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London Criminal Courts Solicitors' Association

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Response to the Independent Review of Criminal Legal Aid
Call for Evidence

Introduction

1. Though the Criminal Legal Aid Review ("**CLAR**") is much delayed we welcome the effort and sense of urgency with which the current phase of the review is being conducted by the Chair and Panel. Time is running out for our members and the firms to which they dedicate a considerable amount of time and effort in sustaining.

2. Our members tell us they are on the brink. The pandemic struck at a time when we were already brought low after more than a decade of fee cuts, falling prosecution rates and declining numbers of solicitors and firms. The COVID-19 crisis has meant revenue for legal aid firms has not only has not only been delayed but will be lost from the system altogether, as fewer cases have entered the courts in the last year. The Treasury's furlough scheme has been instrumental to sustaining the sector, but this is a temporary fix. We anticipate that the furlough scheme will end this Autumn, and only then will we know the true state of the profession.

3. For those that remain morale is low. Solicitors not on furlough have, for over a year, been forced to spend more nights in police stations, covering more remand hearings in the day and all the while knowing that their Crown Court case load only expands with each vacated trial or new listing in 2022. In the quiet moments between video meetings, they can look forward to answering calls from distressed remand prisoners who find salvation from 23 ½ hour lock ups only by making calls on the phones installed in their cells.

4. They have watched their colleagues leave in their droves to the CPS and are told that the pay is better, the work-life balance more manageable and the support far superior. They welcome the increased investment in maintaining an effective prosecution service, and equally recognise that the judiciary deserved their recent pay rise for their hard-work and commitment. For a profession which pleads for equality and fairness every day on behalf of their clients, there will come a time when they must advocate the same for themselves.

5. The Independent Review will report some three years after promises were first made to invest in criminal legal aid. For our members this is a watershed

moment. If fees are merely restructured for greater efficiencies, we anticipate that those dedicated solicitors who have been instrumental in sustaining the criminal justice system during this national crisis will take their cue and depart the stage.

Response to Questions

In answering questions 1-3, we have deemed it necessary to address each stage of the CJS in turn, divided into (a) the investigation/pre-charge stage; (b) the Magistrates' Court; (c) the Youth Court; (d) the Crown Court and (e) Appeals.

Investigation Stage (Questions 1-3)

1. What do you consider are the main issues in the functioning of the Criminal Legal Aid System?

6. The main problems which affect the proper functioning of the criminal legal aid system at the pre-charge investigation stage are:

    a. Fixed fees are too low and do not increase in line with the seriousness and complexity of the offence, nor the experience of representatives who attend the police station. There is often no real incentive for experienced lawyers to go to the police station to handle complex and serious cases given the poor level of remuneration.

    b. There is very limited funding for pre-charge litigation work (i.e. work done outside of the police station attendance itself). The hourly rates are poor and the means test is set far too low. This means that pre-charge work must either be paid for privately or a solicitor conducts this important work for no remuneration.

    c. Suspects being released under investigation ("RUI") and the subsequent length of time it takes the police to make a disposal decision in many cases impose additional costs on firms. Files that have had their fixed fee paid must still be kept open and worked on until the solicitor is notified of the disposal decision. This means that work done in keeping abreast of developments in the case and communicating them, with advice, to anxious clients is unremunerated. This situation can (and frequently does) continue for years rather than weeks or months.

    d. The length of time suspects spend in custody has an adverse impact on solicitors' efficiency and profitability. Some suspects are warehoused in police stations waiting for an investigator to become available. In our experience detention times are rarely justified but the mechanisms for ensuring investigations are progressed "expeditiously", as required in law, are not effective. Solicitors are mostly called at the onset of the case and they are obliged to monitor detention periodically and provide ongoing advice to suspects. Unnecessarily long detentions are a drain on our resources. A reduction in officer numbers or the availability of overtime payments for detectives has a knock-on effect on CLA practitioners. It also means a greater proportion of cases require working during unsociable hours.

    e. The fee scheme for non-police interviews is no longer fit for purpose. In an age of voluntary police interviews, the CRM & 1 and 2 funding

mechanism with its miserly £99 per week income allowance is perverse. Compare the elderly and vulnerable suspect accused of a 6-figure benefit fraud for not disclosing a savings account who must attend a PACE interview with the DWP, with the chief executive of a FTSE100 company called to attend a police station as a volunteer, accused of pushing his wife. The former is denied legal aid by virtue of their pension payments while the latter may claim it regardless of their immense wealth.

2. Do the incentives created by the current fee schemes and payments encourage sustainability, quality and efficiency at the pre-charge investigation stage?

7. As a general observation, we think it a misnomer to refer to the fee schemes at the pre-charge investigation stage as creating "incentives", considering they are so low. Firms are not incentivised to do pre-charge investigation work under legal aid because of the pay on offer. Rather, the low pay is tolerated because this work is an essential service for clients and can lead to other, more profitable, work.

8. Sustainability: The fixed-fee scheme does not encourage sustainability because the fees are too low, and often make a loss for the firm in anything other than the simplest and most straightforward of cases when handled by accredited representatives or trainee solicitors. Many experienced solicitors recognise that quality representation for suspects is an essential safeguard in a functioning democracy, but they attend despite their firms' economic interests.

9. Quality: The fixed fees do not *encourage* quality. Quite the opposite; they disincentivise it because they prioritise volume and speed over quality. Most police station representatives are paid the same no matter how long they are present. Taking detailed instructions and attending in interviews where the suspect answers questions is far less attractive than seeking a superficial response and then exercising the right to silence. Firms and practitioners with a good ethos and commitment to clients will provide quality despite this disincentive but we recognise this not achieved across the sector.

10. Efficiency and Value for Money: Working at speed does not promote efficiency and value for money overall. It is recognised that early advice and identification of issues saves time and money down stream in the CJS. Inexperienced and lesser qualified advisers providing rushed and/or inadequate pre-interview advice can delay the point at which a suspect might arrive at the right decision, fully informed of the consequences. Experienced solicitors spending longer with clients in pre-interview disclosure, providing high quality advice will lead to better and earlier resolutions.

3. Are there any interactions between different participants within the CJS, or ways of working between participants, that impact the efficiency of criminal legal aid services at the pre-charge investigation stage?

11. There are interactions and ways of working between many different participants within the CJS at the pre-charge investigation stage which impact negatively upon criminal defence legal aid services.

12. We would not say that they impact upon the "efficiency" of those services because firms have become used to managing the deficiencies of these participants in order to ameliorate their effects upon their businesses and their clients. We would argue that defence firms have been forced to become increasingly adept at managing the inefficiency of other participants in the CJS. This should not be the case. A solicitor who expends significant time and energy addressing other parties' inefficiency will inevitably face a negative impact in terms of the ultimate profitability of the case.

13. The main interactions between participants at this stage of the criminal process are as follows:

    a. Between the Duty Solicitor Call Centre and defence solicitors: DSCC staff are often poorly trained and badly remunerated with a limited understanding of how the system works. There seems to be a high turnover of personnel, so the same problems recur. This can often lead to the inaccurate distribution of cases because the desire to deploy the case as quickly as possible appears to override the obligation to deploy it correctly. This leads to firms losing out on duty or own client work.

    b. Between the police and defence solicitors (pre-interview): At the pre-interview stage, it can now take many hours before an officer is assigned to progress a detained suspect's case at the police station. As discussed above this is a drain on the time and efficiency of the CLA provider.

    c. Between the police & defence solicitor (post-interview): Communication between the police and defence solicitors about what is happening on a case can often be poor due to the police being unresponsive to requests for updates. It is very much up to the officer in the case if they choose to keep the solicitor informed about developments on the case and it increases the solicitor's administrative workload if they have to constantly chase for updates. Officers often fail to inform solicitors that charges have been laid and the suspect summonsed to court. It is recognised by the courts that legal representatives increase the likelihood of defendants attending court on time. Informing the legal representative of the charge will reduce the number of first instance warrants and the cost to the system of seeking, arresting, detaining, and producing defendants for court. It also produces a higher number of defendants who are in a position to indicate a plea at the first opportunity, having had the benefit of legal advice in advance rather than being encouraged to seek assistance only once appearing in the dock.

d. Between the police & their digital forensics suppliers: in the digital age, evidence contained on electronic devices is increasingly pivotal in many cases. However, the supply of digital forensic services to the police has not kept up with demand and this is causing long delays in disposal decisions in many cases, such is the backlog of devices waiting to be interrogated.

e. Between the police & the Crown Prosecution Service: the delay between interview and disposal decision is often increased by the fact that the CPS take an inordinate amount of time to make charging decisions.

Magistrates' courts (Questions 1 -3)

1. What do you consider are the main issues in the functioning of the Criminal Legal Aid System?

14. Owing to unreliable preparation for first hearings by CPS, police and HMCTS, too often defence lawyers are left waiting around at court for most of the day. Examples include failures by police to supply evidence to the CPS, failures by the CPS to provide evidence bundles in time, the preparation of GAP cases that should be treated as NGAP, failures to list cases and failing to book interpreters or arrange HO Production Orders. Busy solicitors are forced to hire agents to cover hearings so they can progress their caseloads. This breaks client continuity and case ownership is missing, to the detriment of both the defendant and to the efficient (and fair) functioning of the CJS in general.

15. After the first hearings, the burden of case-preparation is asymmetric. The CPS do not allocate reviewing lawyers to cases and they often fail to keep to deadlines set for service and disclosure. The Transforming Summary Justice initiative created Not Guilty Anticipated Plea (NGAP) courts before which a full bundle with initial disclosure of unused materials and a half-completed PET form were to be served. In our region this aspect of the reform has been a complete failure. Often the most important evidence is left out of the bundle and the other two parts never arrive. The burden of chasing the CPS and reminding them to complete these basic tasks falls on the defence representatives. Though the CPR requires all parties to be proactive in preparation this in practise has been an expectation that the under-funded CLA defence lawyer should bear the burden. Failings on the part of the prosecution will frequently be forgiven or overlooked where the same latitude would not be afforded to the defence.

16. There is no effective sanction for prosecution non-compliance. Prior to heavy cuts imposed on HMCTS the defence practitioner could rely upon the court to list cases for non-compliance and the courts would assist in applying pressure to the prosecution. In recent years emails often go unanswered or requests for a mention are refused altogether.

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

17. Sustainability: Making early plea decisions which are proper and realistic requires experienced legal advisers who fully understand the case life-cycle. Current remuneration does not allow for (a) recruitment of sufficient talent, (b) retention of that talent, (c) career progression or (d) manageable case volumes. There is nothing wrong with the basic structure of lower, higher and non-standard fees but the pay is so low as to be seen as barely worth it. Paying £350 for trial preparation in circumstances where a person's liberty is at stake is derisory.

18. Quality and efficiency: Transforming Summary Justice encourages the front-loading of preparation, so more cases complete at the first hearing. Rates of pay are so low that firms can only operate guilty plea cases profitably if everything is left to be resolved at the first hearing, with solicitors hoping to conduct multiple matters for the firm which all complete on the same day. By contrast TSJ envisages advance preparation on the papers, consultations with the defendant in the office and the obtaining of materials for the plea in mitigation all prior to the first hearing. This is simply unworkable in practice.

19. Quality: Many advocates conducting work in London's magistrates' courts are paid a flat rate of £50. This is the logical consequence of CLA rates which are **lower than they were in 1996.** Consequently, to remain viable, solicitors are forced to take on 3 or 4 matters per day in order to be cost effective. They often receive 50-page IDPC bundles the same day due to failures to provide evidence in advance or late instructions. The evidence cannot be fully absorbed and analysed, and time with the defendant is short and rushed. Inevitably mistakes are made and miscarriages of justice ensue.

20. The enhanced payments system (CCS para 10.99-102) is a good idea but needlessly complex and ambiguous. The system lacks certainty such that firms are dissuaded from identifying and properly allocating complex, weighty or unique matters to experienced solicitors. The amount of uplift is left entirely to the discretion of the costs assessor and it creates a potential for 100 variations of the rate from 45p to £45.35. It would be better to have two or three levels of enhancements with far greater certainty of definition around them.

21. Efficiency: As more and more solicitors and firms exit the market, those that remain will have higher volumes of cases in the magistrates' courts. At such low hourly rates there is a disincentive to work hard in preparing cases and to aim for higher or non-standard fees. The incentive is to work as few hours as possible on lower standard fees. Not only does this lack quality it is a false economy for the wider CJS. Cases which are not prepared in advance are more likely to lead to adjournments. Inadequate time with defendants leads to guilty pleas on the day of trial rather than at the first hearing or failures to secure bail in remand hearings. Inadequate preparation for sentence leads to harsher penalties, more short-term prison sentences and the consequent

costs to other budgets. Defendants who are inadequately prepared for their trial are more likely to want to appeal and try again in the Crown Court.

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

22. Between defence solicitors and courts: When the courts intentionally over list a trial session by 3 or more times the capacity they adversely impact upon solicitors' profitability and behaviour. Defence solicitors are not paid to travel or wait, so to attend a summary trial only to be told that there is insufficient court time is financially ruinous for solicitors. It is a disincentive to prepare a case in advance. If one has a low priority case type (on bail, not a priority such as domestic abuse), it has become normal to expect to appear at two trial sessions before the case can be heard.

23. Between police and courts: The police regularly fail to book interpreters for first hearing despite using one for interview and therefore being under a duty to arrange it. This has a cost impact for defence firms but there is no sanction or consequence.

24. Between CPS and police: Disclosure reviews should be a CPS responsibility, not the police. Officers still do not complete schedules accurately or give enough information. The CPS seem exhausted by simply asking for the schedules and do not seem to adequately hold OICs to account for shortcomings. In summary jurisdiction we see cases discontinued and are told off the record it is owing to police failures to provide schedules. Though they tend to do this in victimless crimes it is an inappropriate and ineffective way to discipline officers. It is a drain on our time and the value of our fixed fees to fight for the provision of documents that should be routinely provided.

Youth Courts (Questions 1-3)

25. Much of the response above for the magistrates' court above applies equally to the youth court. However, the youth court does have its own unique and particular issues.

1. What do you consider are the main issues in the functioning of the Criminal Legal Aid System?

26. Much work has been done in the last decades to divert more children away from the criminal courts and prosecution rates have plummeted. What is left in the youth court today is a more serious type of offending or defendants whose personal circumstances are so challenging that diversions are not effective.

27. As stated above, the rates of remuneration are so low that lower crime work is seen as a loss-leading area. Yet the youth court requires specialist knowledge, training and skill to meet a more challenging case type. Solicitors

must communicate with defendants exhibiting a broad range of learning difficulties or behavioural disorders. They encounter those who may have been trafficked or exploited and might be the first professionals to make a disclosure to the National Referral Mechanism. They must work with parents who are vulnerable or who themselves display challenging behaviour. They are expected to earn the trust of young people who feel marginalised; regularly addressing issues of discrimination and bias before the courts.

28. Many dedicated solicitors overcome these difficulties and provide excellent representation, but they do so despite the low pay it provides and within firms that feel morally obliged, rather than properly incentivised, to ensure these clients are not let down. That is not a sustainable model to ensure consistently high standards.

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

29. The low rates of pay do not sustain experienced solicitors in youth court practice and so do not support quality and specialism. Consequently, the system is less efficient.

30. The comments regarding enhancements above are applicable here. There should be clearer guidance on what cases in the youth court can attract enhancements, so that firms can allocate senior solicitors to take over conduct at an early stage. A prior authority system could be created for this which would supplement the certificate for counsel / higher court advocates system.

31. At present disbursements incurred for experts are only paid at the conclusion of the case meaning the provider bears the cash-flow burden in the interim. While a problem for all summary jurisdiction case work, this is particularly acute in the youth court which deals with more complex cases and frequently demands the use of psychologists, social workers, intermediaries and psychiatrists.

32. The financial burden produces a disincentive to ensure appropriate support for defendants. There is no reason why payments on account cannot be facilitated as they are in the Crown Court.

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

33. Without repeating the comments above, the lack of communication from the CPS is exacerbated in the youth court. This area of practice involves a greater number of representations under the Code for Crown Prosecutors to review the decision to prosecute (because a higher proportion of defendants are either unconvicted or have vulnerabilities). Defence solicitors often must send

multiple requests or risk the prosecution proceeding without an adequate response in writing.

Crown Courts (Questions 1-3)

1. What do you consider are the main issues in the functioning of the Criminal Legal Aid System?

34. The rate of pay for the majority of Crown Court work is too low. The CLA sector has survived because of the recent increased use of digital evidence and the proliferation of conspiracies based upon mobile phone evidence. This increase in complex case work is here to stay and should not be viewed as an anomaly. The work required in those types of cases should continue to be funded.

35. The Ministry must also recognise that the significant reduction in the number of VHCC cases in the last decade has decanted this high-cost work into the LGFS scheme. Where investment is needed is at the lower end of the Crown Court case type.

36. Certain categories of work, such as E and H, are paid so poorly there is evidence that some firms are actively turning it away.

37. The cracked trial fee structure is now perverse. The litigator, who will have completed the bulk of their preparation when the trial starts, faces a sharp cut in pay in cracked trial cases, whilst the advocate in the same case enjoys a full trial fee when often they have performed only a small fraction of the work required of them. The cracked trial fee disincentivises firms from engaging with court initiatives towards front-loading case preparation.

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

38. Sustainability, quality and efficiency are plainly not encouraged by fee levels within the scheme that have been frozen or reduced since the LGFS was introduced.

39. Quality: Fees under the proxy system are driven either by the actions of the prosecutor (charges preferred and evidence served) or the defendant (plea decision and stage) and not by the quality or endeavour of the provider. Currently all that is required of providers is proof they received evidence which can be claimed and to demonstrate the stage reached. That does not measure what work was done to ensure a quality service is provided to the client. This also has an impact on sustainability. Pay is divorced from quality, meaning experienced and skilled assistant solicitors struggle to justify their position within CLA firms.

40. Efficiency: The light touch claims regime was supposed to be efficient, but recent attempts by the CPS and LAA to artificially reduce the page count in

more complex matters have reduced its benefits. It is evident that CPS lawyers frequently attempt to serve exhibits informally via police officers or they send it on digital media without the requisite covering letter, even when the items have been exhibited within witness statements that have been formally served. Likewise, the LAA offer ever-evolving reasons to try to avoid payment upon exhibits even when they have been supplied with evidence of their service and relevance to a case. This has led to a series of drawn-out contests in costs courts battling over the supposedly simple swings and roundabouts system the MOJ created in the interests of efficiency.

41. Fixed fees that rise only as evidence is served does not encourage early preparation. With rates low and their value eroding each year it is inevitable that some providers will delay giving advice to defendants until evidence has been released. As we will detail below there is often no justification for evidence to have been held back in the first place.

42. When defendants elect trial for offences deemed suitable for summary jurisdiction the legal representatives are subjected to a financial penalty if the case cracks. These types of case are often short, of a less serious nature and have low volumes of evidence. The fees are usually among the lowest for the litigator. It is therefore fallacious to impose a penalty upon them to discourage them from advising on electing trial. A higher standard or non-standard fee will often pay more than the LGFS fee would pay for a trial and, as the case may complete 12 months earlier it provides a cash flow advantage. This element of the scheme does not secure cost efficiency as would be expected but penalises those who give unbiased advice in the best interests of their client and disincentives a high quality of work.

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

43. <u>Between the prosecution and defence solicitors</u>: The Better Case Management framework encourages a bare minimum approach to service by the prosecution at the early stages. Despite being in possession of crucial evidence, too often the material supplied for the PTPH is lacking. Early service will reduce the number of cracked trials and save money in the long run. This problem is often encountered even for defendants who may have spent two years RUI, so there can be no justification for delay once charges are preferred.

44. Case ownership by prosecutors is an important issue for CLA providers and impacts efficiency of case completion. Though the BCM reforms aimed to improve this the results have been patchy. If Crown prosecutors become overloaded with work, they do not take ownership of all their cases. Engagement letters are not sent, emails and phone numbers are not added to the DCS, stage dates are missed. When they are allocated calls and emails go unanswered. This leaves CLA providers having to chase up service and disclosure. When matters are listed by the courts for review, too often judges

seek to criticise defence solicitors for having not asked repeatedly for stage 1 and other routine actions. This is outsourcing the responsibility of monitoring performance by a state actor who bears responsibility for bringing the case, to underfunded CLA firms in the private sector.

45. Between police and CPS: As discussed above, disclosure reviews should be a CPS responsibility, not the police. Officers still do not complete schedules accurately or give enough information.

46. Between litigators and advocates: The trial warned list system means advocates are disincentivised from taking case ownership. As this is unlikely to change in the near future the fees schemes should recognise the need to ensure adequate funding for experience litigators to lead case preparation.

Appeals (Questions 1-3)

1. What do you consider are the main issues in the functioning of the Criminal Legal Aid System?

47. There are very few solicitors' firms that undertake a lot of appeal work. It is difficult, stressful, often challenging in terms of the issues of law being dealt with and ultimately few cases are successful. However, it remains one of the most important areas of work undertaken by criminal lawyers as these cases set the law for future cases and miscarriages of justice, some many decades old, can be rectified through the hard work and perseverance of criminal lawyers.

48. The paltry rates of pay are no incentive to undertake this work at all let alone at the level of seniority that is often required for cases before the appellate court that attract a representation order for litigators.

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

Court of Appeal funding

49. The CACD can grant a representation order usually in cases where leave has been granted. In the vast majority of cases, legal aid is granted for the advocate only. It is relatively rare for the representation order to cover work by a litigator. Where the order does cover litigation work, the scope can be limited to specific work and the claim for costs is assessed at the end of the case.

50. The rates payable are hourly rates for all work reasonably undertaken on the case within the scope of the representation order. The rates remained static from 1st April 1996 until the end of March 2014 when they were reduced by 8.75%. There was a further 8.75 % reduction following the March 2014 reduction which was subsequently reversed in 2016. Consequently, the rates paid now are less than they were 25 years ago.

51. Without an increase to their rates, and a significant increase at that, it is difficult to see how this area of work will continue in the future. It is accepted that in many cases, the firm that undertook the initial trial or sentencing will be engaged with the appeal but in a very large number of cases, there has been a change of representation between trial and appeal.

52. Specialist appeal lawyers are now extremely rare. Those who do undertake a lot of this work are well into their 50s and there is little sign of younger solicitors eager to undertake this arduous work. The future for appeal work looks bleak.

53. This work makes up a very small percentage of the criminal legal aid budget. According to the LAA statistics there were 4,922 cases funded in 2012/13 and only 2,579 in 2019/20 with the cost of the work dropping from £4.5M to £2.6M in the same period which is about 0.3% of the current criminal legal aid budget.

Appeals and Reviews (including applications to the CCRC)

54. This is a very small percentage of the criminal legal aid budget with just over 1M acts of assistance in 2019/20 down from 1.7M in 2001/02. It makes up about 0.5% of the criminal legal aid lower work budget.

55. The work is remunerated on an hourly rate under the advice and assistance scheme and is subject to upper limits on funding which can be extended by application to the LAA.

56. The existing payment structure does not differentiate between the level of fee earner undertaking the work and does not allow for any uplift to reflect the more complex nature of the work on certain cases.

57. Very few firms undertake this work with any regularity. Many will avoid it at all costs as being uneconomic. Many individuals write to large numbers of firms and never find anyone able to take their case forward.

58. This area of work includes applications to the CCRC. The number of legally represented applicants to the CCRC has fallen steadily over the years and is now at an all time low. Conversely, it is recognised that applicants who are legally represented by firms with expertise in the area have a much better chance of having their cases referred. Many cases that come to solicitors who are experienced in this area will not get to the CCRC because negative advice is provided to the clients. This in turn prevents the CCRC having to deal with applications that are unlikely to succeed and reduces the strain on the CCRC, an issue which was highlighted in the recent Westminster Commission on Miscarriages of Justice.

59. Many clients are not eligible for funding as the eligibility financial criteria is set so low. In addition the income and savings of a partner are included even if the couple are separated by the prison sentence being served. The capital limit is set at just over £1000 and the income limit after a nominal deduction for dependants is set at £99 per week. Individuals including those on pensions

or in prison with a working partner do not qualify and cannot afford to pay privately for advice. Consequently they must seek to challenge their convictions unrepresented.

Appeals to the Crown Court

60. Appeals to the Crown Court from the Magistrates' Court are funded by a fixed fee of £155.32 for an appeal against sentence and £349.47 for an appeal against conviction. An appeal against conviction is a re-trial of the case.

61. Many firms will follow the Law Society guidance in relation to these cases and not take on an appeal against conviction if the firm did not act at the trial in the lower court as the work is simply uneconomic.

62. If denying appellants, the right to change provider is a policy of the Ministry that should be made clearer. Currently it is being achieved indirectly by neglect of fee levels. To avoid creating a perverse incentive to try again with a new provider regardless of merit a new application process should be devised.

63. Where a new provider is approached to conduct an appeal, if they can show the former provider has declined to assist and there is an issue that was not explored adequately in the lower court, they should be able to apply to the LAA for hourly rate funding of the work in preparation. If preferred the magistrates'' court tiered fee structure could be utilised instead to provide a lighter burden on the LAA.

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

64. Firms often find it difficult when dealing with a case post-conviction to have an effective dialogue with CPS or police. The police will often seek to use the case of *Nunn* to refuse disclosure requests even those formulated in accordance with the guidance in *Nunn*. With no court immediately seized of the case, these issues are of great concern and cause sometimes intractable problems.

QUESTION 4. Do you consider that Criminal Legal Aid work, as currently funded, represents a sustainable career path for barristers, solicitors or legal executives?

65. The answers provided to earlier questions set out why, at many stages of the criminal case life cycle, CLA work is not sustainable for solicitors.

66. We note from the MOJ's Summary Information on Publicly Funded Criminal Legal Service document (released in February) that women are disproportionately impacted by the lack of sustainability and long term career

prospects in CLA. It records that 69% of solicitors entering CLA firms are female. Thereafter at every age bracket their proportion dwindles until they represent only 14% in the final age bracket. The data available on the numbers of duty solicitors leaving the profession shows the largest exodus of women in the 35-44 age bracket. This would tend to suggest that women are finding CLA work incompatible with the demands of having and raising a family. The impact is far less pronounced amongst male solicitors within the same age bracket.

67. Certainly the anecdotal evidence suggests that unsocial hours, extended court times and unpredictable working patterns combined with low levels of remuneration are making the profession increasingly unattractive. This is especially when compared with the significant benefits offered by the CPS, both in terms of pay and work-life balance and parent-friendly incentive schemes.

68. The above data is further contextualised by the evidence of an ageing profession. Duty solicitors are getting older as fewer solicitors are entering and remaining within the profession. For three successive years the average age has increased by 1 so it now stands at 49 years. The life of the duty solicitor is often gruelling, many will have worked through the night at a police station and headed straight to court the next day, clocking up over 30 hours' work in a 48-hour period.

69. This trend is not sustainable, and the fear is that once the current generation retire the skills, culture and knowledge may not be passed down adequately if something does not change very soon. Clearly, for young solicitors entering the profession, duty CLA work does not represent the attraction that it may once have done. Over time, this will lead to the quality of the sector being diminished as those remaining become simply too exhausted or disillusioned to continue.

QUESTION 5. Does the present structure of Criminal Legal Aid meet the needs of suspects, defendants, victims and witnesses? Please explain your answer.

70. The answers to earlier questions set out why CLA does not meet the needs of the suspects and defendants. The pressure on pay that has accumulated during the 25 years' stagnation and reduction has had an adverse impact on the quality of representation that can be offered.

71. Slowly but increasingly CLA is seen by defendants to be inadequate; a lower class of representation which threatens their prospects and thus their liberty. More and more people who are financially eligible to claim it choose not to do so. The correlative to this trend will be the notion that a conviction does not carry the same certainty or weight when a defendant relied on CLA lawyers as opposed to those with privately instructed solicitors. This has profound implications for social cohesion and the rule of law. We are approaching a two-tier system which, if not properly and comprehensively addressed, will prove extremely difficult to deconstruct.

72. Inadequate funding increases the likelihood that cases will be conducted incompetently. When this leads to delays to pleas or to effective trials then victims and witnesses will inevitably suffer. They are already suffering from incomprehensible delays to cases being heard, a problem which has been exacerbated (but not caused) by the pandemic.

73. Maintaining a sustainable and experienced supplier base will ensure correct decisions are made earlier and cases completed efficiently. HMCTS initiatives to improve efficiency depend upon the defence community playing their part and adhering to the rules that are set. As CLA funds the vast majority of defence representation, its health and future viability is of systemic importance. This has become increasingly clear to other CJS partners as we have collaborated during the pandemic and as they plan to clear the backlogs that have been created.

QUESTION 6

6.1 - Are there any new working practices you would want to retain, and why?

74. Virtual hearings should be retained for all case management hearings and mentions in the magistrates' and crown court.

75. It should be an option in the magistrates' court for not guilty pleas where the advocate can demonstrate that all matters have been resolved prior to the hearing date. This would be suitable for indictable only offences on bail where the BCM Form has been completed at the time of applying.

76. There has been an increased digitisation of forms and this should continue. The BCM and PET forms should remain in electronic format. Pre-sentence reports should continue to be emailed in advance.

77. The availability of CVP links for prison legal visits has been a welcome development which should be rolled out more extensively with a greater level of availability. Significant time is spent by solicitors travelling to visit clients in prison, and in the security and booking in process. CVP links enable far more efficient use of time, with the added benefit of ready access to papers and underlying material.

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

78. The pandemic has to act as a wakeup call to the CJS to protect the well-being of those who work in it. Defence lawyers, court staff, probation officers, prosecutors and the judiciary are not disposable. We have realised that, collectively, we have kept the CJS functioning, not only through the pandemic but through a period of excessive and prolonged austerity. We must now insist

on safe working environments and practices, from the crumbling court estate to working hours that are humane and enable us to have family lives.

79. The pandemic has also highlighted in stark terms how providers have become dependent on a narrow band of Crown Court trial case work. The financial support from the Treasury was crucial in preventing systemic collapse. Interim payments much be maintained in the longer term.

80. The court's digital infrastructure should continue to be improved. The pandemic has shown how under-developed it was, and how much more efficiently it can be run with adequate investment. The difference between the civil and criminal courts was thrown into sharp relief at the outset of the pandemic, with civil courts adapting much more quickly than their criminal counterparts due to the digital infrastructure already in place.

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

Independent Fee Review Body

81. We call not only for an increase in fees but an independent fee review body to ensure rates are reviewed annually. Practitioners' representatives should have a presence on any committee and recommendations should be made public. Failure to do so will see an inevitable return to the crisis we currently face.

Police station fixed fees

82. Uplifts to the fixed fee for indictable only offences would encourage more experienced solicitors to attend on the more serious case types, which improves quality for suspects where it matters and supports sustainable career progression. A minority of case types are so intensive that a notional increase to the fixed fee would make no difference to behaviour and the current escape fee mechanism is unfit for purpose. We propose that for a small number of the most complex cases an hourly rate fee is paid if a grade A fee earner is deployed. Homicides, terrorism, rape and serious fraud investigations, when led by specialist teams, would be the most appropriate designation and there could be a minimum number of hours before the hourly rate fee would apply, but unlike the current system, there should not be any period where providers are unpaid.

Summary trials and enhancements

83. At present, weighty or complex matters in the youth and magistrates' courts can attract an uplift in hourly rates if conducted by senior solicitors who demonstrate skill and dispatch in the conduct of the work. This has to be argued ex-post facto so the provider bears all the risk and the LAA faces no consequence upon refusal, the work has already been done.

84. There should be a simple priority authority mechanism so the provider can argue why the case meets a set of criteria agreed in advance.

Unused material

85. When performing statutory disclosure under the CPIA we call for the routine provision of the 'Three Cs': CAD, CRIS and Custody Records. These three documents provide the bedrock of any investigation and too often time is wasted trying to obtain them. Prosecutors at trial routinely and almost without exception agree they should be provided. Trial advocates seek to obtain as detailed a chronology of events. from offence to prosecution, as they can. From there they can assert what questions have been answered and what have not. They can determine what areas of cross examination are likely to assist their case and what will not. These 3 Cs form the basis of that chronology and understanding.

Wasted costs

86. The wasted costs regime at ss.19 and 19A Prosecution of Offences Act is not fit for purpose in CLA cases. The CPS, when they are guilty of an act or omission which causes unnecessary loss to the CLA firm need pay nothing. The fee structure, in removing travel and waiting, means that a wasted hearing causes a loss of value for the case. But as the defendant has incurred no costs no order can be made under s.19. s19A could be applied by the CLA firm against an individual at the CPS but this would be exceptionally rare. Practitioners are rightly reluctant to penalise individuals for faults of the system and benches are more reluctant still.

87. To ensure that CLA firms are compensated for the wrongdoing identified by the Act there should be a mechanism to enable costs to be awarded to CLA providers as well as defendants in privately funded cases. This need not be punitive in quantum and for CLA matters a table of fixed amounts could be set, modelled along the CPS' own schedule of costs as applies to defendants. This would be transparent as it would show which agency is driving the costs of the system and would be a guarantor of efficient practice.

Cracked trial fees for those who elect trial by jury

88. If the Ministry seeks to dissuade people from electing jury trial in weak and less serious cases it should look at the prosecution costs regime.

89. In the magistrates' court there is a simple costs schedule that solicitors can advise clients upon (£85 for guilty plea, £620 for a trial). A similar model should be properly utilised in the Crown Courts with a proportionate uplift. That way solicitors can show the increased costs of taking a matter to the Crown Court should the defendant not succeed.

90. Judges should enquire as to how the case arrived in their jurisdiction when considering costs applications. Though this does occasionally happen, it is

not nearly consistent enough to drive behaviour changes based on certainty of outcome.

LGFS fee structure

91. If the proxy measure is to be abandoned, we might support the adoption of the magistrates' fixed fee structure provided the rates were appropriate. Offences should remain categorised and each one would have its lower, higher and non-standard fee with boundary markers. These boundary markers would be drafted around the current case completion stages: guilty pleas at a PTPH, cracked trials and trials.

92. The example of magistrates' practice shows how this incentivises early preparation. If in a magistrates' court matter the case cracks, a higher standard fee for a guilty plea fee is better paid than a lower standard trial fee. If a provider is proactive and their advice brings about a change of plea early, their fee is better than for the provider who did little and gave the advice to the client on the day of trial.

93. Within this structure serious offences should attract grade A fee earner rates, for example for certain offence types (categories A, B, J and K under the current scheme). This offers sustainability and career progression and drives quality to where it matters most. To ensure the complexity of mental illness is recognised it too should attract grade A rates in certain circumstances. One measure would be to allow it for defendants who had ever been subject to a Mental Health Act section in the past or if that is the final disposal of the case in question. By extension, this uplift should apply to youths being tried in the Crown Court.

94. The system need not be overly burdensome on the LAA. A hybrid-proxy scheme can be devised so that routine evidence types can attract notional time values. An example could be 3 mins per page for statements and 1.5 mins for exhibits. Audio and video footage that is relied upon could attract 2 mins analysis time for every minute in length but less if the footage is source material disclosed as unused.

95. A review committee should be established to review rates annually and should have representation from the professions and the LAA to ensure it remains appropriate over time. This blends consistency and certainty with more tailored fees ensuring funds are spent appropriately.

QUESTION 8. The Review will be conducting other exercises to gather data on the profitability of firms undertaking Criminal Legal Aid work and the remuneration of criminal defence practitioners. However, we would also welcome submissions on this subject as part of this call for evidence.

96. It is disappointing that in 2021 government is still looking for evidence of the financial pressures and hardship facing providers of criminal legal aid, and is still searching for an elusive panacea providing an ideal structure for the market.

97. The idea that the system can be radically changed and improved without additional funding, through one or other form of tendering, or encouragement of certain structures or sizes of firm, has been something of a holy grail for the MOJ/LAA since the publication of Lord Carter's report in 2006. We have never believed that the present complex system of criminal defence firms working in a form of free market, comprising large and small practices, specialists and generalists, can be forced into a particular model providing efficient quality services to match or better what we already have. Whatever system the government settles on, if there is insufficient funding it will not work.

98. Government recognises the symptoms. The Review recognises that criminal legal aid work is the preserve of an ageing cadre of solicitors, who are not being replaced by younger entrants. If that if this is not confronted, there will eventually be extensive lack of representation and access to justice.

99. The problem is exacerbated by the continuing exodus of solicitors, leaving defence practice for the Crown Prosecution Service, to work in other areas of law or leaving the profession altogether. Very few criminal law firms offer training contracts as an entry point to the profession. All this is known and provides the backdrop to the enquiry into criminal defence firm's levels of profitability.

100. The focus in the Review on the need for "resilience" reflects a concern (or should do) for the ability of criminal providers to continue to provide defence services nationwide and for the viability of the current model long-term, particularly as to the looming loss of irreplaceable experience and knowledge.

101. Government also knows that the main costs to defence firms are (a) office space and (b) employees. Faced with cuts, the easiest way to reduce costs is to hire less experienced, less qualified and less expensive employees, a change which may suggest the firm is surviving financially but which long term can only result in reduction of service levels.

102. There is an interesting comparison of solicitors working in areas of law historically covered by legal aid with others in the public service market, such as teachers or social workers. There is also much to be gained from examining the hourly rates effectively paid. We welcome any such analysis if the figures can be obtained. We know the long hours worked by employed solicitors without overtime benefits. We also know that many owners of firms work extraordinarily long hours[1].

103. Government knows that the funds available to criminal defence firms have never been lower and government has never had more information about the suppliers with which it contracts. There has been no increase in the basic underlying rates paid for legal aid work **since 1st April 1996**. More

[1] We note that while solicitors working in legal sector may be paid fully or in part through public funds, defence lawyers are not teachers or social workers; they are not state employees and they do not benefit from the employment rights available to public sector workers. Further, criminal solicitors represent a small minority of all lawyers whereas public sector teachers and social workers represent the norm and attract salaries similar to those in the private sector. Finally, defence firms are not public sector enterprises. The owners carry all the responsibility and risk of the business, the duty to staff and the government carries none of that risk or responsibility.

specifically rates have been cut and average cost per case reduced across the system as set out below.

Magistrates Court's fees

104. The fees payable in Magistrates Court work prior to the introduction of the Access to Justice Act 1999 were governed by the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 with the rates set out in Schedule 1 paragraph 1. Version 8 covers the period 1st April 1996 to 31st December 1996 and Version 9 does not increase the rates from 1 January 1997 until the Access to Justice Act 1999 came into force on 1st April 2000.

105. These underlying hourly rates were cut by 8.75% in March 2014. This cut was followed by a further 8.75% reduction which was reversed in 2016. The effect of these cuts is that the rates have not increased since 2016 and are below (in terms of the actual amounts) what was paid 25 years ago (with the exception of advocacy and attendance with assigned counsel (rare in any event) which have increased by less than £1 in 25 years).

106. The rates can be compared as follows which includes an inflation calculation courtesy of the Bank of England inflation calculator to 2020.:

Class of work	London Rate 1996	London Rate 2021	1996 Rate adjusted for inflation to 2020	**Percentage reduction in real terms**
Preparation	£47.25	£45.35	£90.70	**50%**
Advocacy	£56.50	£56.89	£108.46	**47.5%**
Attend at court with assigned counsel	£30.50	£31.03	£58.55	**47%**
Travel/Wait	£24.75	£24.00	£47.51	**49.5%**
Letters/calls	£3.60	£3.56	£6.91	**49.2%**

107. If the rates from 1996 were adjusted for inflation to 2020, the cut on what is paid in 2020 in the region of 50%. Therefore, in real terms, the current rates are half what they were 25 years ago.

108. In 1996, legal aid rates were well below those charged on private work. In 2021 that gap has widened so much as to make it impossible to guarantee a legally aided client a service equivalent to a privately paying one.

Litigator Fees

109. A similar exercise can be undertaken with Crown Court rates. However, the introduction of the Litigator Graduated Fee Scheme has made a direct comparison more difficult because it has so radically changed the payment structure. Where the old ex post facto schemes still apply, comparison can be made.

110. Work undertaken as special reparation or for payment in relation to unused material above three hours, confiscation and work under a Court of Appeal representation order use the underlying rates that can be traced back to those in the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 and applicable as at 1st April 1996.

Class of work	London Rate 1996	London Rate 2021	1996 Rate adjusted for inflation to 2020	**Percentage reduction in real terms**
Preparation (A grade used)	£55.75	£50.87	£107.02	**52.5%**
Advocacy	£64.50	£58.86	£123.82	**52.5%**
Attend on assigned counsel (A grade)	£42.45	£38.55	£81.49	**52.7%**
Travel/Wait	£24.75	£22.58	£47.51	**52.5%**
Letters/calls	£3.60	£3.29	£6.91	**52.4%**

111. Consequently it can be seen that where comparison can be made, the rate payable now is below that paid 25 years ago and reflects a reduction in real terms of 52.5%.

Police Station fixed fees

112. When the Police Station fixed fees were set, the fee was different for each police station as the fee was based on historic data on the costs of claims at particular police stations. The fee payable was decreased by 8.75% in 2014 and was subject to the further reversed 8.75% reduction. Consequently, the rate is 8.75% - below where it was before March 2014.

113. The police station fixed fee includes all work undertaken under advice and assistance and any work up to the threshold figure which is very roughly three times the fixed fee. This means that in many cases unremunerated work is done before the hourly rates kick back in. A similar exercise can be done on those hourly rates but it should be obvious by now that the stagnation in legal aid rates for decades does not get any better by repetition.

114. Many firms will not use the advice and assistance scheme at police stations as it does not generally increase the fee payable unless it is one of the rare escape fee clauses. This will mean that any analysis of the work claimed under this scheme will miss the many hours on many cases that are done by solicitors without any fee being claimed or recorded for billing purposes.

115. Added to the stagnant rates of pay, one sees a dramatic reduction in volume demonstrated by the quarterly legal aid agency statistics bulletin. It can be seen that in 2001-2002 there were 1,685,094 magistrates court cases funded by legal aid at a total costs of £500.8M whereas in 2019-2020 (so not including any COVID impact) there were 886,000 cases at a cost of £254.9M. The volume has dropped by half as has the cost to Government.

116. The LGFS scheme (introduced in 2008) shows a reduction in cases from 2009-10 of 126,143 to 81,679 in 2019/20. The overall cost of the cases has fallen every years since 2012/13.

Appeals

117. The CACD can grant a representation order usually in cases where leave has been granted. In the vast majority of cases, legal aid is granted for the advocate only. It is relatively rare for the representation order to cover work by a litigator. Where the order does cover litigation work, the scope can be limited to specific work and the claim for costs is assessed at the end of the case.

Class of work	London Rate 1996	London Rate 2021	1996 Rate adjusted for inflation to 2020	**Percentage reduction in real terms**
Preparation (A grade used)	£55.75	£50.87	£107.02	**52.5%**
Advocacy	£64.50	£58.86	£123.82	**52.5%**
Attend on assigned counsel (A grade)	£42.45	£38.55	£81.49	**52.7%**
Travel/Wait	£24.75	£22.58	£47.51	**52.5%**
Letters/calls	£3.60	£3.29	£6.91	**52.4%**

Appeals and Reviews (including applications to the CCRC)

Work	Apr-96	1996 rate indexed to 2019	Current rate	**Percentage cut in real terms**
Preparation & attendance	£47.25	£92.61	£45.35	**51.03%**
Travel and waiting	£24.75	£48.51	£24.00	**50.53%**
Letters and calls	£3.60	£7.06	£3.51	**50.26%**

118. The overall cost to the public purse of legal aid (on the LAA statistics) has fallen from £1072M in 2011/12 to £821M in 2019/20 which is a fall of 23.4% in 9 years.

119. It was against this stark backdrop that criminal defence firms faced the devastating, all-encompassing impact of the Covid-19 pandemic. One well publicised result has been the dearth of Crown Court trials and a resulting delay in anticipated payments to firms of all sizes and structure.

120. The drop in income has been accompanied by an increased workload as cases are unable to be closed and clients continue to engage for months

longer than would be expected, many of them detained in custody pending trial. [2]

121. While it might in theory be possible that firms are somehow running efficiently and profitably given the collective evidence it is difficult to understand how this would be the case. Profitability can be increased by the targeted selection of work, with some firms only taking on the more profitable cases, but firms across the board have identified that it is simply not possible to take on work such as Appeals against conviction in the Magistrates Court (as a new case). Finding solicitors to conduct this work, essential to the integrity of the justice system, is extremely difficult.

122. Another option to increase profitability is to employ less qualified staff who are paid lower salaries. These questions are presumably designed to assist the Review in determining whether further funding is required and if so, how much. This causes us some concern, not as an aspiration, but given the difficulties previously experienced in agreeing such statistical analyses. In light of the history of such exercises and the particular focus of this survey we foresee a number of difficulties in obtaining information that is reliable and useful in this area.

123. Alternative funding streams (whether from private clients or from non-criminal legal aid) should not be part of the profitability test. Legal aid criminal funding needs to be capable of providing a business with a profit level sufficient to reward its owners reasonably to invest in its staff and infrastructure. If this cannot be done as a standalone business with income solely from criminal legal aid, the system is by definition neither resilient, stable nor sustainable. Criminal legal aid needs to be capable of supporting firms who operate an exclusively criminal legal aid practice.

124. Criminal legal aid funding levels cannot take into account and/or be reliant on cross department or private client subsidy. We have seen in multiple firms over the past twenty years how success in attracting private work can often lead to the break-away of the department or of key individuals. Such success can provide a veneer of stability as it masks the true finances of the department. This is the opposite of stability or resilience; it creates a system designed to fail, leaving even established departments at risk of closure (as has happened in response to each wave of legal aid reform).

125. For those firms that conduct small amounts of private work this is not a reliable income source. If and when a firm grows its private work to a reliable and sizable level the disparity in fees leads to tensions, loss of staff, pressure to drop less profitable legal aid work, and departmental issues.

126. The gap between criminal legal aid work and privately paid work is now so great that it has damaged the name of legal aid. The Review contemplates a minimum standard of service. Providing resources that only allow for a bare minimum service will guarantee that some firms fall below the standard

[2] The period October 2020 to December 2020 shows a remarkable reduction in expenditure against the same period the previous year, with expenditure made through the LGFS reportedly down 48%.

required and that the public will be denied an acceptable service. This will accelerate what we perceive to be a growing divide in the service offered to private clients over legally aided clients.

127. We are concerned that any results will be generalised averages and subject to error. The gathering of accurate information will involve significant input of time from firm owners and could require analysis of information not readily available to all. Firms will not all have records of all hours worked by their employees and partners. We fear that many owners will choose not to engage with any financial information gathering exercise that requires a significant time input. We note that where profit margins are low, the margin for error is also low. A plus/minus 3% accuracy figure for profitability could mean the difference between a small profit or a loss.

128. Accurate profitability figures are also potentially misleading. What do they demonstrate? We note that a firm may be profitable because it is bad firm, performing poorly for clients, working fewer hours, and/or it may be working only on the more profitable cases. Conversely a firm conducting fantastic work may have dedicated lawyers necessarily working all hours, including on cases which are loss making to the firm.

129. What then does government do with the figure produced? What if the figure is 2%, or 5%? What figure is an acceptable level of profit? It has seemed in the past that <u>any</u> profit has been viewed as a failure in the system. We have asked the LAA and MOJ previously what sum represented value for money, what fees did the LAA consider represented a fair sum for work done? This question was asked in the context of the litigation that followed the tendering proposals. No answer was ever forthcoming. Is there an acceptable level of profitability and where does any target figure come from?

130. We note that the LAA has never had more information as to its firm's finances than now. By way of example:

    a. It knows how much work we have done and what we have been paid, in each type of case and stage of the proceedings.

    b. It sees the trends for our work, our SMPs and our average cases costs.

    c. It knows how many supervisors we have, and how many employed solicitors.

    d. It knows how many hours we claim for work in police stations and magistrates' courts.

    e. It knows the advertised rates of pay for duty solicitors in different parts of the country and for CPS lawyers at every pay grade.

    f. It knows which firms have closed in which areas of the country and at what rate.

g. It knows the rates paid to expert witnesses in criminal cases and how the rates paid compare to those paid for the lawyers preparing and conducting the case.

h. It knows there are no out of hours uplifts in contrast to the overtime payments available to employees throughout the rest of the CJS.

i. It knows the number of acts of assistance in criminal matters and the cost of providing this assistance.

j. It knows how much unclaimed work remains in the system and how many months' payments this equates to.

131. It may be that the quest for yet further information on firms' finances is a drive to discern and highlight what partners/owners are paying themselves as against what employees are receiving. Could the panacea explanation which requires no extra funding be a plea from the government for a fairer distribution of the available profit? We note in this regard the need to determine the hours worked by partners and to consider the nature of the work done by the partners (which may generate much of the firm's profit). This might be from an alternative revenue stream such as private work.

132. All up to date Public Defender Service information should be published. In addition to the micro-detailed information on its contracted firms Government also knows the cost of running offices of varying sizes and structures in different parts of the country and the notional profitability of each office. This data should provide an indication of profitability of offices of different sizes with different case profiles which can be used as a bench mark against non PDS firms of similar size.

133. We do not welcome any effort to prescribe what structure of firm (or combination of firms) the market requires to work effectively. By now it should be clear to all that it is impossible to determine from statistics the best fit of large and small firms for any given area. There are good and bad 'small firms' and good and bad 'big firms.' There are efficient/successful firms both large and small, as with most business sectors.

134. We note that all sizes of firms have dropped out of criminal legal aid, not one specific type. We query why yet another review seeks to discern a system fit for all instead of accepting the reality that any system requires adequate funding, and that years of cuts and underfunding have an inevitable impact on the size and shape of the market and the quality of the work conducted.

135. The free market in the provision of criminal law advice allows new firms to service areas or clients in need. If there are gaps in provision this suggests simple free market economics at play with solicitors simply not being attracted to do the work required of them at the rates available. Barring new entry is to the detriment of the client as competition by reputation is curtailed and services standards are able to fall without the pressure of any competition and,

in some cases, with pressure from owners on employees not to conduct work beyond that paid for on the particular case.

136. We ask that any new data obtained in respect of the finances of law firms be provided in full to allow all to understand and analyse the finding. This should be a transparent exercise.

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

137. In February 2021 the MoJ released a data compendium entitled 'Summary Information on Publicly Funded Criminal Legal Services.' This research reminds us of the importance and fragility of the market in this global city.

138. While a regional 'Levelling Up' agenda might be called for in commerce and infrastructure, it cannot be justified in the criminal legal aid sector.

Significance of the capital

139. Over the period studied by the MoJ, the data shows that London is home to 25% of criminal legal aid firms and 28% of all duty solicitors in England and Wales. This is a larger share than would be expected when comparing London's equivalent share of the population (estimated in 2019 to be 8.9 million compared to 59 million in total in England and Wales).

140. The data showed a consistent reduction in the number of duty solicitors nationally, tracked by region. 27% of those who left were based in London, showing that the talent flight problem applies to this region as much as the rest of the country.

Age

141. Another concern, first highlighted by the Law Society, is the ageing profile of duty solicitors. The average age has increased by one year in each year of the three studied and now stands at 49. In the compendium the analysts report on the percentage of solicitors who are under a notional mid-point of 45 years of age, the "younger half" to put it crudely. Nationally 38% of duty solicitors are in the younger half. In London it is only marginally above average at 41%. This is not evidence of a healthy situation in the capital.

142. Firstly, 41% is a worryingly low figure, particularly when one considers that it is part of a downward trajectory overall. Secondly, it is long acknowledged the capital is a 'graduate magnet'. Young lawyers are attracted to work in the capital in their twenties before moving to their home region to establish themselves. That is still the case, and yet London does not see the thriving younger criminal legal aid market that one might expect in a capital city.

143. London courts see a high proportion of serious and complex crimes in areas such as terrorism, sophisticated fraud in financial markets or large-scale drug

trafficking operations. Extradition cases are only heard in London and a significant number of defendants (or "Requested Persons") are represented by solicitors at Westminster Magistrates Court with the benefit of legal aid. While this raises the stakes were the market to fail, it does not grant the suppliers of CLA services safety from the impacts of cuts and stagnation in fees. There are many problems that providers in the capital face.

Inefficiencies

144. The criminal justice infrastructure is dispersed irrationally around the capital. Unlike the civic quarters of many small cities and market towns, few police stations are sited close to magistrates' courts. Magistrates' courts are rarely close to their Crown Courts and London's prisons are sited in inconvenient locations. Three of the eight prisons in the city are all located next to each other in one remote corner. Car ownership is low down on Londoners' priorities and the congestion charge and scarcity of parking make it an unattractive alternative.

145. London firms compete fiercely for clients and often rely primarily on own client work. Their clients are inconveniently arrested away from the firm's home borough and so a morning's list of remand hearings will take staff to all corners of the city. London's firms remain relatively fragmented, so the benefits of economies of scale do not apply to the same degree as in other areas.

146. With no payments for travel and waiting time, the above issues make lower crime work more unprofitable than elsewhere. Though frequent, London trains and buses crawl slowly through central areas. Travel to some of the furthest London courts and prisons often include two changes of public transport (with the inevitable delays caused by frequently disrupted services) and can take more than one hour each way.

147. As an international city it is natural that clients require interpreters more often than elsewhere. Acute mental disorder is also more frequently encountered in big cities. In a sector where payments either in no way reflect the work done (Police Station and Crown Court work) or are tapered at loss-leading levels (magistrates' court work) these two types of special need are a further reason why a London practice is made more unprofitable.

Recruitment and Retention

148. If banks will lend 4.5 times an annual salary for a mortgage and the median price of a three-bedroom property in London is around £750,000, what chance does the average duty solicitor have of owning a modest home and raising a family? Duty solicitors in the capital are estimated to earn around £30-35,000 p.a. putting even modest properties out their reach. It is no wonder that once they see the limits of their earning potential, so many move away or choose another area of law to practice.

149. CLA solicitors see their work as a vocation or a calling. Their idealism, passion for the work and dedication to their clients leads to self-exploitation, working

long hours for relatively low pay. That is less likely to be found in practice support staff. An accounts clerk, receptionist, secretary or paralegal might welcome the experience they gain from working in a CLA firm. But once they have been trained it would be illogical not to apply for the same post with a city law firm who can offer far better pay.

150. Owing to the London salary weighting and vibrant corporate legal sector, London CLA firms struggle to recruit support staff to make solicitors more efficient. The depressed salaries of duty solicitors make de-skilling the workload unviable. The additional costs of living in London force those on lower relative incomes to move to the outskirts of the city, thereby exacerbating problems of travel and accessibility and increasing reliance on agency workers.

151. The Independent Review into Criminal Legal Aid will question every aspect of the current fee structures. The London weighting will no doubt be under review, but the forces that led to its introduction apply more so now than ever before. Currently the weighting is only applied in a minority of CLA fee areas. Not only should it be retained, it should be embedded throughout the schemes.

5th May 2021