faced by legal aid practitioners.

33. Issues of digital exclusion, and the ability to use digital services successfully, are a dimension of consumer vulnerability that could lead to worse outcomes for some citizens than others. These issues are particularly relevant to criminal legal aid users. Any digitisation of criminal legal aid processes needs to consider the impacts on criminal legal aid users. This can help ensure that citizens are not excluded from accessing services when they need them most and identify what support is needed. It can also help ensure that users have a choice in how they access legal aid services.

34. New technologies, such as Artificial Intelligence (AI) and Machine Learning (ML), have the potential to improve efficiencies within the criminal legal aid system such as by automating routine and time-consuming tasks and reducing the likelihood of human error. Widespread use of AI and ML is relatively immature within the legal services sector, but it is growing. Examples include tools and software that assist in analysing the large amounts of digital data collected in the course of a criminal investigation.<sup>18</sup> The transformative potential is clear, but the barriers to their use encompass issues of trust, capability and capacity. As we explore how the use of such technologies can align with standards of public trust and ‘social acceptability’<sup>19</sup>, we will share any relevant findings with the Review team.

## **Diversity within the criminal legal aid system that promotes fairness and improves service quality**

---

<sup>18</sup> See for example: [Cellebrite](#), a Digital Intelligence solutions provider that offers a range of technological tools.

<sup>19</sup> We use the term “socially acceptable” to mean that the proposed use of a technology is broadly acceptable to legal professionals and consumers, as well as being compatible with general societal interests. We adopt this term from ‘[The Regulation of New Technologies in Professional Service Sectors in the United Kingdom: Key Issues and Comparative Lessons](#)’ by Professor Roger Brownsword.

35. Dismantling barriers to a diverse and inclusive profession is a key challenge facing the legal services sector. In our State of Legal Services 2020 Report, we outline how there is a mixed picture of the composition of the profession and that three related issues need to be addressed - composition, conduct and culture.

36. The barriers faced by those with protected characteristics differ depending on their circumstances:

- for those with a disability, attitude and workplace practices (such as denying reasonable adjustments) limit opportunities and slow career advancement. This can impact professionals and legal aid users
- women and BAME lawyers face higher levels of harassment and bullying. They are less likely than men and white lawyers to secure training contracts at large law firms
- disabled lawyers who have mental illness face challenges due to a long-hours culture, fixation with billable hours and dealing with pressures that come from managing client expectations. There is a fear that they will be placed at a disadvantage if they disclose having a disability, particularly those with non-visible disabilities.

37. We know that often someone in the criminal justice system will obtain legal support from a legal professional who does not share their background and protected characteristics. We also know that there is a consistent overrepresentation of those from a BAME background in the criminal justice system. In 2019, around 16% of the population of England and Wales identified as BAME, while 23% of those prosecuted for indictable offences were from a BAME background.<sup>20</sup> The disparity is particularly acute for drug offences prosecutions where those from a BAME background comprised 39% of prosecutions.<sup>21</sup> There is also evidence of gender disparities in the fees

---

<sup>20</sup> House of Commons Library, '[Insight: Ethnicity and the criminal justice system: what does recent data say on over-representation](#)' (2 October 2020)

<sup>21</sup> House of Commons Library, '[Insight: Ethnicity and the criminal justice system: what does recent data say on over-representation](#)' (2 October 2020)

earned by male and female barristers,<sup>22</sup> with research suggesting that between 2019-20 female junior advocates accounted for 35% of all advocates paid by the CPS but received 26% of the total value of fees paid.<sup>23</sup>

38. Dismantling the barriers to a diverse and inclusive profession relies on a wide range of actors working together and collaborating to achieve real change. In 2020, we set out our commitment to using our oversight role to deliver greater progress on diversity and inclusion and stated how we will assess the performance of regulators against three characteristics:

- an understanding of the composition of their regulated community
- an understanding of the barriers to entry and progression within the regulated community, and a programme of activity to mitigate those barriers with measures in place to evaluate effectiveness, and
- measures in place to understand any differential impact on protected characteristics within their disciplinary/ enforcement procedures.

## Challenges facing criminal legal aid over the next decade

39. In '[Reshaping Legal Services: A sector wide strategy](#)' we identify a series of challenges that the sector needs to overcome if it is to better meet society's needs. We group these challenges under three strategic themes: fair outcomes, stronger confidence, and better services. We believe that these themes are relevant to the Review.

40. On **fairer outcomes**, a well-funded public legal system is of fundamental importance to ensuring that affordability is not an obstacle for citizens in accessing justice and in maintain confidence in the judicial system. This is particularly important in the context of criminal legal aid where the consequences for individuals can be significant. The ability of people to achieve fairer outcomes also relies on a sustainable provider base that is diverse and inclusive, and that reflects the community that it serves.

---

<sup>22</sup> See for example: The Times, '[Black female barristers are paid the least and are offered less lucrative work](#)' (6 May 2021)

<sup>23</sup> See: HHJ Emma Nott, '[Gender at the Bar and fair access to work \(4\)](#)' (4 January 2021)

The funding of criminal legal aid can go some way to addressing these issues, but the Review should also consider issues of legal capability and service design.

41. On **stronger confidence**, there is a need to build public confidence on stronger foundations. As we have noted, the criminal justice system is often perceived as being in a state of crisis, and in urgent need of investment and reform. While many of these perceptions are rooted in historic problems, Covid-19 has exacerbated many of these issues and there are concerns that the criminal justice system is now at breaking point. The breadth and depth of consensus means that these issues cannot be ignored.
42. On **better services**, the opportunities for technology and innovation to increase access must be embraced in tandem with an exploration and mitigation of its risks. Covid-19 has demonstrated the possibilities that technology offers in the delivery of legal services, but it has also raised questions about the limits of its use. For criminal legal aid users, the risks of digital exclusion are particularly relevant and there is a need for these risks to be understood and managed. Initiatives that help tackle digital exclusion can help, but it is important that alternative ways of accessing services are maintained. Traditionally, culture has been one of the biggest impediments to technological innovation and there are opportunities for legal aid providers to be at the forefront of this cultural change within the sector.
43. Changes to legal aid can impact on our regulatory objectives. Changes in how legal aid is designed and delivered, for example, could help increase confidence and help people understand their legal rights and increase access justice; for others, changes could negatively impact their ability to access services. For professionals, changes to criminal legal aid could promote competition and encourage an independent, strong, diverse and effective profession. Conversely, levels of remuneration could reduce competition in the provision of services and limit the entry, progression, and retention of some providers. As such, any changes in criminal legal aid necessitate careful consideration. Public policy officials have to balance finite public

resource against access to justice. We believe that the continuing challenges facing the criminal legal aid system demonstrate a clear need for change. Reform of the criminal legal aid system, along with wider changes in the legal services sector, can help to guarantee and protect access to justice for those in need.