

STAGE FIVE: FOCUS GROUPS WITH CCRC STAFF

HIGHLIGHTS

- While the relative significance of lawyers to case progression was a matter of debate, participants were unanimous in their desire for good lawyers to be involved and expressed sadness and concern over the future of representation in CCRC cases, recognising the problems of a declining legal aid market.
- Participants reported an increase in unrepresented applicants and a decline in the quality of lawyer-led applications, both of which affected workloads.
- Participants were concerned that lawyers appeared not to be engaging with the CCRC's online guidance and suggested changes to the availability and accessibility of the guidance, improved communications, as well as a more proactive approach to engaging lawyers. However, these suggestions were reliant on funding and resources and limited by concerns about independence.
- CCRC staff were sensitive to the criticisms of external parties, particularly around the motivations and independence of the CCRC, and changing external perceptions of the CCRC was a priority for several participants.
- Seen alongside stage four, the focus groups suggest that the lawyer-CCRC relationship is strained in both directions and that both sides are affected by resourcing issues that cause barriers to effective communication. Some participants appeared distrustful of lawyers and others had found lawyers to be unreasonably confrontational.

There were differing views among participants over who should be instructing experts in CCRC cases. This variation in approach and attitude within the CCRC may create challenges for lawyers.

This briefing paper outlines some findings from stage 5 of the research project 'Criminal Cases Review Commission: Legal Aid and Legal Representatives'. This is the final 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://legalaidandrepresentatives.wordpress.com/>.

Stage 5 was funded by the ESRC and sought to obtain feedback on the findings of previous stages, assess levels of understanding about the issues faced by legal representatives among CCRC staff, and explore possibilities for constructive change.

The findings are based on analysis of two focus groups conducted online in September 2020. One included Case Review Managers and admin staff. The second involved Commissioners and CCRC management.

1. THE ROLE OF LAWYERS

Participants were not surprised that lawyer-led applications were more likely to pass to the review stage, but there was uncertainty around the reasons for this. Some suggested that it was likely due to the fact that lawyers did not start, let alone submit, cases that did not have a prospect of going further, and one participant believed it was "important not to assume that lawyers are what makes the difference". However, while some participants did not believe that lawyers necessarily affected the quality or progression of cases, they seemed to agree that lawyers sifted out less valid or meritorious cases.

Both focus groups acknowledged the benefit of legal representation for applicants and in sifting out unmeritorious cases. They stressed that lawyers should ideally be involved from the first appeal stage,

something that would also help to reduce the number of no appeal applications received. Notably, however, the existing funding regime is not conducive to this kind of holistic representation. Despite their overall desire to have lawyers involved in the process, participants' comments suggested that it was "well-informed" lawyers who took "an objective view," and did not have "too much personal engagement with the case" that were wanted.

Although they were keen for lawyers to be involved, both focus groups were concerned that legal

representatives had not appeared to engage with the CCRC's online guidance, leading participants to suggest changes to where and how CCRC guidance can be accessed. There was also debate over the potential risks of lawyers' involvement, with one participant suggesting that profit-driven lawyers would not take on the less obvious cases or those that require more work. While the suggestion was countered by another participant, it nonetheless revealed a suspicion toward lawyers. Even so, when participants were given an opportunity to summarise their main messages, they clearly asserted their desire to have lawyers involved.

2. PERSPECTIVES OF LEGAL AID CHANGES

Participants indicated that there had been an increase in the number of unrepresented applicants and suggested that, while there was variation, the quality of lawyer-led applications overall had deteriorated with knock-on effects for CRM and administrator workloads and other cases (Box 1). Participants also noted a rise in the number of (potential) applicants raising concerns about access to legal advice and/or attempting to claim exceptional circumstances on that basis. Although participants were not able to pinpoint the moment of change, there were some indications that 2014 was a watershed moment, supporting the findings of other stages of the project (Box 2).

In suggesting that quality had fallen, one participant suggested that deskilling (as a result of low funding) had played a part, both in terms of who was doing the work in firms and in terms of charity and university groups who were filling the gap left by contraction in the legal aid market. Another explained that reduced availability of legal representation had pushed some applicants into the hands of bad lawyers.

Box 2: Indications of change around 2014

"I do remember on the cases that I had, and that were in our group, and when I was on reception, there was a load of people who phoned up and immediately the first thing that they would say was something about Legal Aid. Whether they were applicants or potential applicants, loads of those sorts of queries and comments did start coming in at that point, I do remember that"

"Thinking back, it was around that time when I noticed it, but certainly now it has become quite rare to pick up an application and find they've got legal representation"

Box 1: Deterioration of lawyer-led application

"When I first started there was quite a comprehensive response with the solicitors, they would go into detail, they'd obviously done their homework, as it were ... If I get any legal reps at all now it tends to be nothing more than a covering letter saying, you know, 'Here you go'. Or you might get some appeal documents sent to you, but half the time you just look, and you think, 'Well, you haven't actually done anything, you're just a glorified postal service really'"

"Representation went as far as a cover letter, and they didn't even bother checking that the massive lever arch file of documents was pretty much everything that had already been considered in the previous application bar a slight change in the way that it was presented. And it was so frustrating because it took me the longest time to work out. I had to compare what I had got with what we had already got to see whether or not there was anything new, [...] and I actually had to speak to my group leader in the end to say, "It's at the detriment of other cases..."

Participants were generally aware of the challenges facing lawyers and, when asked about morale, they were quick to suggest that lawyers' morale was low (although they did not believe that low morale was affecting cases or communications). Recognising the decline of the legal aid market as having negative consequences for the CCRC and its applicants, some participants also expressed sadness and concern over the future of legal advice and assistance and pointed to sustainability as a key issue for the CCRC going forward.

3. COMMUNICATION AND RELATIONSHIPS

This theme was explored given our stage 4 findings that lawyers' decisions about casework (including funding) were affected by their perceptions of the CCRC. Participants raised concern about lawyers' perception of applications as disappearing into "a black hole" at the CCRC. While some believed there were good reasons for this, including independence and resource constraints, others felt that the CCRC's communication style – which one participant described as a series of "position statements" – could improve. Participants also suggested that in some cases lawyer-applicant relationships were weak, causing confusion on all sides and increasing workloads for the CCRC.

Participants had found some lawyers to be aggressive and unreasonably confrontational, and while they

often implied that trust issues flowed one way, there were indications of distrust in lawyers among CCRC staff. More broadly, participants demonstrated awareness of the strained relationships between the CCRC and its various stakeholders, including lawyers, and there were signs that these relationships were affecting communications and encouraging decisions not to share information (Box 3) One participant also noted that commitment to independence led CRMs to hold applicants and lawyers “at arms-length”. Despite this, participants were generally keen to foster better relationships with lawyers, recognising that there were crossed wires and areas of misunderstanding.

While participants suggested that CCRC morale was high, it was sensitive to criticism about the CCRC’s motivations and independence. This sensitivity manifested as frustration and sadness on the part of CCRC staff who understood themselves as committed to overturning miscarriages of justice but did not feel recognised as such. Changing external perceptions of the CCRC was thus a priority for several participants, with particular emphasis placed on the need to change external perceptions of the CCRC’s independence. There was also a suggestion that the CCRC’s culture of independence was difficult for lawyers to understand given their training in adversarial criminal justice when compared to the CCRC’s more inquisitorial role with its many stakeholders. However, our interviews with lawyers suggest it is not necessarily a lack of *understanding* so much as a lack of agreement about what the role of the CCRC should be and how it should interpret its independence.

4. CCRC RESOURCES AND POWER

At stage four, lawyers expressed concern about the CCRC’s resourcing levels and their effect on the quality and progression of casework and these concerns were to some extent reflected in the focus groups. One participant implied a potential resource issue in relation to expert reports, stating that “Obviously, there’s a resource issue and we have to be fair to other applicants”. However, this suggestion was countered by a later discussion about resources in which other participants explained that, unlike lawyers, their ability to instruct experts was not limited by funds. While they were not restricted from investigating by resources, participants noted that resource pressures affected the timeliness of cases, especially given large CRM caseloads, and in both focus groups participants regularly referred to resources as a barrier to change.

While several lawyers suggested that the CCRC had considerable power to challenge the Court of Appeal and refer cases but did not seem to use that power, comments of focus group participants suggested that CCRC staff did not see themselves as having power or influence in relation to the Court of Appeal. This seems to support the comments made by lawyers about the CCRC’s deference to the Court, as well as Hoyle and Sato’s argument that the CCRC sets the frames within which decisions are made, yet rarely recognises its power in this regard. Perceptions about the CCRC’s approach can influence lawyers’ decisions about whether the sufficient benefit’ funding test can be satisfied, and whether applying for legal aid funding can be justified at all.

Box 3: Strained relationships in both directions damaging communications

“I do sometimes wonder if the people hosting those Twitter feeds think that there are real people at the other end who are hurt and upset by what’s said, because I haven’t met anybody at the CCRC who doesn’t want passionately to find referral cases [...]. That creeps into any relationship and communication”

“We’ve noticed [...] a pattern of certain legal representatives making personally offensive attacks on members of staff and commissioners dealing with the case [...]. That starts to put that doubt in people’s minds as well, or actually causes people at the organisation perhaps to creep more back into their shells and do minimal communication”

5. EXPERT REPORTS

Focus groups revealed differing views over who should be instructing experts in CCRC case. One participant suggested that lawyers should do case investigations themselves and, in some cases, “couldn’t be bothered” to do the work. However, others believed that lawyers should provide reasoning and justification for expert reports but leave their instruction to the CCRC. The general consensus seemed to be that lawyers should provide reasoning on why an expert report would be helpful or relevant and outline what difference it would make to a case, but that legal representatives might be wasting time and money where they commissioned a report themselves. The variation in approach around the instruction of experts supports previous findings about variability at the CCRC and is likely to be unhelpful for lawyers making decisions

about the instruction of experts, leaving them in an uncertain position, procedurally and financially.

In cases where the CCRC decided not to commission an expert report, participants explained that there was always a reasoned argument, but that while lawyers were generally accepting of decisions, their reactions varied. One participant expressed concern at the quality of evidence put forward by applicants and another noted the difficulty that applicants and lawyers faced in accessing exhibits post-conviction, demonstrating an awareness and appreciation of the difficulties of post-conviction disclosure.

6. SUGGESTIONS AND POSSIBILITIES FOR CHANGE

While participants felt that more money for lawyers and the CCRC would be helpful, it was recognised that this was unlikely, and participants were divided over whether more money was the answer, some suggesting that more practical alternative solutions needed to be found. Despite recognising the problems lawyers faced, participants felt that there was limited opportunity to change the funding situation and that, as a result, this was not something the CCRC could focus a great deal of resources on. Even so, it was not suggested that lobbying about legal aid should cease.

Participants supported the introduction of training and engagement activities for lawyers, suggesting that some lawyers did not fully understand the role and/or requirements of the CCRC. However, they also pointed to the lack of awareness about the CCRC across the criminal justice system and society more broadly and suggested that the CCRC be more proactive in getting information out to people, including lawyers, through professional training, seminar-style events, and legal magazines. This was felt to be particularly important since lawyers were already overworked and underpaid and was thought to have wider potential for resolving trust and communication issues. There were also suggestions that training could provide an opportunity to emphasise the CCRC's independence.

The inability to signpost potential applicants to legal representatives (as a result of changes to the market and the CCRC's independence) was a concern for both focus groups. It was not an issue the participants saw a solution to, although one participant supported the introduction of a specialist panel of better resourced experienced lawyers, to which they would be able to signpost (and which would have other knock-on benefits for the CCRC).

Despite the possibilities and evident desire for change in both focus groups, the discussions also revealed potential barriers to change, including funding and resources. If there are to be improvements in relationships and communications, or if the CCRC is to lobby for changes to legal aid alongside lawyers, there is likely to be a need for more funding. A second cultural barrier to change, perhaps harder to overcome, results from ideas of independence among CCRC staff. Indeed, in several cases, ideas for change were rejected due to concerns about independence, or even the perception of independence.

Recommendations

Participants were supportive of our earlier recommendation to introduce training and CPD events for lawyers. Although their comments implied an instructional style of training, we would suggest that a more dialogic style of engagement/training would have more potential for improving communication and building mutual trust and understanding.

Given the evidence of inconsistency in CCRC staff's attitudes toward the instruction of experts, we also suggest that the CCRC consider developing new guidance, or updating existing guidance, to clarify what is expected of representatives and to counter variation among staff.

Further, we suggest that relationships on both sides might improve with greater openness and dialogue. This could, in turn, improve the perception of independence in the defence community, while also facilitating changes to signposting and communications that would be beneficial to applicants, lawyers, and the CCRC themselves. The implications of perceptions about independence on other stakeholders (e.g. CPS, courts) are beyond the scope of this research.

Given the pressures that lawyers are under, we suggest the CCRC work more proactively and positively to engage with lawyers and seek to improve relationships between the CCRC and lawyers. Doing so could result in clearer delineation of roles, better managed workloads, and improved communication. For maximum benefit, emphasis should be on engagement that is dialogic rather than merely instructional. In the short term, there are overlapping concerns, including around post-conviction disclosure and expert witnesses, that may provide fertile ground for building two-way dialogue.