

# STAGE THREE: SURVEY OF REPRESENTATIVES

## HIGHLIGHTS

- Lawyers were unanimous that legal aid rates for work on CCRC applications are “too low”, making the work unprofitable at best or loss-making at worst.
- Several participants raised specific concern about the payment rate given the complexity of potential CCRC applications.
- Many respondents indicated that the 2014 cut to legal aid reduced their capacity to conduct CCRC casework, and that the rate at which they conduct pro bono work has been negatively affected by legal aid cuts.
- Lawyers reported that funding cuts have had an impact on lawyers’ ability to instruct expert witnesses but that they would still instruct an expert if needed.
- Respondents felt that the ‘real possibility’ and exceptional circumstances tests lacked clarity and wanted the CCRC to be more transparent, open, and engage more with lawyers.

## 1. BACKGROUND

In 2016, the CCRC raised concerns about the impact of austerity measures, including 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 3, which builds on the data and case file analysis conducted at Stages 1 and 2. Stage 3 sought to explore lawyers’ views on a range of issues related to CCRC casework and funding using an online survey (ahead of more detailed investigation at Stage 4). The survey ran from 6<sup>th</sup> August 2019 to 13<sup>th</sup> March 2020, by which time we had 16 usable responses. The low response rate and the consequences of this for our analysis are discussed in the full Stage 3 report.

The following section provides demographic information about the 16 survey respondents as well as levels of experience and supervision. This is followed by sections on findings related to the availability of public funding, changes to work practices since 2014, levels of pro bono work, use of expert evidence, and views on the CCRC. The summary paper concludes with considerations moving into Stage 4 of the project.

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## THE PROJECT

This briefing paper outlines the key findings of stage two 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 was an 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 representatives, and Stage 5 consisted of focus groups with CCRC staff.

Stage 1 was a scoping study funded by the University of Sussex. From Stage 2 the project was funded by the Economic and Social Research Council.

Summaries and full reports of each stage (including methods and literature reviews) are available on our website:

<https://legalaidandrepresentatives.wordpress.com>



## 2. EXPERIENCE AND SUPERVISION

Contrary to concerns expressed by a few participants about paralegals being used to save money, most participants in our survey were at a senior level of the profession. This is also contrary to previous research, which suggests that cuts to funding lead to deskilling and delegation of work to junior practitioners and may be reflective of the ageing population of criminal defence solicitors generally.

11 of the respondents indicated that their work on applications to the CCRC is not supervised. 2 indicated it is sometimes supervised and 3 indicated that their work on CCRC cases is supervised. Levels of supervision are what one would expect, i.e. more junior professionals report higher levels of supervision than senior professionals. The respondents who indicated their work on CCRC applications is unsupervised included 1 partner, 7 senior partners and 3 barristers.

## 3. RATES AND AVAILABILITY OF LEGAL AID

The respondents were unanimous that legal aid rates are “too low” and some raised specific concern about the payment rate in light of the complexity of CCRC casework. Some respondents reported that the rates are so low that they are no longer able to do CCRC casework. As well as receiving relatively little pay for lots of work with little chance of success, respondents noted an element of uncertainty about being paid by the Legal Aid Agency (LAA) for work done on cases.

The vast majority of respondents (14 of 16) reported finding it either “somewhat” or “extremely difficult” to get legal aid to support a CCRC application since the funding rates were reduced in 2014. The remaining respondents said it is “neither easy nor difficult.”

### Box 1: The respondents

Of the 16 respondents, 12 were men and 4 were women. There were 7 senior partners, 3 partners, 2 assistant solicitors, 1 trainee solicitor, and 3 barristers.

The years of experience respondents had in criminal defence ranged from 2 to 35 years. However, the vast majority (14) had worked in criminal defence for over a decade.

All the respondents had experience making or assisting with applications to the CCRC on behalf of a client and 10 of the 16 respondents had had cases referred to the Court of Appeal. The number of applications respondents had made or assisted with ranged from 0 to 50. (One respondent indicated having made 0 applications to the CCRC, which could be due to typographical error or not including “assisted with” applications).

14 of the 16 indicated that they are currently accepting potential CCRC applications. The 2 respondents who said they are no longer accepting potential CCRC applications indicated that this was due to funding issues.

Having raised concerns about the appropriateness of the sufficient benefit (merits) test at Stage 2, we asked respondents for their views. Responses were mixed (Box 2), suggesting that this needs further research. Some respondents also expressed concern about the LAA’s financial eligibility criteria (means test).

Some respondents seemed to take the view that the LAA itself could be obstructive, with 11 respondents reporting that they found the procedures for obtaining legal aid in CCRC cases “extremely” or “somewhat difficult.” Respondents complained that

### Box 2: Sufficient benefit

When asked about the appropriateness of the “sufficient benefit” test, respondents were divided. Those who thought the test was appropriate (7) seemed to accept that there is a need to ensure public funds are reserved for meritorious cases. Those who felt the test was inappropriate (8) seemed to disagree with the way the test is interpreted and applied by the Legal Aid Agency. This was something some respondents who thought the test was appropriate also commented on.

Overall, respondents seemed to feel that the existence of a test is appropriate, but interpretation of the test by other bodies – particularly the LAA – is problematic.

the LAA applies tests in an unfair or inconsistent manner, variously describing LAA processes as irrational, perverse, or burdensome. The attitude of the LAA could mean that lawyers are more keenly aware of a need to demonstrate sufficient benefit and, given that the LAA was created a year before the 8.75% fee cut was introduced, there may also be a cumulative relationship between problems with LAA decision-making and legal aid cuts.

#### 4. CHANGES TO WORK PRACTICES SINCE 2014

A majority of respondents (10) indicated that their work on applications to the CCRC has changed since the 2014. This might suggest that the drop in legal representation is connected to the 8.75% fee cut (as suggested by Stages 1 and 2) and that this cut has had a cumulative effect on business practices, causing fewer firms to take on CCRC work and forcing those that do to be more selective when taking on cases.

Both respondents who were no longer offering advice in relation to potential CCRC applications said that the decision was directly related to problems with funding:

##### Box 3: Changing approaches to CCRC work

“I no longer undertake this work”

“Less likely to take on; overall profitability of criminal legal aid work is so low now, and these applications almost inevitably entail pro bono work, it is often simply not financially viable”

“The main issue is that cuts across the board are so extreme that I can no longer fund CCRC as a loss leader.”

“The uncertainty over funding has led many practitioners to become sceptical before agreeing to undertake such work.”

“We have had to focus on fewer clearer cases as we do not have capacity to respond to the volume of requests we receive.”

“We review enquiries more closely before agreeing to take them on. We limit cases that we take on as to take on too many is not financially viable. We run the dept [sic] at a loss as it is.”

“Lack of funding on legal aid. Not allowed to take on cases as they are loss making. Would take work if funded better.”

“the fees offered make it impossible to provide a proper service and I am no longer willing to work for a loss”

Several respondents commented that advising in this area is loss-making for the firm and many described having to change their approach to CCRC casework as a result of changes to legal aid. This included reports that, as a result of funding cuts, they are now more sceptical about requests for advice and assistance, are less likely to take cases on and are more selective about the cases they do take on (Box 3). The extent to which this also relates to complaints about the LAA’s obstructiveness requires exploration.

#### 5. LEVELS OF PRO BONO WORK

The majority of respondents (13) had done pro bono work for a client wanting to apply to the CCRC. However, more than 60% of those indicated that the rate at which they do pro bono work has decreased since 2014 and 85% said that they no longer do pro bono work for potential CCRC applicants. While one respondent reported that the firm no longer offers assistance in this area (for unknown reasons), the others all reported that the reason they no longer offer pro bono assistance is related to funding cuts. Most simply ticked that pro bono work is “no longer economically viable”. Others expanded as follows:

“LA is soo [sic] low cannot afford to”

“profit margins in legal aid work are so low and proper appeal representation is so complex that pro bono work is impossible. In any event it merely serves to allow the state to evade its proper access to justice responsibilities”

“The funding cuts have decimated turnover. Which means our time has to be prioritised for those cases where we remain hopeful of being paid.”

Although respondents reported that the rate at which they are undertaking pro bono work has decreased since 2014, just over 60% of respondents reported doing work on potential CCRC applications when they are unsure whether or not they will be paid. When asked how often investigations are conducted when unsure about payment, 6 out of 10 indicated they did so either “most of the time” (4) or “always” (2).

A bivariate analysis seems to show a correlation between respondents saying that they found legal aid difficult to obtain and doing work when they were unsure that they would be paid with relative frequency. That correlation did not appear to be affected by seniority within a firm, with respondents across the range of job roles indicating that they conduct work when they are unsure whether or not the firm will be paid.

## 6. USE OF EXPERT EVIDENCE

The majority of respondents (10) reported that they had noticed changes in the use of expert evidence since expert witness fees were cut in 2013. Survey respondents reported that experts appear to be less willing to prepare reports at legal aid rates, meaning that fewer experts are available to accept instructions, and suggested that finding expert witnesses is also difficult because of payment delays. One respondent also commented that the availability of legal aid is particularly relevant in cases involving expert evidence.

Despite these difficulties, all but one respondent indicated that they would be likely to commission a new report if they were assisting an applicant to the CCRC who raised concerns about expert evidence, which seems to be at odds with the case file analysis conducted at Stage 2 and lawyers' own suggestions that it is difficult to find experts willing to work on legal aid. The one respondent who said they would not be likely to commission a new report said this was due to the "inability to fund an expert report" and explained that they would get the CCRC to commission the report.

## 7. OPINIONS ON CCRC PROCESSES AND GUIDANCE

Of the procedures asked about, the application process was most well understood; 56% indicating that the process was "somewhat clear". Half of the respondents had used the Easy Read form to make an application and of those who had experience of using the form, the majority found it useful. Over half of respondents (9) had concern over the clarity of the 'real possibility' test, including senior lawyers of at least partner level. A majority (9) felt that the review process lacked clarity – it was only "somewhat clear" to 2 respondents – and several respondents were unclear about the exceptional circumstances test.

The majority of respondents found the information provided on the CCRC website moderately (10) or very useful (3), and a majority found information provided in correspondence moderately (11) or slightly useful (3). 14 respondents indicated that they would find further training on CCRC processes and procedures useful; 2 said that training would be "not at all useful".

A majority (11) indicated that, in their experience, it is extremely unlikely for cases to be referred to the Court of Appeal and one respondent described having to manage applicants' expectations:

"I manage expectations explaining to the applicant and their family that unless their case is an outlier they can expect poor, slow often unlawful decision making with little appetite to investigate or think critically leading inexorably to a refusal to refer."

Common complaints included a lack of transparency and openness at the CCRC, unexplained delays, and low levels of communication, suggesting that further engagement with lawyers during the review process could be beneficial. Other complaints were that the CCRC is too defensive, too conservative and too sensitive to the Court of Appeal, that there is too much variation among Case Review Managers, and that staff need to be more proactive in their investigations.

Overall, survey respondents wanted to see more transparency, better quality responses, more cases being referred, and quicker decision making from the CCRC. They also pointed towards more collaborative working but acknowledged that funding cuts have made this more difficult on both sides.

### What's next?

Although the small size of the Stage 3 data set means that our findings cannot be considered generalisable, they provide useful insight into issues that can be explored further at stage 4, including:

- Issues about the inadequacy of payment given case complexity;
- Seniority of people doing CCRC work;
- Suitability of the sufficient benefit test;
- Obstructiveness of the Legal Aid Agency;
- Funding for and use of expert evidence;
- Usefulness of engagement with the CCRC during the review process and/or further training or information required.