

STAGE FOUR: INTERVIEWS WITH LEGAL REPRESENTATIVES

HIGHLIGHTS

- Many participants/firms had stopped accepting potential CCRC cases on a publicly funded basis and those who continued to do so explained that they struggled to make the work financially viable. In many cases, CCRC work was done at a loss to the firm.
- Lawyers working on legally aided cases reported doing large amounts of unpaid work because the funding was either not available for the work required, or because the work involved in applying to the Legal Aid Agency (LAA) was thought to outweigh the funds requested.
- Interviewees noted that general criminal lawyers often lacked knowledge of the CCRC and appeals process and would benefit from training. However, most of those already working in this area of practice felt that they did not need training so much as information and clarity about CCRC procedures and decision-making.
- The majority of legal professionals interviewed recognised the CCRC as an improvement on what was available before, although many raised concerns over its funding and resources, particularly given increased numbers of applications.
- Several interviewees expressed the wish for better communication with CCRC staff. They were keen to promote dialogue with the CCRC and felt that this would be beneficial for CCRC staff and applicants.
- Particular concern was raised over investigations and expert evidence, and lawyers were keen for the CCRC to be more open in sharing the details of its investigations with applicants and their lawyers.

This briefing paper outlines some of the findings from stage 4 of the research project 'Criminal Cases Review Commission: Legal Aid and Legal Representatives'. This is the penultimate stage of the project and, to make the most of these summaries, all five documents should be read together. All summaries can be found at <https://legalaiddandrepresentatives.wordpress.com/>.

Stage 4 was funded by the ESRC and sought to explore lawyers' views on a range of issues in interviews with 45 legal representatives, of whom 43 had experience of CCRC casework. Sampling was broad, though participants were self-selecting.

Interviews were conducted in person, online and by phone between November 2019 and August 2020.

1. FINANCIAL VIABILITY & SUSTAINABILITY

Of the 43 participants who had experience of CCRC casework, 18 were no longer willing and/or able to accept CCRC cases on legal aid. Thirteen of those were no longer accepting potential CCRC cases and 5 were only taking cases on a private basis (though some explained that they would make exception for existing clients, straightforward or interesting cases).

The principal reason for withdrawing from legally aided CCRC work was funding, although in some cases the effects were indirect (e.g., related to concerns about billing targets and job security). At one end of the profession, participants had retired from CCRC work at the end of their careers. At the other end, paralegals and trainees expressed their intentions to move out of this area of practice, noting the low rewards on offer, and several mid-career lawyers had replaced legal aid with private work. Partners also explained that junior lawyers choosing not to stay or specialise in

appeal/CCRC work were difficult to replace, raising questions about sustainability and skill development.

Participants described CCRC work as unprofitable, financially unviable and even loss-making. While they emphasised different issues – and some noted that the work had never been profitable – they all attributed the financial challenges to LAA rates and procedures. Participants were unanimous that legal aid rates for CCRC work were too low and some explained that the rates had become a virtually insurmountable barrier to practice. Several participants who had continued to do legally aided CCRC work also indicated that they would not be able to afford to do so indefinitely (Box 1).

Low legal aid rates often prevented lawyers of the appropriate level and skill from working on CCRC cases. Indeed, while participants were almost unanimous in believing that the work should be done by the most specialist lawyers, some firms could only afford to pay people at paralegal/trainee rates, or as consultants. This was something some participants found troubling given their belief that CCRC work was particularly complex and specialised, and which also increased demands on supervision and risks on audit for firms.

The financial unviability of CCRC work was further exacerbated by the fact that large portions of the work were unpaid. As outlined in the following section, this was often due to LAA funding arrangements, including an inability to fund initial filtering work, unpaid administrative work involved in making LAA funding applications, an inability to make interim claims, and the difficulty of extending the funding above an initial upper limit. Several participants also suggested that the LAA did not grant the hours required, increasing the financial strain on firms and creating a situation where diligent lawyers were often working for free.

Many participants felt that the LAA was distrusting and some suggested that it was getting in the way of good lawyers' work. Some participants also indicated what they saw as "traps" in the LAA's forms and while these were not unique to CCRC work, lawyers' comments suggested that the subjective nature of the sufficient benefit test caused particular problems in CCRC cases because of the difficulty in discerning benefit without considerable (unpaid) work reviewing a case first. The sufficient benefit test thus left firms vulnerable on audit and, ultimately, to repaying funds, which fed into the work's unviability. Some lawyers also reported that the LAA aggressively audited appeal and CCRC files to

scrape money back retrospectively, increasing the financial risks involved.

While some firms had become more selective in the cases they accepted, others were taking on higher volumes in an effort to make ends meet. Lawyers also described subsidising CCRC work with more profitable areas of practice or private cases and charging private fees for sections of work that were not covered by legal aid, thereby increasing the barriers for applicants.

The interviews highlighted clear examples of things changing around 2014, including redundancies, firm closures, and decisions to withdraw from legally aided CCRC casework. However, as at other stages, it was difficult to separate the effects of the 8.75% fee cut from other factors. Lawyers were sometimes unclear about when changes had occurred and, in many cases, suggested that the cut was one of many contributing factors, albeit one that had intensified other issues by further reducing firms' profit margins.

2. LEVELS OF PRO BONO WORK

A minority of respondents (3 of 43) had done CCRC work on a purely pro bono basis, but many more reported doing large amounts of work unpaid. Moreover, the fact that CCRC work often struggled to break even, and was sometimes loss-making, meant that, for many, it was de facto pro bono. Three interviewees had also found themselves working pro bono for clients that had initially paid privately.

Participants working on legal aid cases reported doing large amounts of unpaid work on CCRC cases. Unpaid work was particularly common at the start and end of a case, and it was also notable that some of the hours that went unpaid were those dedicated to client care. At the start of a case, initial assessment and filtering work was not fundable because it occurred before the sufficient benefit test could be justifiably met. In many cases, the work done once an application has been submitted to the CCRC (e.g., liaising with the client or providing further submissions) was also unpaid as lawyers had to bill their files at the point of submission to release funds because the LAA does not allow interim payments in CCRC cases. In the case of filtering work, the problems caused by a lack of funding were also intensified by the high proportion of requests that did not pass the LAA merits test, for which there was ultimately no funding. These unpaid sections of work created barriers for firms and were cited as reasons for withdrawing from legally aided CCRC work.

Box 1: Future capacity concerns

"If rates don't improve, there's going to be some point in the next 12 to 18 months where we'll stop taking on publicly funded cases."

"Forget the cuts, the rates of pay have to be improved. They have to be improved because otherwise, even firms like us are just going to stop doing it."

"I have to say, it's getting to the point with us where we haven't said we've stopped doing appeal work, but we're much more selective."

Lawyers also reported working pro bono because the LAA restricted how many hours they could be paid, because the administrative burden of applying to the LAA for funds (and negotiating over extensions) was thought to outweigh the benefit of getting the funding, and/or because they felt the need to be conservative in requesting hours to keep the LAA onside.

3. USE OF EXPERT EVIDENCE

The interviews revealed reasons why an expert report was not commissioned even where applicants raised concerns, including the LAA's refusal to fund a report and lawyers' decisions to ask the CCRC to commission an expert instead. Despite recognising the importance of expert evidence, some lawyers appeared less likely to commission experts in CCRC cases than in other cases because of the CCRC's existence, particularly given resource pressures in firms. However, this was not always the case, and several participants reported preferring to instruct experts themselves because of doubts over the CCRC's willingness to do so.

When participants decided to instruct an expert, they explained that it was increasingly difficult to find an expert willing to work at legal aid rates. This had not deterred participants from seeking to instruct experts but made the job more challenging and time-consuming. In some cases, participants also suggested that low expert fees risked the quality of reports.

4. LAWYERS AND THE CCRC

Lawyers' understanding of CCRC tests and processes varied, as did their opinions of them. However, while lawyers were divided over the clarity and suitability of the CCRC's tests and procedures, several noted the difficulty clients had understanding what constituted exceptional circumstances and real possibility. Some also expressed a need for transparency around the CCRC's processes and tests, which even experienced practitioners said they did not fully understand. These issues had an impact on whether lawyers felt that a case would be eligible for publicly funded representation and the extent of casework that could be conducted under that funding.

Although several lawyers commented that the CCRC was an improvement on what went before, and many described positive experiences, concerns were raised over the lack and/or quality of communication with CCRC staff. A common frustration was that once an application is submitted it disappears into a black hole and the applicant and legal representative are cut out entirely (Box 3). While lawyers appreciated that there were reasons for this, including resourcing, there was a general feeling that the CCRC could and should

Box 2: Distrust in CCRC investigations

"Essentially, one of the things we've learnt is that you can't rely on the CCRC to do stuff like that."

"Our view is that we can't trust the CCRC to adequately investigate it in the way that we would like to. So, I can't say to the CCRC, "I've spotted there's a couple of points here, could you investigate this please?" because I am fearful that the CCRC are effectively going to do a desktop review and aren't really going to do it."

"They say, "We'll listen to further representations." Fine. They do, but they take no notice"

Box 3: Lawyers' perceptions about lack of communication with the CCRC

"When a case goes to the CCRC it sort of disappears into a bit of a black hole. You've got no visibility on what happens to it when it gets there."

"You don't want to put your application in, which is incredibly well thought through and a lot of work has been done by a team of people, and then you hear nothing and a year later you get a statement of reasons which is a load of nonsense, which doesn't take into account any of the points that you've made."

"They basically tell you not to ring up and chase us, "We'll tell you when we've done something." So, you're left for long periods of time not knowing what's going on or what's happening, and no-one getting in touch with you [...] Though, for us, it's hard, for a client who's sat there and can't receive any updates, that's really difficult."

engage more, and that doing so would be beneficial for applicants and staff. One participant explained:

"When you're dealing with people like me, who have experience, don't take bad points, don't waste their time, and try and set out the arguments as clearly as possible to help them [...] I don't understand why they wouldn't want to meet, just to talk it through, because I can only assist them in understanding the points I'm trying to make."

There were particular concerns over communications about investigations with several lawyers suggesting that the CCRC should be willing to share documents they uncover with applicants and lawyers as this would help to assess what casework would be required. Indeed, while they recognised the importance of the CCRC

being independent, lawyers did not believe that being independent needed to negate open communication.

Concerns were also raised about what lawyers saw as a lack of investigation and reluctance to instruct experts at the CCRC, as well as the quality of decisions and waiting times, the latter generally attributed to increased numbers of unrepresented applications. In doing so, lawyers also highlighted the importance of their role in holding the CCRC to account.

More broadly, it seemed that a perceived lack of transparency in investigation and decision-making processes had bred suspicion among some lawyers about the quality and quantity of work done on cases. Despite some reports of positive experiences, lack of trust in the CCRC investigative process was fairly widespread among our sample (see examples in Box 2), and seems to pose a challenge to relationships and morale going forward. It may also have an impact on sustainability, in terms of attracting junior lawyers to this branch of the profession and retaining those already there.

5. LAWYERS' SUGGESTIONS FOR CHANGE

Reflecting the difficulties lawyers had engaging with the LAA, many of the changes they suggested were about the LAA rather than the CCRC. These included: increased hourly rates, or at least the option of enhancing the hourly rate on complex cases, greater flexibility around the merits test, particularly when it comes to filtering cases, raising the financial eligibility threshold, easing the administrative burden involved in applying for funds, and trusting firms more. Another suggestion was to introduce the possibility for interim payments to ease cash flow on long-running cases (allowing lawyers to self-certify for 2 or 3 hours before having to pass the sufficient benefit test), and the introduction of an accredited panel for appeal/CCRC work. Accreditation was not unanimously popular, however, with concerns raised about creating another hurdle for lawyers.

When it came to the CCRC, lawyers' suggestions often centred around issues of communication. They wanted the CCRC to engage more openly with applicants and their lawyers and to be more open and transparent during the review process. Lawyers were keen for the CCRC to share evidence and engage in conversation about their investigations. The CCRC does, however, need to comply with the disclosure restrictions imposed by s.23 Criminal Appeal Act 1995. One suggestion was for a more interactive application track for legally represented applications that would acknowledge the filtering work done by lawyers prior to submission.

Lawyers also suggested that the CCRC be more open-minded in their investigation, braver and more candid in dealing with the Court of Appeal and referring cases, and less conservative in how it applies the real possibility test. Some also suggested that it would be useful for Commissioners to be better paid and employed full-time. Although experienced lawyers generally felt that they did not need further training, they noted that training may be beneficial for legal professionals generally, especially given that CCRC work is different to other areas of criminal practice.

Recommendations

The stage 4 findings support the tentative recommendations at stage 2 to review the blanket application of the LAA's merits test and consider offering CPD training for lawyers. However, while the provision of basic training may be useful to lawyers in general, for those who already do CCRC work the need is not for general guidance so much as for greater clarity and transparency around CCRC tests, procedures and decision-making. This may also help to restore trust in the CCRC and improve relations with experienced legal representatives.

Given the concerns that some representatives had about the CCRC's investigations and use of expert evidence, the tentative recommendation to implement a policy of contacting applicant representatives who raise potential issues with expert evidence is also supported at stage 4. Many of the lawyers we spoke to would want to engage much more with the CCRC, although it should also be recognised that in several cases lawyers are not being paid for work done after the application is submitted.

Changes to legal aid will also be necessary to reverse the decline of the legal aid market. The blanket application of the sufficient benefit test may need to be rethought, at least until there is a significant increase in the payment rate, as lawyers are increasingly unable to afford the unpaid assessment work required to justify sufficient benefit. Another important change would be for the LAA to relax its restrictions on interim payments in CCRC cases, allowing costs to be recouped earlier and reducing unpaid work. While an increase in rates will be necessary in the long term to ensure the future of this area of practice, these smaller changes could ease the pressure on firms in the short term.