

## STAGE TWO: CASE FILE ANALYSIS

### HIGHLIGHTS

- The Easy Read form was used in the majority of applications sampled, regardless of whether the applicant was legally represented or not.
- Our sample suggested there was a significant drop in applicants with legal representation (from around one third to one quarter of applicants) around late 2013/early 2014. Legal aid was cut during 2014. Recent figures released by the CCRC indicate that levels of legal representation have fallen further since then.
- Lawyer-led applications were less likely to be deemed ineligible for review and more likely to be sent for a full review than applications that do not have the benefit of legal advice. This process increases the likelihood that material will be discovered that could create a ground of appeal or lead to a referral.
- A small, but not insignificant, proportion of applications raised concerns about expert evidence (12.5%). In 60% of those cases the issue was raised by a legal representative; however, lawyers seemed less likely to commission additional expert reports than in the past. This is being explored further at later stages of the project.

### 1. BACKGROUND

In 2016, the CCRC raised concerns about the impact of legal aid cuts, on the number and quality of applications received. Following these concerns, the Justice Select Committee agreed that the impact of such measures, including the effects on the levels and availability of legal representation for defendants, should be investigated. That decision ultimately led to the commissioning of the 'Criminal Cases Review Commission: Legal Aid and Legal Representatives' research project.

In this summary paper, we present key findings from Stage 2 of the project, which builds on the data analysis conducted at Stage 1 through qualitative analysis of 160 CCRC case files (dated October 2011 – September 2014). The aims were: (1) to check trends identified at Stage 1; (2) to examine what, if any, correlation exists between lawyer-led submissions and case progression; (3) to examine lawyer activity levels on cases; (4) to identify features of 'good' legal representation; and (5) to explore trends in the use of expert evidence.

The following section outlines findings relating to the use of the Easy Read form. This is followed by sections on our stage 2 findings relating to levels of legal representation, access of representation, the effect of representation on case progression and outcomes, nature of lawyer activity, and issues relating to expert evidence. The summary paper concludes with tentative recommendations and some considerations moving into Stage 3 of the project.

### CONTENTS

1. Background
2. Use of the Easy Read form
3. Levels of legal representation
4. Access to representation
5. Effect of legal representation on outcomes
6. Nature of lawyer activity
7. Expert Evidence
8. Tentative recommendations

### THE PROJECT

This briefing paper outlines the key findings of Stage 2 of the research project 'Criminal Cases Review Commission: Legal Aid and Legal Representatives', a mixed methods research project examining the impact of legal aid cuts on applications to the CCRC.

Stage 1 consisted of analysis of CCRC data, Stage 2 involved a qualitative analysis of CCRC case files, Stage 3 surveyed legal representatives, Stage 4 involved interviews with legal reps, and Stage 5 consisted of focus groups with CCRC staff.

Stage 1 was funded by the University of Sussex but from Stage 2 the project was funded by the Economic and Social Research Council.

Summaries and full reports of each stage are available on our website:

<https://legalaiddandrepresentatives.wordpress.com>



## 2. USE OF THE EASY READ FORM

Our Stage 1 analysis indicated that the number of applications received increased significantly around the time that the Easy Read form was introduced (in April 2012). Case file analysis at Stage 2 supports this and indicates that the Easy Read form was used in most applications, whether the applicant was legally represented or not. The form appears to help guide applicants (and their lawyers) about what information the CCRC requires.

Of the 160 applications analysed, 20 were submitted before the form was introduced. Of the remaining 140 cases, 117 (84%) used the Easy Read form. In the remaining 23 cases, 12 had not used the form, and in 11 cases it was not clear because, for example, the application was missing from the online case management system. Between April 2012 and December 2013, 55-65% of applicants used the Easy Read form. This increased to 75-85% between December 2013 and September 2014.

Although lawyers (and applicants) are permitted to make applications via written submissions with a covering letter and are not obliged to use the Easy Read form, from April 2012 legally represented applications were also making use of the Easy Read form. Of the 33 applicants in our sample who submitted applications after April 2012 and were legally represented, 23 used the Easy Read form (70%). During the period September 2013 to September 2014, every legally represented applicant applied using the Easy Read form. This suggests that the form is useful to legal representatives as well as non-legally represented applicants and may help lawyers to direct their representations. This issue will be explored further during Stages 3 and 4.

## 3. LEVELS OF LEGAL REPRESENTATION

The prima facie proportion of applicants who were legally represented in our sample was 38%. However, we recorded 23 cases in which applicants had named legal representatives who were not in fact acting for them. Once we remove those 23 cases, we reach a more accurate figure for the proportion of applicants who had legal representation, which was 24.4%.

The spike in legal representation in mid-2012 to end-2013, reported at Stage 1, is also reflected in the Stage 2 data. That data also shows a drop in levels of legal

representation since 2013, with a significant drop in the number of legally represented applicants from around March 2014 (when an 8.75% fee cut was introduced). This is shown in the data set as follows:

Time Period	Legally represented applicants (out of 40)
A: April 2012 (introduction of the Easy Read Form)	8
B: March 2013 (just before LASPO comes into force)	17
C: December 2013 (experts' fees reduced)	10
D: March 2014 (8.75% legal aid fee cut)	4

The declining rate of legal representation since 2013 appears to correlate with a reduction in defence lawyers' legal aid fees which came into force in March 2014, alongside other changes to contracting criteria (reductions in the number of legal aid contracts awarded, requirements to obtain a management quality mark, changes to supervisor requirements). That lower levels of legal representation may be attributable to changes in legal aid funding is further supported by the number of applicants complaining about access to lawyers.

## 4. ACCESS TO REPRESENTATION

Before 2014, no more than 4 or 5 applicants (out of 40) suggested they were struggling to access legal services. From late 2013, by which time lawyers were aware that a cut was to be implemented, the number of applicants complaining that they could not access a lawyer for funding reasons increased to 9 out of 40 applicants (see Box 1). Although we have not had opportunity to speak to applicants themselves, applicants' comments indicate that obtaining access to legal advice is increasingly problematic and that (prospective) applicants are alive to those issues.

Lawyers can obtain public funding for conducting enquires for potential CCRC applicants under the Advice and Assistance Scheme. This funding is only available if the applicant passes means and merits tests. The vast majority of CCRC applicants will not be eligible for legal aid unless or until a potential ground of appeal has been found, because the case would not pass the Legal Aid Agency's merits ('sufficient benefit') test. However, finding a potential ground of appeal

**Box 1: Issues raised by applicants about access to legal advice from 2013**

“I cannot obtain legal aid funding for an appeal” – *Case D7*

“I can’t get a solicitor due to legal aid cuts” – *Case D10*

“I could not appeal because I had no money ... There is little or no access to solicitors” – *Case D17*

“On release I sought independent advice from another solicitor who informed me that legal aid was not available until a right of appeal had been granted” – *Case D19*

“Solicitor said if he had money to look into my case he would” – *Case D20*

Applicants in cases D12 and D20 also complained that they had no money to pay a lawyer privately, were not eligible for legal aid.

requires an investment of lawyers’ time and, given the fee cuts, lawyers may be less prepared to look into possible grounds of appeal. The ‘sufficient benefit’ appears to operate as a barrier to effective early legal advice. The extent to which this is an issue will be explored in Stages 3 and 4.

According to the Ministry of Justice’s 2019 Tailored Review of the Criminal Cases Review Commission, approximately 40% of applications received are no appeal cases (where there had been no previous appeal and the applicant therefore had to prove exceptional circumstances). Notably, every application in Box 1 that raised issues about access to legal advice were ‘no appeal’ cases. Research by Hodgson, Horne and Soubise indicates that the CCRC has also taken a narrower approach to the existence of exceptional circumstances in recent years and placed greater reliance on applicants identifying exceptional circumstances themselves, which could be especially problematic for applicants who have not had the benefit of legal advice. Applicants in no appeal cases may fall into a system in which lawyers are reluctant to take their cases on to find a ground for appeal (or exceptional circumstance), however, lack of legal advice is not an exceptional circumstance that will enable the CCRC to conduct an investigation. If the

threshold for finding sufficient benefit in no appeal cases were to be lowered, lawyers may be able to provide advice earlier and in more cases, potentially reducing the number of ineligible applications received by the CCRC.

It is possible that difficulty in accessing legal advice will undermine their faith in the system even prior to making an application, with a consequent ‘contagion effect’ that people will be deterred from making applications in the first place. They also may not benefit from realistic advice about whether an application should be made in the first place, which has implications for both the workload of the CCRC and whether or not the process is viewed as fair. Early intervention in the form of suitable legal advice may filter out cases where no grounds exist, reducing workloads and allowing the CCRC and Court of Appeal to focus on meritorious cases. The cases presented in Box 2 illustrate these potential benefits. In case D1, legal advice helped to ensure that the grounds upon which a referral was later based were clearly and quickly identified and, in case A1, early access to legal advice might have saved the CCRC valuable time and resource.

**5. EFFECT OF LEGAL REPRESENTATION ON OUTCOMES**

It was extremely difficult to identify the effect of representation on outcomes and, given the small number of cases in which a referral resulted (5 cases, or 3% of sampled cases), it was not possible to draw significant conclusions about the impact of legal advice on referral rate. However, the data did indicate that those who were not legally represented were more likely to submit applications that were ineligible for review. This is consistent with our Stage 1 findings, which showed that applicants who were legally represented (or represented by an action group) had a higher percentage of cases sent for review.

Across the whole time period (2011-2014), 9 of 39 (23%) legally represented applications were deemed ineligible for review (compared to 59% of non-legally represented applications). 74% of legally represented cases were allocated for review (compared to 39% of non-legally represented applicants). These differences may be explained by the quality of the application or the possibility that lawyers are performing their own assessments of the strength of cases and only proceeding where they believe reasonable grounds

exist. Sifting cases is already part of legal aid lawyers' role when applying the LAA merits test but could also help to regulate the workload of the CCRC.

The fact of being sent for review means the CCRC will almost invariably conduct investigations beyond the scope of the possible grounds identified by the applicant/lawyer. In 116 of 160 sample cases (72.5%), the CCRC used their extensive powers to gather information from public agencies. This almost always included the court files (113 of 116 cases), however, the CCRC sought further materials from other parties in a significant number of cases: from the Crown Prosecution Service (61 cases), the police (49 cases) and lawyers (23 cases). CCRC investigations may result in discovery of material that leads to more in depth analysis by Commissioners and/or a referral to the Court of Appeal. In short, applicants who are legally represented are more likely to have their case sent for review, which increases the likelihood that material will be discovered that could create a ground of appeal or lead to a referral.

## 6. NATURE OF LAWYER ACTIVITY

Effective, and early, legal advice can provide benefits that flow both ways – realistic advice to clients (with consequent effects on level of faith in the system) and appropriate direction of CCRC resources. Lawyer-led applications tended to be apposite, well-structured and to provide a point of liaison with clients. The assistance of legal representatives manifested in the following ways: (1) explaining issues/grounds to clients; (2) guiding the CCRC to lines of enquiry; (3) providing realistic advice.

We found that 20 of 39 legal representatives made reasonable submissions – ones in which reasonable

lines of enquiry "arguably capable of leading to referral but in the event the CCRC was not persuaded, or the line of enquiry did not result in the (reasonably) hoped for outcome" were identified – even where the application, ultimately, was not referred to the Court of Appeal. This accords with the finding that most lawyers make written and further representations to the CCRC on behalf of their clients (30 of 39 applicants) and supports the finding that legally represented applicants are more likely to have their cases sent for review than those without legal representation.

The most helpful legal advisers were well prepared, set out the basis of the application clearly and were responsive to CCRC requests for further information or clarification. Where lawyers did not behave in these ways, there were instances when the CCRC may have performed unnecessary work trying to ascertain avenues of investigation. A few lawyers appeared to take an adversarial stance towards the CCRC by, for example, threatening them with Judicial Review in the event of an unfavourable outcome. This may result from differences in approach from adversarially-trained lawyers as against the inquisitorial role assumed by the CCRC and its staff.

Lawyer-led applications could generally be improved by providing lists of documents that could assist the CCRC (though these may be beyond the scope of the legal adviser's knowledge). Other areas for improvement included providing further guidance to the CCRC, both in terms of the issues the CCRC might choose to investigate and a clear indication of how they believe referral criteria are met in the case. Applicants (and their lawyers) also seem to interpret the 'exceptional circumstances' and 'real possibility' tests differently from the CCRC, perhaps indicating a need for more training or guidance.

### Box 2: Benefit of legal advice for CCRC workloads

**Case A1 (Apr 2012):** The applicant was initially unrepresented and the CCRC spent many months investigating the case. The CCRC provided a Provisional Statement of Reasons indicating that there did not appear grounds for a referral. The applicant contested that decision and made further representations. The CCRC investigated those issues. Partway through those investigations the applicant sought legal advice from Counsel. Counsel advised the applicant that the CCRC decision making was not flawed and the application was withdrawn on legal advice.

**Case D1 (Mar 2014):** The applicant indicated on the Easy Read form that advice had been received from a lawyer about possible grounds of appeal, but that the applicant could not actually afford to formally instruct the firm. It was clear from the file that, although that applicant was unrepresented, the advice that they received from the lawyer was useful to both the applicant and the CCRC, who referred the case as a result of the issues raised in the application (rather than as a result of findings from their own enquiries).

## 7. EXPERT EVIDENCE

Although most of the sampled applications raised more than one issue to be explored, only a small proportion (20 out of 160 case files) raised concerns about expert evidence. Expert evidence was a less frequent complaint than poor representation at trial (55 applications), police malpractice (28 applications), judge/jury conduct (24 applicants) and complaints about sentencing (24 applicants).

In 12 of the 20 cases where concern was raised over the use, or lack of use, of expert evidence, the issue was raised by the applicant's legal representative. However, only four of those lawyers conducted investigations in the form of commissioning further expert reports or pursuing conversations or other investigations with experts. Possible reasons for this may include difficulties locating a qualified expert or lawyers not having the time or resources to instruct and liaise with experts.

The way lawyers process such issues seems to have changed with lawyers seemingly less likely to commission additional expert reports than in 2005-2007, when Hodgson and Horne conducted a similar analysis. Lawyers were more likely to raise concerns about expert evidence before December 2013 (when expert fees were cut): 9 of the 12 lawyers who raised concerns about expert evidence did so prior to 2013. Conversely, there was a fairly consistent rate of the same issue being raised by applicants who were not legally represented. This seems to suggest that lawyers have altered their behaviour in relation to complaints about expert evidence (or lack thereof) since the cut to expert fees. However, given the small sample size this requires further investigation at Stages 3 and 4.

It was not clear whether lawyers who raised issues about expert evidence hoped that the CCRC would conduct further investigations into the issues. In 3 of the 20 cases that complained about expert evidence, the CCRC conducted further investigations into. In 2 of those cases, a legal representative had conducted further investigation that the CCRC built upon. The most often cited reason for deciding against further investigation was that the application was prima facie ineligible for review, or that the issue raised about expert evidence was not new (i.e. already considered at trial or on appeal). While this is a legitimate ground upon which the CCRC can decide against conducting further investigation, the fact that a small, but not

insignificant, proportion of lawyers and unrepresented applicants are raising concerns about expert evidence suggests that it could be a problematic area of law in need of further exploration .

## 8. Tentative recommendations

- Review the blanket application of the LAA's merits' test, which appears to operate as a barrier to effective early legal advice.
- Make further guidance on the application of the tests (including illustrative examples) available in prisons and to lawyers to limit the possibility of misunderstanding of the standards and tests applied and consider offering CPD training days for lawyers.
- Offer lawyers more guidance about the CCRC as an inquisitorial body and an explanation of what information is useful to the CCRC. More knowledge about the operation of the CCRC may also help to improve working relationships.
- Should subsequent research confirm that the issues relating to expert evidence are indeed particularly problematic, consider implementing a policy of contacting applicant representatives who raise potential issues with expert evidence to discuss what (if any) enquires have already been made and what further steps are necessary.

## Moving forward

At Stages 3 and 4 we talk to lawyers about their views and experiences, respectively through a survey and interviews. In doing so we will continue to explore the following issues:

- Whether/how the Easy Read helps lawyers to direct their representations
- Whether lawyers are less likely to commission new expert reports as a result of fee cuts (with potential consequences for the outcomes of review)
- Lawyers' views on the falling rates of legal representation and consequences of this
- Whether lawyers feel that extra training/CPD would be beneficial