

# THE CRIMINAL CASES REVIEW

## COMMISSION: LEGAL AID AND LEGAL REPRESENTATIVES

### Final Report

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Prof. Richard Vogler  
Dr Lucy Welsh  
Dr Amy Clarke  
Dr Susann Wiedlitzka  
Dr Liz McDonnell

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### The project team

Richard Vogler is a Professor of Comparative Criminal Law and Criminal Justice. Having qualified as a solicitor he worked as a defence advocate in England for a number of years before taking Ph.D. He works as a specialist adviser on comparative criminal justice for a number of countries around the world.

Lucy Welsh is Senior Lecturer in Law. Lucy has been consulted by the House of Commons Justice Committee in relation to their inquiry, *The Future of Legal Aid*, and by the Ministry of Justice. Lucy spent 10 years working as a criminal defence solicitor before moving into academia, and practices as a supervisor of the Sussex Criminal Justice Law Clinic

Amy Clarke is a Research Fellow, and was previously an ESRC funded Postdoctoral Research Fellow at Queen Mary University of London. The Fellowship followed her Ph.D. in Geography, which focused on boundaries and hierarchies of belonging through qualitative analysis.

Susann Wiedlitzka is a Lecturer in Criminology and now works at the University of Auckland. Her areas of expertise include research methods, hate crime and policing. Susann has also worked on an EU DG Justice-funded research study on hate crime, which examined the application of criminal laws and sentencing provisions for hate crime across five EU Member States.

Liz McDonnell is a Senior Lecturer in Sociology. Liz has a very broad range of qualitative research methods expertise and continues to contribute to a wide range of research projects as a methodologist. She has a long standing interest in research ethics and was the Chair of the Social Science and Arts Research Ethics Committee between 2017 - 2020.

For further information please contact: Dr Lucy Welsh, University of Sussex School of Law, Politics and Sociology Freeman Building, BN1 9QE Email: [l.c.welsh@sussex.ac.uk](mailto:l.c.welsh@sussex.ac.uk).

All content and any errors remain the responsibility of the authors.

## List of Abbreviations

CAA	Criminal Appeal Act
CCRC	Criminal Cases Review Commission
CoA	Court of Appeal
CPS	Crown Prosecution Service
CRM	Case Review Manager at the CCRC
EC	Exceptional circumstances test used by CCRC in 'no appeal' cases
FSOR	CCRC Final Statement of Reasons
LAA	Legal Aid Agency
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
MoJ	Ministry of Justice
PSOR	CCRC Provisional Statement of Reasons
RP	Real Possibility test for a referral to the Court of Appeal
SBT	Sufficient Benefit Test (for legal aid)
SOR	CCRC Statement of Reasons

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## Executive Summary

This three year project involved five stages: (i) a statistical analysis of CCRC data from 1997-2017, (ii) a detailed review of 280 individual CCRC case files from 2012-2014, (iii) a questionnaire survey of 16 legal practitioner respondents, (iv) semi-structured interviews with 45 legal practitioner respondents, and (v) two focus group sessions with CCRC staff. The final 4 stages were funded by the ESRC, and the first was funded by the Sussex RDF. The conclusions, in summary, were:

1. There was a very high level of acceptance by both applicants and their representatives of the Easy Read application form introduced in 2012.
2. There was considerable evidence to suggest that both the regime and the administration of tests and audits by the LAA was undermining lawyers' efforts to conduct CCRC casework efficiently and in a financially viable way.
3. Levels of representation of CCRC applicants, which have previously been recorded at 34%, declined to an average of 23% in the period 2012-2014, and to as low as 10% towards the end of that period.
4. Declines in the representation of CCRC applicants appear to be associated with the reduction of legal aid fees in 2014, with serious impacts on all participants in the system.
5. Legal practitioners explained that they have been increasingly driven to undertake unremunerated work or to abandon practice in this area altogether. The resulting market contraction for legal services in this specialism appears to have led practitioners to be more selective about the type of case they take on, and reportedly has resulted in greater reliance on unskilled staff or volume processing by a diminishing number of legal professionals.
6. The CCRC itself has been faced with poorly expressed, underprepared and often misguided applications, submitted by unrepresented individuals, who have had no advice on the viability of their application. This appears to have increased the already substantial workload of the CCRC.
7. The results suggest an association between legal representation and success of applications, particularly at the initial review stage.
8. There was agreement from all research participants (including various levels of legal representative and CCRC staff) that well-informed and professional representation of CCRC applicants is valuable.
9. There was scope for the improvement of communications and understanding between CCRC staff and legal professionals.
10. Reductions in legal aid funding appear to have had an impact on the commissioning of expert evidence by legal practitioners, to some extent shifting this burden on to the CCRC itself.
11. Our recommendations in response to the above are set out on pp 30-33. We make separate recommendations in relation to three issues: rates and methods of legal aid payment, the CCRC's processes and procedures and the behaviour of legal professionals.

## Research Background and Objectives

This work was conducted in response to the Criminal Cases Review Commission's call for research that would explore the effects of legal aid changes in relation to whether, and how, applicants are legally represented. The overarching theme of the project is, therefore, the impact of legal aid cuts on applications made to the CCRC. The CCRC (a non-departmental body, sponsored by the Ministry of Justice) was created in 1997 to independently review potential miscarriages of justice, replacing the Home Office's much criticised Division C3.

Convicted individuals can apply to the CCRC for a review of their case, and ask the CCRC to use its extensive inquisitorial powers to investigate the safety of their conviction, or propriety of their sentence. If the CCRC takes the view that there is a 'real possibility' that the CoA will not uphold the conviction (or sentence),<sup>1</sup> it will refer the case to the CoA. For applicants who have not exhausted traditional appeal avenues, the CCRC is likely – in the absence of exceptional circumstances – to deem an application ineligible for review and invite the applicant to consider making an application directly to the CoA. Additionally, an applicant must raise something 'new' on which a referral could be based, meaning new evidence or legal argument that was not used in previous proceedings, or considered either at trial or on appeal. The CCRC's referral rate is notoriously low,<sup>2</sup> although the organisation is clear that its success should not be judged on the basis of its referral rate alone.<sup>3</sup> When the CCRC does refer a case, there is a good chance that the CoA will overturn it.<sup>4</sup>

To understand the nature of this work, it is important to be aware of the public funding available to represent clients who wish to make an application to the CCRC. Initial post-conviction advice on appeal is included in the terms of a Representation Order granted by the LAA, which oversees and administers publicly funded defence work conducted by lawyers. If a ground of appeal arises during the course of a trial, the trial lawyers will usually continue to represent the defendant under the terms of the Representation Order. If, however, no grounds of appeal exist, or (leave to) appeal is refused, that Representation Order falls away as there is no longer considered to be public interest in funding the case. This means, of course, that many applicants to the CCRC no longer have the benefit of publicly funded representation by the time their case might be eligible for review by that body.

Consequently, a different funding regime applies to potential CCRC cases: the Advice and Assistance scheme. This covers the provision of second opinion advice on the possibility of an appeal. In the absence of a material change in circumstances, advice under this scheme cannot be provided within 6 months of another lawyer providing advice in the same matter.<sup>5</sup> The provisions of advice under the Advice and Assistance scheme are subject to a test, which must be kept under regular review by lawyers. The test states:

*“Advice and Assistance may only be provided on legal issues concerning English (or Welsh) law and where there is sufficient benefit to the Client, having regard to the circumstances of the matter, including the personal circumstances of the Client, to justify work or further work being carried out.”*

Specifically in relation to CCRC casework, the LAA's Standard Crime Contract goes on to state:

*11.19 You must take instructions from the Client to establish whether the case is one which the CCRC could consider. You must bear in mind that the CCRC is a last resort and an application to the CCRC may only be made if the Client has either appealed against the original conviction or leave to appeal has been refused.*

<sup>1</sup> CAA 1995, s.13. Judicial interpretation of this test was given in *R v Criminal Cases Review Commission (ex parte Pearson)* [1999] EWHC Admin 452

<sup>2</sup> Maddocks, G (2019) An argument for reforming the Court of Appeal Law society Gazette, 4 November; Kerrigan K. (2012) Real Possibility or Fat Chance?. In: Naughton M. (eds) *The Criminal Cases Review Commission*. Palgrave Macmillan, London.

<sup>3</sup> Criminal Cases Review Commission (2020) Annual Report and Accounts 2019/20 HC521 ([https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq11/uploads/2020/07/CCRC-2329571-v1-CCRC\\_Annual\\_Report\\_and\\_Accounts\\_2019-20\\_Final\\_for\\_web.pdf](https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq11/uploads/2020/07/CCRC-2329571-v1-CCRC_Annual_Report_and_Accounts_2019-20_Final_for_web.pdf))

<sup>4</sup> Roberts, S.(2019) Post-Conviction Review in England and Wales: Perpetuating and Rectifying Miscarriages of Justice. in: Lennon, G., King, C. and McCartney, C. (ed.) *Counter-terrorism, Constitutionalism and Miscarriages of Justice: A Festschrift for Professor Clive Walker* London Hart Publishing. pp. 249-267

<sup>5</sup> This is problematic of itself given that there is a 28-day post-conviction time limit to lodge an appeal at the CoA, subject to the Court's discretion to allow an extension under Practice Direction 52C.

11.20 *If your Client's Case is suitable to be heard by the CCRC, you must consider whether the case may be able to meet the referral criteria applied by the CCRC.*

If a case is considered to have sufficient benefit, initial funding is limited to £456.25 (roughly 10 hours work) in the first instance, though applications to extend that upper limit can be made.

There has been no increase in criminal litigators' legal aid payment rates for more than 20 years, and this represents a substantial cut in real terms, due to inflation.<sup>6</sup> There were fee cuts in March 2014 and reductions in the upper limit for payment. The main objective of this project was to examine the impact of these funding cuts on applications made to the CCRC. In doing so, we hope to inform public policy and provide guidance about how CCRC casework can be conducted more effectively.

The primary aims of the research were to explore:

- a) What, if any, problems might exist for applicants seeking legal advice/help preparing applications to the CCRC
- b) The impact of changes to legal aid funding on lawyers' ability to conduct CCRC casework
- c) The impact of legal aid cuts at the CCRC

Additionally, the project aimed to address whether cuts to publicly funded representation have had any impact on:

- a) the number of applications being made
- b) who is making the applications
- c) the quality of the applications being made and
- d) the types of issues being relied upon by applicants

To address those issues, we needed to examine whether it was possible to identify trends in the number of applications being submitted; whether such trends reflected changes in legal aid provision; whether it was possible to focus the data around specific points in time; and whether it was possible to detect a change in the quality of the preparation of applications which are submitted.

This project also aimed to fill an important gap in research. While there has been research on (i) the impact of legal representation on applications made to the CCRC and, separately, (ii) the impact of legal aid cuts generally on criminal defence lawyers, there has not been any research which combines these factors. The project addresses that gap in the field.

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<sup>6</sup> In 2020, as a result of the Ministry of Justice's *Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes*, some litigator fee payments that had been removed from scope were reinstated, though there was no increase in fee payment rates at this time. There had also been an increase in advocates fees in 2018, following the Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2018.



## Research Design

We drew on our experiences as legal professionals, academic lawyers and a criminologist, alongside specialisms in research methods to design a project that would use a robust mixed methods approach. This research was conducted over the course of almost three years, and consisted of five stages that combined quantitative and qualitative research methods to enhance opportunities for triangulation of data, and thus generate more robust research findings. Each stage is described further below.

### Literature that informed the research design

We drew on two main bodies of literature to inform our research design. The first suggested that lawyers can play a crucial role in the CCRC's decision making process. Hodgson and Horne's study found that a lawyer's role was perceived to be crucial in 49% of cases where a decision to refer the case was made, and that applications involving lawyers had a significantly greater chance of referral than those which did not involve lawyers.<sup>7</sup> The same research suggested that levels of legal representation were around 33%, but that the CCRC would regard higher levels of representation as beneficial to the review process.<sup>8</sup> Quality of casework was measured (by the CCRC) in terms of focusing submissions on pertinent issues, thoroughly preparing case papers and liaising with applicants.<sup>9</sup> However, CCRC staff did express, to Hodgson and Horne, some concern about lawyers providing poor quality advice, which was perceived to be the result of inadequate funding.

Solicitors interviewed by Hodgson and Horne expressed the view that publicly funded remuneration rates were so low that CCRC work was not economical, and some firms were abandoning such work altogether. Hodgson and Horne also developed their research by reference to the quality of applications made by legally represented applicants, and we used that understanding of what constitutes 'quality' as our starting point in this work. As our work progressed we also drew on research which indicated that lawyers perform a significant amount of filtering work in relation to potential CCRC cases, and the impact that this might be having on the number of ineligible applications received by the CCRC.<sup>10</sup>

Recent research by Hoyle and Sato highlighted the considerable scope for discretionary decision making at the CCRC.<sup>11</sup> This work also provided some insights into how the CCRC viewed the role of lawyers in CCRC cases. Their research found that some Commissioners suggested, for example, that lawyers often do nothing and in some cases can be "a nightmare" to work with.<sup>12</sup> Despite this, Hoyle and Sato noted that the Commission did encourage applicants to seek legal representation and was in favour of good legal representation, noting that good lawyers could help the process by providing detailed, informative and clearly written submissions, and could assist in sign-posting key issues.<sup>13</sup> Hoyle and Sato took the view that it is unsurprising that legal representation has been shown to have an impact on outcomes. Both Hoyle and Sato, and Hodgson and Horne, noted that legal representation often had the most impact on a CCRC case at the initial screening stage.

The second body of literature that informed this research was that which examined the impact of legal aid cuts on the work of criminal defence lawyers. Existing research on the impact of legal aid cuts on lawyer behaviour has identified three key themes: a level of de-skilling and greater reliance in unqualified staff to conduct 'routine' work;<sup>14</sup> routinisation of work so that less time is given to the

<sup>7</sup> Hodgson, J and Horne, J (2009) *The extent and impact of legal representation on applications to the Criminal Cases Review Commission (CCRC)*. Working Paper. Coventry: Department of Law, University of Warwick. Working papers series. These findings were based on a study of data taken from the CCRC management information system; their own analysis of 10% of applications closed within the sample periods 1 October 2005 to 30 September 2006 and 1 October 2006 to 30 September 2007; interviews with 15 CCRC staff and with 7 solicitors involved in CCRC applications; and 13 questionnaires completed by solicitors who are involved in CCRC applications.

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Hodgson, J, Horne, J and Soubise, L (2018) *The Criminal Cases Review Commission. Last resort or first appeal?* Coventry: Department of Law, University of Warwick.

<sup>11</sup> Hoyle, C. and M. Sato (2019). *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission*. Oxford, OUPs

<sup>12</sup> Ibid; 111.

<sup>13</sup> Ibid; 109-112

<sup>14</sup> Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).

specific detail of individual cases<sup>15</sup> and less time is spent on client care;<sup>16</sup> and tension between the need to maintain business interests while also acting in a clients' best interests.

Changes to the provision of legal aid in defence services, including the reintroduction of means testing, have produced further uncertainty about payment, thereby increasing the risks for lawyers deciding whether or not to provide assistance in cases.<sup>17</sup> Lawyers who struggle to balance the interests of the client against the needs of the firm, and the obligation to maintain contract compliance with the LAA, experience heightened role conflict which places further strain on the lawyer-client relationship.<sup>18</sup> The increasingly complex nature of the criminal justice process has also had a significant impact on lawyer behaviour,<sup>19</sup> particularly in the face of fees that have not risen in line with inflation. Resultant low morale, coupled with funding concerns, have increased concerns about the sustainability of the profession.<sup>20</sup>

### The Research Stages

The project was informed by four temporal anchors, each of which are referred to by letters in this report:

- 1) The CCRC's introduction of an Easy Read application form in April 2012 (**time period A**)
- 2) The enactment of LASPO in April 2013, which created the LAA (**time period B**)
- 3) Cuts to legally aided expert witness fees in December 2013 as a result of the Criminal Legal Aid (Remuneration) Regulations 2013 (**time period C**)
- 4) An 8.75% fee cut across the board of criminal legal aid fees that defence litigators could claim, introduced in March 2014<sup>21</sup> (**time period D**).

Having identified the above four dates as being of potential significance, we designed the project to consist of five stages in total:

**Stage one:** A quantitative analysis, using STATA, based on information contained in CCRC databases. We examined all data in the CCRC dataset from 1997 – 2017. Analysis consisted of both descriptive statistics and time series analysis results around the four temporal anchors described above.

**Stage two:** A review of 280 CCRC casefiles. This analysis was conducted using the CCRC's case record system. We systematically sampled 70 cases from the six months either side of the four time periods. Analysis focused on counting the incidence rate in a form of quantitative content analysis of particular features around each time period. We also conducted a thematic qualitative analysis of the data in relation to narrative comments recorded on case files.

**Stage three:** A survey of legal professionals. This stage involved using Qualtrics to construct an online survey of lawyers according to some key themes around funding, lawyer behaviour and lawyer opinions about the CCRC.

**Stage four:** Semi-structured interviews with 45 legal professionals, conducted between November 2019 and June 2020. The key themes explored at stage four replicated the themes investigated at stage three. Agreed and anonymised transcripts that were produced from the interviews were coded using NVivo.

Our intention was that the bulk of our sample should comprise legal professionals with experience of working on potential CCRC cases under public funding. We began with a broad sampling frame and made use of snowball sampling to build the sample. Our decisions about who to approach became slightly more purposive as we sought to build a balanced and diverse sample, in terms of experience, funding and work practices. We also decided to include a small number of lawyers who did not or had

<sup>15</sup> Gray, A, Fenn P and Rickman, N 'An Empirical Analysis of Standard Fees in Magistrates' Court Criminal Cases' (LCD Research Series, 1999).

<sup>16</sup>Tata, C. and F. Stephen. "Swings and roundabouts: do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes?" *Criminal Law Review* 2006 (2006): 722-741..

<sup>17</sup> Welsh, L (2017) *The effects of changes to legal aid on lawyers' professional identity and behaviour in summary criminal cases: a case study*. *Journal of Law and Society*, 44 (4). pp. 559-585

<sup>18</sup> Ibid; Dehaghani, R and Newman, D (2021) *Criminal Legal Aid and access to justice: an empirical account of a reductio in resilience* *International Journal of the Legal Profession*

<sup>19</sup> Newman D, (2013) *Legal Aid, Lawyers and the Quest for Justice* (Hart Publishing); Cape, E and Moorhead, R (2005) *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre)

<sup>20</sup> Ibid; Thornton, J 'Is Publicly Funded Criminal Defence Sustainable? Legal Aid Cuts, Morale, Recruitment and Retention in the English Criminal Law Professions' (2020) *Legal Studies* 4(2) 230-251

<sup>21</sup> A further 8.75% cut was planned to be introduced but was indefinitely suspended by Michael Gove when he was Lord Chancellor.

not done CCRC work, in order to explore whether funding was part of that decision and whether CCRC work was perceived differently by those who did not undertake such work.<sup>22</sup>

**Stage five:** Focus groups with CCRC staff. As the final stage of the project, the focus groups were intended to draw developed themes together and to examine possibilities for change. As a result of the Covid-19 pandemic and subsequent changes in University research guidelines, we adjusted our research design from in-person focus groups to online focus groups of around 90 minutes via MS Teams. Before the focus group, participants were asked to read a 15-page document outlining the findings at each completed stage and this formed the basis for the discussion.

Participants were recruited via the CCRC's research liaison staff. Commissioners, Managers, CRMs and casework administrators were all invited to participate. Eleven people took part in the research. Anonymised transcripts were coded thematically using NVivo software.

### Limitations

Throughout the project, we had to keep in mind that changes around the four anchors occurred too close to properly distinguish from each other. This was especially problematic at stage one, where we were already dealing with limitations of administrative data. In relation to that data, the CCRC had advised us that raw data about levels of legal representation was likely to be inaccurate. It often transpired that the applicant had erroneously named their trial lawyer as acting on their behalf, and the applicant was in fact unrepresented, but the system indicated that the applicant was legally represented. We adjusted our stage two analysis to account for this data, where it was possible to do so.

Also at stage two, and given the nature of this project, we had hoped that it would be possible to find out information about legal aid status from the case files. However, the case records contained information about representation status rather than how that representation was funded. We could not therefore distinguish applicants who were in receipt of publicly funded representation from those who had privately funded representation.

The survey, interviews with legal professionals and focus groups all have the potential to be affected by self-selection bias as participants were all people who had volunteered to take part. It is possible, for example, that the respondents who completed the survey or who agreed to be interviewed represented a more politically active sub-section of the profession and this motivated them to take part. During stage four, we attempted to overcome any problems associated with self-selection biases by purposively recruiting lawyers from a variety of firms. However, an element of bias towards people who did more of this kind of work and/or were more actively engaged in this kind of work may remain. While mitigated by the promise of anonymity, it is also important to recognise that both survey and interview data reflects self-reported behaviours, which may or may not match people's actual behaviour. Although it is important to recognise that the ability of interviews to uncover actual working practices is necessarily limited, the different stages of this research provide opportunities for triangulating lawyers' accounts with other data sources and, where lawyers' accounts were consistent with one another, we can also surmise that their accounts were close to reality. The focus groups were not intended to be representative, which meant that self-selection bias was not a serious concern, although it was something we kept in mind when analysing the data.

In relation to the survey in particular, the link was distributed to 480 firms/individuals that we had identified as potentially or previously conducting CCRC casework. Additionally, we asked professional organisations (including the Criminal Law Solicitors' Association and London Criminal Courts Solicitors' Association) to promote the survey and to distribute the link among their members. Despite our best efforts, we ended up with a dataset of only 16 respondents, which meant analysis of this data was limited to descriptive statistics. Nonetheless, our participants' views provided initial insights into issues around legal representation and the CCRC from a practitioner perspective which we followed up within the later stages.

The low response rate is not unique and previous research with legal professionals has suffered from very low response rates. For example, Hodgson and Horne reported receiving 13 responses to their

<sup>22</sup> This decision also resulted from our experiences with the survey. The survey immediately cut off people without asking them why they did not do such work, so we changed the research design to ensure we captured the view of people who (no longer) perform CCRC casework.

questionnaire, which was sent to 50 firms recorded as working on CCRC cases.<sup>23</sup> The very low response rate must also be viewed in the specific context of publicly funded criminal defence work with its low remuneration rates, time pressures, and low morale. The legal aid landscape has changed quite significantly since 2008.<sup>24</sup>

Other limitations at stage five may result from the online nature of the focus groups. Conducting focus groups online is not common within social science research and there is therefore little to suggest in what ways our data may be affected by online data collection. Within the literature that does exist, it is suggested that conducting focus groups online may lead to more distractions (related to connection, software and hardware issues),<sup>25</sup> and fewer interactions between participants (because conversation may be less flowing, dynamic and deep where people are not in a room together and are less able to read visual cues).<sup>26</sup> In our research these features do not appear to have been significant, perhaps because of the participants' existing familiarity and/or the rapid increase in the use of online meeting software from March 2020 as a result of the Covid-19 pandemic. We also worked to limit online fatigue by keeping the focus groups under 90 minutes and including interactive activities at regular intervals

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<sup>23</sup> Hodgson, and Horne (n7); 11.

<sup>24</sup> See also Sommerlad, H. (2002). Women solicitors in fractured profession: Intersections of gender and professionalism in England and Wales. *International Journal of the Legal Profession*, 9(3), 213-234.

<sup>25</sup> Abrams, K., et al. (2015). "Data Richness Trade-offs Between Face-to-Face, Online Audiovisual, and Online Text-Only Focus Groups." *Social Science Computer Review* 3: 80-96.

<sup>26</sup> Gothberg, J., et al. (2013). "Is the Medium Really the Message? A Comparison of Face-to-face, Telephone, and Internet Focus Group Venues." *Journal of Ethnographic & Qualitative Research* 7: 108-127.

## Part I: The Easy Read application form

The stage one results suggested a significant increase in CCRC applications after the introduction of the Easy Read form in April 2012. Between April 2012 and December 2013, the proportion of applicants in our stage two sample using the Easy Read form rose from 49% to 80%. Overall, from the introduction of the form to the end of the review period in September 2014, the percentage of applicants in the sample using the Easy Read was 88% (216 out of 245 applicants), demonstrating high levels of acceptance.<sup>27</sup>

Although no other form was available after April 2012, it remained possible for lawyers to make an application on behalf of a client by simply preparing written submissions with a covering letter. However, by the end of the review period, every legally represented applicant was using the Easy Read form. We assumed initially that this could have been because legal representatives found the form useful to ensure that all the information required by the CCRC was included in the application, and that representations were appropriate and targeted. However, during the interviews it became apparent that many lawyers were under the impression that the CCRC actually required them to submit applications via the Easy Read form.

While several stage three respondents found the form useful to a greater or lesser extent,<sup>28</sup> some lawyer interview respondents felt patronised by what they understood to be the obligation to use it:

*It's designed to be completed, I think, by people who are in prison. So, with the greatest of respect, it's a bit Noddy-ish, the actual application, a bit sort of Toy Town. It just feels a bit odd sometimes when you're filling it in, when you're going to attach to it something that you're very pleased with professionally – R26*

There was clearly a disconnect between CCRC and lawyer understanding about use of the form, which helps us to contextualise lawyers' understanding about what is required in CCRC casework. One lawyer told us:

*I mean, basically, we don't need those forms at all. I can understand, just like we send out questionnaires, that the CCRC have got their forms that they want with every application. So, sometimes, we have to write to the client and say, "Look, we're all good to go here, can we just have your signature on this form please?" And then we have to wait two weeks, or whatever, to get the form; we didn't actually need it ourselves, the CCRC did – R40*

The belief of some lawyers that they were obliged to complete the form fed into feelings of being patronised, when it is unlikely that was the CCRC's intention.<sup>29</sup> Greater clarity of communication in both directions could assist with this disconnect, and foster better avenues of communication more generally (see Part IV). This could, in turn, mitigate some of the issues caused by funding challenges that are described below.

Most respondents recognised the utility of the form in facilitating applications from unrepresented applicants, even though the process is still challenging. The form does state that applications should contain new and important information, be used by people who have already tried to appeal, and should not repeat points made at trial or on appeal. However, the high rate of 'no appeal' applications,<sup>30</sup> and our file observations of applications being rejected for repeating previously used arguments/issues, suggest that applicants cannot understand what is required without further specialist assistance:

*The vast majority of our clients are in the vulnerable ... learning issues, mental health problems, again, language issues. So, I would say that even though the form is made as accessible as possible*

<sup>27</sup> The success of this form prompted the CoA to adopt its own Easy Read form in 2018. The CCRC assisted the CoA with the implementation and design of its form.

<sup>28</sup> Half of survey respondents who had experienced using the Easy Read form, the majority of whom found it useful (1 ticked extremely useful, 3 "very useful" and 3 "moderately useful"). One respondent found the Easy Read form not useful at all.

<sup>29</sup> The CCRC indicates that it did receive feedback about the Easy Read form from 7 of the 20 solicitors that it consulted prior to introduction of the document, and that the feedback was positive. Nevertheless, there remains disconnect surrounding expectations regarding the use of the Easy Read form in the broader community of CCRC legal representatives, which could be remedied by more communication in this area.

<sup>30</sup> Averaging around 40% of applications received according to Hodgson, Horne and Soubise (n 10)

*for people to complete, they're not really knowing what they need to write, and a lot of them can't even write or spell or read – R32*

There is probably little more that the CCRC can, itself, do to make the process easier and more accessible for unrepresented applicants. This seems instead to highlight a need for specialist guidance about what are, and are not, grounds for review. We did, however, note a contrast between the way the Easy Read form and the SOR documents were presented. The application process is represented simply and pictorially, whereas, notwithstanding recent attempts to improve accessibility,<sup>31</sup> the outcome in the SOR is often a dense document employing highly technical language. While the Easy Read form is active (to be completed) and the SOR is passive (no action necessarily required), it does seem something of a disconnect, especially for unrepresented defendants who have no-one to explain the meaning of the SOR.<sup>32</sup>

### Summary

Our research suggests acceptance of the Easy Read form by both applicants and legal practitioners, and an increase in the number of applications received since its introduction. Reactions to the form amongst legal professionals were mixed, with some finding it useful in helping to organise an application, whereas several others, seemingly unaware that there was no obligation for lawyers to use it, considered the form unsuitable for their purposes or felt patronised by it.

While use of the Easy Read form increased the initial accessibility of the CCRC to applicants, it does not address the more fundamental problem that unrepresented applicants struggle to understand the nature of a CCRC application, and the requirements to be eligible for review. The introduction of the form seemed to lead to an increase in the number of applications received, but it is not clear that there has been a corresponding level of cases that are considered eligible for review, or for referral. The CCRC seems to have exhausted – through both the form and its outreach programme – its ability to assist in this regard, which highlights the importance of specialist assistance for potential CCRC applicants.

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<sup>31</sup> The CCRC has, in the last few years, developed three different types of decision notices to try and improve the accessibility of these documents. However comments made by lawyers (see Part D) suggested that more could be done in this regard.

<sup>32</sup> Concerns about the accessibility of decision documents were also raised at p.58 of the Westminster Commission on Miscarriages of Justice's report: <https://appgmiscarriagesofjustice.wordpress.com/commission-on-miscarriages-of-justice/>

## Part II: LASPO and the Creation of the LAA

LASPO had a “devastating” effect on the availability of legal aid in civil cases, moving many areas of practice out of scope.<sup>33</sup> LASPO also created the LAA, an executive agency of the MoJ.<sup>34</sup> It became increasingly apparent during this research that the way the LAA operates is a significant barrier to legal professionals who want to conduct CCRC casework.

### Lawyers’ experiences of dealing with the LAA and how that affects casework

At stage three, it became apparent that legal professionals believed that the LAA could be obstructive. Many respondents complained that the LAA applied tests in an unfair or inconsistent manner, with respondents variously describing its processes as irrational, perverse, or burdensome. These issues were raised again in interviews at stage four, where participants felt that the LAA was obstructive and distrusting of lawyers,<sup>35</sup> and found this frustrating and insulting. In this sense, barriers created by the LAA seemed not only to exacerbate delays – making the work more drawn out and, therefore, less time efficient – but also had knock-on effects for morale. This appeared particularly problematic amongst more junior practitioners, several of whom were open about their plans to move into different areas of practice.

Legal professionals raised a range of issues relating to trust and communication between themselves and the LAA, but the operation of the SBT provided a useful illustrative example of the difficulties that legal professionals experienced when attempting to interpret and apply tests used by the LAA. As noted on page 5, the first hurdle that must be overcome for a legal professional to provide publicly funded advice in CCRC cases, is the SBT. At stage two, we identified a potential issue with ‘no appeal’ cases and the SBT, which seemed to create a particular problem for prospective CCRC applicants. When asked about the appropriateness of the SBT at stage three, lawyers’ responses were very mixed: seven respondents found it appropriate, one person indicated it was “neither appropriate nor inappropriate”, and eight respondents found it inappropriate. Legal professionals accepted that there was a need to ensure that public funds are spent in the most appropriate way, and that the SBT assists with the proper management of public funds, but also felt that the CCRC’s low referral rate had knock-on effects for funding since a lower chance of referral made it harder for lawyers to satisfy the test. However, when asked to explain their reactions to the SBT, it was evident that even where the test was considered appropriate, participants were concerned about the way in which the test was administered by the LAA. These concerns are illustrated by the following comments entered on the survey:

*It is subjective and open to interpretation against the [sic] solicitors by the LAA on audit. It would be preferable for there to be a right to undertake basic work to see if the case has merit before committing to further work on it but not such that clients can go from firm to firm seeking a different opinion continuously. It is possible to deal with cases in this way under the SBT but there is always a risk of negative review on audit and nil assessment of the case.*

These concerns were echoed at stage four, where participants suggested that the subjective nature of the SBT was particularly problematic in CCRC cases. Participants explained that filtering required an unfunded commitment of time to establish merit. A large proportion of cases would entail work merely to establish ineligibility and as a result “you’ve got nothing, or a negative quota on your sheet for doing that file” (R23). The subjectivity of the SBT also left firms vulnerable to criticism on audit and, ultimately, to repaying funds, which fed into the overall financial unviability (Part III) of the work.

*Nobody really knows where the line is. You could be audited on it and the auditor could say, “Well I think there’s no sufficient benefit here”, even if you thought there was. Then you end up in a big argument about whether that was right or not. But again, who needs that? You know, who running a criminal legal aid firm needs to put themselves in a position whereby they might end up in an argument over a case that was completely uneconomic in the first place? – R45*

<sup>33</sup> Organ, J and Sigafos, J (2018) The impact of LASPO on routes to justice. Equality and Human Rights Commission. Research report 118. (Manchester: Equality and Human Rights Commission)

<sup>34</sup> Immediately prior to the creation of the LAA, legal aid was administered by the Legal Services Commission (LSC). The LSC was an executive non departmental body, meaning it was more removed from the Ministry of Justice than the LAA.

<sup>35</sup> Examples of LAA obstructiveness provided by participants included the requirement for written quotes to come from counsel even where details are set out by an experienced solicitor, and advices to be written by counsel, even where solicitors were competent in providing them.

In the interviews at stage 4, it became apparent that suspicion and uncertainty about the way the LAA administered tests – especially for extensions of the upper payment limit – fed into the way that legal professionals conducted casework. Several participants explained that the LAA simply did not grant the hours required to do the work, creating a situation where diligent lawyers ended up working for free. The position is highlighted by the following example of common concerns:

*If you put a request into the Legal Aid Agency, you know you're not going to get the level of funding you require to do the piece of work. They may grant you two hours, but you know it's going to take you five. So, you find the time to do it, whether that's weekends, evenings – R17*

Whether extension applications were successful or not, there was work involved in making them, and more work if lawyers had to challenge a LAA decision not to grant the hours requested. It was therefore significant that the (often time-consuming) administration involved in applying to and negotiating with the LAA was also unfunded. This unpaid administrative work made the work less profitable and increased the financial strain on firms, especially in long running cases where these unpaid hours added up, and in firms operating with large caseloads. One solicitor described the challenges as follows:

*The difficulty is that the process of extending... it's time consuming. And my view is that the amount of time it takes just to do the extensions is probably ... I mean, once you get the money through, it probably pays for the time that you spent getting the extension itself, not doing the actual work that you've got the extension to do – R45*

As well as creating an administrative burden for firms, the requirement to request more hours each time, and then negotiate over those hours, caused delays in casework. A couple of interview participants also noted the impracticality of having to stop each time, explaining that the stop-start nature of the funding system got in the way of completing the work, so that they often just carried on, despite not getting paid. This created a situation where lawyers were almost obliged to conduct *pro bono* work (see Part III).

Legal professionals also raised concerns about the LAA's willingness to fund investigation work, as in the examples below. Ultimately, this meant that investigative work to discover whether or not there was a real possibility of referral (or an unsafe conviction at all) might not be conducted. If lawyers ask the CCRC to conduct those investigations, this will increase the workload of the CCRC, with possible knock on effects for their own resources.<sup>36</sup>

*What we're proposing to do, i.e. go out and meet witnesses, review crime scenes, analyse, spend a great deal of time analysing the documents that are available to look for anomalies and patterns [...] that sort of work, the Legal Aid Agency struggles to encompass under the guidelines that it is operating under – R14*

*Let's say, for example, that a particular witness needs to be spoken to [...]. The Legal Aid Agency want to know why that witness needs to be spoken to, but also will cut down the number of hours as much as it can [...] what they will do is they will make it so, so difficult to do that those avenues won't be explored on appeal – R31*

Another area in which relationships with the LAA appeared to be strained was in relation to the fact that the LAA did not allow for interim disbursement payments in CCRC cases, which meant that firms were either unable to pay expert and counsel fees, along with other disbursements, before the file was closed, or had to carry those costs themselves for long periods of time. In cases involving long running or complex issues this could represent a huge financial burden for firms, which simply could not be carried by firms where this work was already loss-making. One legal professional expressed the view during an interview that “[i]t's really the upfront costs that is one of the biggest obstacles, I think, for firms doing this sort of work, to be honest” (R35).

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<sup>36</sup> This issue is discussed with specific reference to funding expert witness reports in Part V.



## Auditing and risk

While firms routinely make decisions on the merits of potential CCRC cases and on applicants' eligibility, these decisions are open for scrutiny by the LAA which has the power to retrospectively nil-assess files and/or reduce the fee on audit. Several interviewees commented on the strictness of the LAA's bureaucracy, one senior solicitor describing it as "crucifying" (R8) because of the potential risks on audit. While these bureaucratic issues were not unique to CCRC work, some lawyers felt that the risks on audit were exacerbated by the fact that the LAA tended to target CCRC files. Targeting was attributed to two factors: CCRC casework was one of very few areas of criminal defence practice where firms are able to self-certify for legal aid; and, in the LAA's eyes, the cases had already been funded through the trial process. Problems on audit appeared likely to be much more severe for less specialised firms and/or those who relied on less experienced staff to do the work.

Although CCRC files were recognised as at risk of being targeted by the LAA on their merit, participants stressed that so long as everything was justified on the file, there should not be any problem on audit. This seemed, however, to increase the bureaucratic load on lawyers' casework and eat into fee-earning time. Reflecting the fact that risk on audit contributed to the financial unviability of CCRC work, several firms had taken decisions and devised practices to protect themselves from the LAA. One participant, for example, described the process of introducing a specific sufficient benefit form to demonstrate the consideration of merits. Another strategy was to tighten up the processes of collating client information through the use of client questionnaires. Several firms had introduced such forms to allow them to assess merits and means in a way that also demonstrated to the LAA that decisions to take on cases were properly considered.

Risks on audit alone were not necessarily substantial enough to deter or to push people out of CCRC casework, but they were recognised as a contributing factor for some participants who had withdrawn from CCRC work or who were accepting only privately paying clients:

*They were going into lots of firms, reviewing lots of files, and basically just cutting everything. And I know that they did it with a large number of solicitors. And it then got to the point of, really, what is the point in doing this work? [...] It was, even when you've made the decision and you felt that the tests had been met, that they were then coming in saying, "You were wrong to make that judgement" – R32*

## Summary

Legal professionals conducting CCRC casework fully understood the need to maintain compliance with standards set by the LAA to ensure the appropriate management of public funds. However, the way in which the LAA administered tests and audits appeared to undermine lawyer's ability to conduct casework efficiently in the way that they felt would be most beneficial for clients, and for the CCRC. Issues of risk and uncertainty about payment – especially around initial work conducted and the SBT and unavailability of interim payments – seemed to weigh heavily in the minds of participants.<sup>37</sup>

The practicalities of maintaining contract compliance led legal professionals to reportedly conduct significant amounts of work unpaid, both in relation to casework itself, and simply in order to demonstrate contract compliance and to minimise risk on audit. Both of these factors impaired firms' ability to conduct CCRC casework in a financially viable way.

Similarly, legal professionals felt that they were not trusted as professionals who knew how to manage casework. Many professionals who participated in our research were of senior standing, and felt that lack of trust fed into poor morale in the profession. Both financial risk and low morale appear to contribute to the (increasing) unviability of CCRC casework, which is discussed further in Part III.

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<sup>37</sup> This echoes other findings in relation to funding uncertainty and risk. See Welsh (n 17).

## Part III: Funding and changing work practices

Lawyers' experiences of funding were complex. While we have separated key themes below, the issues raised were often overlapping and fed into general concerns about the financial viability of conducting CCRC casework.

### Fluctuating levels of representation

There were clear differences in the reported levels of representation of CCRC applicants across the different stages of this research and in other comparable data. The stage one analysis of representation data between 1997 to 2017 indicated average levels of professional representation for CCRC applicants during that period at 31.50%, with 33.23% of applicants unrepresented and the remainder receiving support from family, friends or action groups.

After 2012, the number of applications made with solicitor representation displayed a negative (downward) trend, while applications with other types of, or no, representation followed a more upwards (positive) or relatively stable trend (see Appendix 1). An analysis of the same data also showed a significant month on month decrease in legally represented applicants after 2012. However, the reliability of the officially recorded data on which these findings are based, seems to be compromised somewhat by missing data<sup>38</sup> and the tendency of applicants to record inaccurately the name of their trial solicitor as their legal representative for CCRC purposes.

To correct for these potential distortions, our stage two review of case files relied on evidence of actual participation by the legal representative, rather than on their being merely named by the applicant. Amongst our sample of 280 cases, 42 applicants had named legal representatives who appeared to play no part whatsoever in the application process, and these were excluded from the list of those applicants we considered to be represented. We found that 64 applicants were actively represented, which constituted 23% of our sample, a figure considerably lower than the 31.5% indicated by the raw statistical data above. This was also a lower level of legal representation than found by Hodgson and Horne across the time period 2005-2007.<sup>39</sup> We consider that the overall rate of representation which we determined at 23% during the period under review (2012-2014), is likely to be a more accurate reflection of reality during that period. The first possible reason for the difference is that alternative recording methods have been used in different data sets. Stage one took the raw figures provided by the case management system, and therefore would have also included people who said they were represented but were not in fact legally represented. Further stage one covered the whole 20 year dataset, but also recorded a drop in levels of representation after 2012. Moreover, the figure of around a quarter is also broadly in line with anecdotal evidence, such as the views of one former Commissioner in 2018.<sup>40</sup>

While the average level of representation from October 2011 to September 2014 was around one quarter of applicants, a breakdown of the stage two data indicates that levels of legal representation have dropped significantly since 2013. We note that the CCRC's 2018-2019 Annual Report also recorded that levels of legal representation have dropped further so that only around 10% of applicants are now legally represented. This decrease can be seen across the stage two data set in which the number of legally represented applicants in each 70 case data set dropped from 21 in period A, to six in Period D. Thus both the stage one data analysis and stage two data analysis suggest a significant month on month drop in the number of legally represented applicants from around March 2014 to Autumn 2017.

This reduction in access to legal advice was also reflected on individual case files where complaints about this issue rose from 1.4% of applicants in the first time period (A) to 5.3% of applicants in the final time period (D). Some applicants even referenced legal aid cuts directly as the source of their inability to secure representation, one saying "(m)y solicitor said not to appeal and now the legal aid laws have changed and I have no money for a solicitor". Concerns about funding were also expressed in the file correspondence by lawyers with greater frequency during time periods C and D. At stage

<sup>38</sup> See Wiedlitzka, S and Welsh, L (2018) Criminal Cases Review Commission: Legal Aid And Legal Representatives. Stage 1 Data Analysis – Final Report (Brighton, University of Sussex).

<sup>39</sup> Hodgson and Horne (n7). Hodgson and Horne categorised their data differently. They included applicants who named a lawyer but that lawyer was clearly not providing representation to the CCRC under the 'represented' category in their study (their 'Acceptably Inactive' category). Further, Hodgson and Horne assessed an 'accuracy rate' for the data. They then examined how many applicants the CCRC case management system recorded as represented and amended the figure by applying their accuracy rate. We instead examined individual case files, and did not include those who named a lawyer who was not acting in the 'legally represented' category.

<sup>40</sup> Persaud, S (2018) *Criminal Justice In Crisis?* Criminal Appeals Lawyers Association Conference, 3<sup>rd</sup> November, London.

five, CCRC staff also reported that they were receiving more enquiries and complaints about/from applicants being unable to access legally aided advice services from around 2014.

Taking all of the above information into account, it is reasonable to conclude that there was a significant decrease in the number of applicants who have had the benefit of legal representation since 2013. This appears to correlate with a reduction in legal aid fees available to criminal defence lawyers, which came into force in March 2014, alongside other changes to contracting criteria (such as the formation of the LAA).

The consequences of this reduction were plain. Many unrepresented applicants failed to understand the necessity for either a rejected appeal or for “exceptional circumstances” justifying the absence of an appeal, in order for the case to be reviewed by the CCRC. CCRC staff did indicate that, particularly as a result of the decreasing levels of representation, investigations needed to be carried out in ‘no appeal’ cases to ensure that there was in fact no issue to be considered. Evidence exists, however, that the CCRC has taken a narrower approach to the existence of ECs in recent years, and that this could be especially problematic for applicants who have not had the benefit of legal advice.<sup>41</sup> Unrepresented applicants who cannot show exceptional circumstances might face the additional hurdle of seeking an extension of time to lodge an appeal.<sup>42</sup> Evidence from our interviews with legal practitioners indicated that firms were increasingly unlikely to take on such speculative work *pro bono*, in the vague hope of future remuneration if successful. Overall it is quite clear that the rise in numbers of unrepresented applicants was likely to increase the workload of the CCRC, whereas early intervention in the form of appropriate legal advice could filter out cases where no grounds exist.<sup>43</sup>

#### How lawyers experienced funding (cuts)

Stage three survey participants voiced strong opinions about legal aid payment rates, and all 16 reported that the payment rates were too low. Some reported that they were so low that they were no longer able to perform CCRC casework at all. Several others commented that providing advice in this area of law was loss-making for the firm, and that they have changed their approach to CCRC casework in light of the legal aid cuts. Half the participants raised concerns about the payment rate, particularly in view of the complexity of CCRC applications. These concerns were also widely held among our stage four participants, as exemplified by the example quotes below.

*You can't do this sort of work effectively on the rates of pay that you get for legal aid, which haven't increased for 20 years or so. In fact, they've declined – R28*

*Generally, we are looking at some very complicated cases, and yet we're supposed to do it for a ridiculous rate of pay. It's just ... It's impossible to be honest – R7*

Rates of pay were not only understood to be low in and of themselves, but in relation to the complexity of the work. Several participants explained that the rates of pay meant you could not afford to pay people with the appropriate skills and experience necessary to conduct CCRC casework. Even firms who used paralegals to conduct CCRC casework struggled to make the work financially viable.<sup>44</sup>

The funding cuts (often referred to as problems arising “about five years ago” (R32)) were also implicated by our interview respondents in changes leading to redundancies, working “harder for less money” (R17), refusing to accept CCRC cases without initial private funding, moving to consultancy work as firms went out of business and, in the case of counsel, a drying up of requests for advice as fewer and fewer solicitors were working in the area. However, respondents differed in the significance

<sup>41</sup> Hodgson, Horne and Soubise reported that nearly 80% of applicants either failed to answer the question about exceptional circumstances, or cited reasons that were expressly excluded from CCRC criteria – including the absence of legal representation - and that the CCRC seems to be placing undue weight on the possibility of lodging an appeal in person in an attempt to remedy a more robust approach (n 10).

<sup>42</sup>As per guidance set out in *R v James & Ors* [2018] EWCA Crim 285. Moreover, recent research has indicated that very few applicants whose cases are rejected on a ‘no appeal’ ineligibility basis in fact go on to make an application to the CoA (Hodgson, Horne and Soubise (n10)). Note that this research predates the introduction of the CoA Easy Read form, so this issue would benefit from further exploration.

<sup>43</sup> This point is supported by the findings of a review conducted by the Ministry of Justice: Ministry of Justice (2019) *Tailored Review of the Criminal Cases Review Commission* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777176/tailored-review-of-the-criminal-cases-review-commission.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777176/tailored-review-of-the-criminal-cases-review-commission.pdf).

<sup>44</sup> Some respondents had experience of privately funded CCRC work, which was much more viable and allowed providers to offer a much higher quality “Rolls Royce service” (R26). Private work was also used to support the work necessary to meet the SBT and thereby enable a full legal aid application to be made later with more chances of success and less risks on audit. Others had concerns that the absence of a merit filter in privately funded cases might encourage support for unmeritorious cases by unscrupulous firms, and could produce different tiers of access to justice.

they attributed to the 2014 cut relative to other factors. For the vast majority of participants, the cut to fees was just one of many interlinked problems. For some, the cuts had been “another nail in the coffin” (R29) or “just another hit” (R40). Much depended on the financial and staffing position of the firm and a single practitioner in this area might manage to keep going even if they were “teetering on the brink” (R19). Several respondents also felt that the real underlying problem was the absence of any (realistic) increases in hourly legal aid rates over the last 25 years, rather than the recent cuts themselves. CCRC casework was recognised to be only one element in a much broader problem of legal aid cuts which made it increasingly difficult for such work to be cross-subsidised by other areas.

### Market contraction

It was striking that 18 of 45 interview participants (42%), the majority of whom were solicitors, were no longer willing and/or able to accept potential CCRC cases on legal aid. A few participants had withdrawn from providing advice and assistance to potential applicants around five years ago, shortly after the 2014 cut. Whilst older specialist practitioners in the area were retiring from the work, of the seven trainees and paralegals/caseworkers we spoke to, one had already moved into another area of practice and two described plans to move into other areas. Similar problems were also reported in the junior bar, where the rates were not sufficient to attract or to keep good junior lawyers. Some participants expressed concern that if CCRC work is not properly funded, juniors would not build specialism in the area, causing long term sustainability problems.

One solicitor described taking the decision to withdraw from publicly funded CCRC work around 2008 because it became “uneconomic” to do it to the necessary quality. Asked what they thought about the legal aid rates for CCRC work, they said:

*They're laughable. They're having a joke. It's just not possible. I don't think criminal practice in general is possible. [...] I can't remember how many years. '94, I think, was the last time they went up properly, '94. And I pulled out 14 years after that ... 14 years of making it more efficient, creating greater economies and trying to hang on to any semblance of quality – R16*

Some participants suggested that the only people still doing CCRC work were those who were passionate and committed, to the point that they would accept the losses the work entailed. Participants who were still providing a legal aid service also commented that they would not be able to afford to do so indefinitely and some suggested that if things did not improve, they too would have to stop. Solicitors still working in the area explained that demand had remained strong, and it was increasingly necessary to turn potential clients away or to direct them to the rapidly shrinking number of other providers, or to innocence projects.

### ‘Cherry picking’ cases

At stage three, lawyers reported that, as a result of changes to funding, they were less likely to take cases on, were more sceptical about requests for advice and assistance, and more selective about the cases they did take on.

Whilst some participants had come to accept unpaid filtering work as “a necessary evil” (R40), others cited this as a reason why firms had withdrawn from or were reluctant to take on CCRC work. Faced with the considerable bulk of evidence involved in such cases, it is inevitable that some firms would selectively ‘cherry-pick’ those cases where the issues were straightforward. The tendency was to reject those which were particularly complex or time-consuming, for example, requiring detailed reading of lengthy transcripts before an eligibility assessment could be made, in favour of those where the grounds were more obvious.

More than one participant suggested that as a result of different adaptation strategies, the legal aid market for CCRC work had fallen into two groups with high-quality small-caseload providers on one hand and less-qualified higher-caseload providers on the other.<sup>45</sup> This split was to some extent born out in our sample and concern was expressed at the consequences for equity and justice of the volume processing of cases and pragmatic selection. As one respondent put it:

*At the end of day, it's horrible for it to come down to money [...] but if it's a situation where we're simply not going to get any more funding, we have to close it off – R23*

<sup>45</sup> This is in line with other research which suggests that legal aid lawyers must, for their firms to remain financially viable, work to volume. See, e.g., Newman (n 19), Welsh (n 17).

### Levels of supervision and deskilling

Interviewees were almost unanimous in believing that CCRC work should be carried out by experienced lawyers, a view supported by CCRC staff at stage five. However, in some firms the financial challenges of legal aid work meant that they could afford to pay only paralegals, trainees and in some cases, consultants. Reported levels of supervision varied significantly and as one solicitor explained: “there’s no meaningful supervision arrangement possible for [consultants]. We tried it, it just didn’t work, and you can’t train people like that” (R16).

Although it was impossible to assess the prevalence of paralegalisation and consultancy from our sample, some participants suggested that young and inexperienced practitioners were widely relied upon to undertake CCRC casework, and some barristers indicated that, in their experience, paralegalisation was common and often resulted in inadequate instructions.

### Pro bono work

Whilst the majority of participants at both stages three and four reported that they did *pro bono* work to assist (potential) clients who were considering making an application to the CCRC, they also noted that the rate at which they do so had decreased since 2014. Eleven of the 13 survey respondents answering that question reported that they no longer did *pro bono* work for potential CCRC applicants, largely as a result of funding cuts.<sup>46</sup>

*Pro bono* work was probably under-reported to us as the definition was not always clear. For example, even those who restricted their CCRC work to funded cases acknowledged that certain aspects of every case were inevitably *pro bono* under current arrangements. This included work on the initial filtering process (as discussed in Part II), cases which were overall loss-making, work which simply did not justify the time of making a full legal aid application, work which required a great deal of client care, or work in the closing stages of a case (where firms had billed files early to release funds). One solicitor estimated that “10 to 15% of our work is probably *pro bono*, which is far too much” (R8) and another noted that “(t)here’s not a single case where we do the amount of time that the Legal Aid Agency want to pay for. We probably do double, treble that on any case” (R23).

In the competition for the time of a hard-pressed practitioner, funded cases were always likely to take priority over unfunded ones and it was also noticeable that, as the viability of other publicly funded work has declined, so too has the opportunity to support pro-bono work:

*I’m fed up now with doing it because we are so badly paid. In the past, I would do it, because I was properly remunerated elsewhere to be offered those services. But now, you know, I just haven’t got the time to do it, because I need to do my other proper cases in order to earn money – R22*

### Summary

The data indicate that levels of representation for CCRC applicants had fallen significantly to an average of less than a quarter of cases during the research period as a whole, and was even lower at the end of that period. These falls correlated with reductions in legal aid provision.

Cuts in legal aid funding were important factors in the reduction in the number of practitioners willing and able to undertake CCRC work, through redundancies, unreplaced retirement, and from firms abandoning this area of practice. Often cuts were seen as the ‘last straw’ in the context of the value of fees being undercut as a result of inflation, rigorous audit by the LAA, and uncertainty around chargeable hours. Market contractions appear to have resulted in more selective ‘cherry-picking’ of cases, and greater reliance on unskilled staff or volume processing by legal professionals. A great deal of work is now performed *pro bono*, which adds to overall financial unviability of this type of work.

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<sup>46</sup> 3 of 43 interviewees who do or had done CCRC casework reported doing CCRC work on a purely *pro bono* basis, where they also relied on other people (counsel, experts) to do so. Senior practitioners noted the importance of networks in making such things possible.

## Part IV: Lawyers and the CCRC

This research revealed that misunderstanding and miscommunication between legal professionals and the CCRC flowed both ways, and that this had a knock-on effect in relation to trust between the parties. Both groups (i.e. the lawyers interviewed and CCRC staff who participated in focus groups) were keen to engage constructively with each other, and to find ways to navigate the relationship in more productive ways.

### How lawyers perceive their own role

Survey and interview participants identified CCRC work as time-consuming and complex, often suggesting that it was a specialist area of practice that required a considerable amount of experience and expertise. They explained that expertise and experience were required because of the complexity and severity of cases, the fact that the case and trial had to be understood retrospectively and at a distance, and the fact that they had to work against the final decision of the criminal justice system. Other participants also suggested that the work was mentally exhausting, particularly the bigger and longer running cases, and that in some cases representatives needed to have the robustness to stand up to clients without meritorious cases.

Although we may expect senior professionals to valorise their area of specialism, similar comments were also made by participants who had undertaken CCRC work as paralegals, some of whom acknowledged the challenges posed by their own lack of experience. Participants often suggested that generalist criminal lawyers did not understand appeal work, or in some cases even know about the CCRC, again pointing to the specialised nature of the work:

*The majority of lawyers don't know how it works. They don't do Court of Appeal work, they don't do CCRC work. In fact, the number of lawyers I've spoken to who haven't even heard of the CCRC ... it wasn't really surprising, but it was shocking – R23*

CCRC casework was also recognised as different and specialist by participants in our sample who had not undertaken any CCRC work. Given that they had nothing to gain from recognising the specialised nature of the work, these statements add weight to the views of those who have specialised in appeal/CCRC work.

Lawyers' awareness of the work required to put an application together led them to emphasise the benefits of legal representation for applicants. Several participants stressed the need to find one good point, explaining that without legal advice applicants would often make as many points as possible, thereby diluting the most important ones, because they did not understand what constitutes a ground for appeal or review. For several participants, this ability to focus was the key advantage of legal advice. As one solicitor put it:

*Legal input makes a difference because it will concentrate on certain issues. I mean, sometimes clients will write letters going to hundreds of pages, and they will raise untold issues that they think this what the CCRC will want to consider. And I use something a barrister said to me once when I speak to clients, and I say to them, "Look, the CCRC don't need a hundred points, they just need one good one" – R35*

Other benefits of legal advice included lawyers' ability to write in a clear and structured way, their greater objectivity about a case, knowledge about the legal system and ability to identify legal grounds for appeal. One participant also noted the importance of a lawyer for applicants who needed to identify fresh evidence, rhetorically asking: "[t]hey have to find fresh evidence and they're behind bars, so how are they going to do that?" (R14). Participants also stressed the value of representation for the CCRC, who they thought would also benefit from more focused and structured lawyer-led applications:

*We're taking away the burden from the decision makers and sifting and only putting forward applications that really do truly have merit. And therefore, we would be limiting the number of cases that go through the courts, that go to the CCRC, and putting reasoned arguments then as to why fresh evidence tests are met, what the mis-directions are, if there's anything that has gone wrong at the trial – R32*

Whilst there was a body of opinion that indicated the importance of legal representation to both the CCRC and its applicants, lawyers, in common with CCRC staff, disagreed about the extent to which it made a difference. Some felt that it made an “enormous” difference (referring to cases that had been referred a second time around with the addition of legal help), whilst others noted examples where cases had been referred without legal advice, or where the CCRC had found a ground for appeal not identified in the application.

### How the CCRC perceives the role of legal professionals

On the whole, focus group participants seemed to be aware of the challenges facing lawyers and, when asked about levels of morale across the system, they were quick to suggest that morale among legal professionals was low. Nonetheless, participants were clear that, in an ideal world, lawyers would be involved in CCRC cases from the outset.

CCRC staff were unsurprised that lawyers appeared to play a significant role in screening out unmeritorious cases, and by the fact that lawyer-led applications were more likely to pass through to the review stage.<sup>47</sup> There was, however, discussion around the reasons for this pattern. CCRC staff tended to express the view that perhaps it was because lawyers were choosing to put forward only strong cases in the first place that these applications progressed, rather than because of anything more that the lawyer did. One member of CCRC staff said:

*It's quite easy to say, "Your case is more likely to be put through for review if you have got a lawyer," or, "Your case is more likely to be referred if you've got legal representation," but I think you can also look at it the opposite way around and say, "If your case is put through for review, you're more likely to be able to attract legal representation" [...]. I think sometimes there's a tendency to sort of assume that it is the involvement of the legal representation which impacts on the success, and I don't think that is necessarily the case – CR11*

As above, lawyers themselves were – at stage four – also somewhat divided on the relative significance of their contribution to CCRC outcomes, and other researchers have exercised caution about drawing conclusions that it is having a lawyer that makes a difference in terms of outcome.<sup>48</sup> This does, however, need to be fully contextualised because it is explicitly a lawyer's role – according to the SBT – that they only pursue cases that have a realistic prospect of meeting the CCRC's grounds for a referral. This sifting work is exactly the type of work that could remove many 'no appeal' applications from the CCRC's workload, a point which CCRC staff themselves acknowledged.

CCRC staff were also unsurprised that the population of CCRC lawyers (and generalist criminal defence lawyers) was ageing, and that levels of representation had fallen, seemingly as a result of changes to legal aid. CCRC staff themselves reported noticing that, since around 2014, it is more unusual to pick up a case with a legally-represented applicant. Participants were concerned that lawyers wanted to do the work but increasingly could not afford to do so and that experienced lawyers were no longer having the same input into CCRC cases. As one focus group participant said:

*It has become quite rare to pick up an application and find they've got legal representation at all. And it is quite depressing [...]. Some of the comments in the reading were solicitors saying that CCRC cases are loss making and not financially viable. [...] when it comes to trying to predict what it's going to be like going forward, it's not good news, is it? You know, the loss-making, lack of capacity caused by the reduction in the rates that are not financially viable, and you just think what's this going to do for the future of the profession? You know, it's not going to get better any time soon unless something changes very drastically in terms of the funding for CCRC work – CR4*

Despite participants' overall desire to have lawyers involved in the process, the comments revealed some scepticism and certain expectations of that desired involvement. Participants expressed a desire for “well-informed” lawyers, who took “an objective view” and who did not have “too much personal engagement with the case” (CR8). Nevertheless, when participants were given an opportunity to summarise what they thought were the main messages to carry forward, participants

<sup>47</sup> In evidence to the Westminster Commission on Miscarriages of Justice, CCRC representatives said “we know a review that has a good solicitor or barrister on it can help us power through and find the key points”.

<sup>48</sup> Hodgson and Horne (n 7); Hoyle and Sato (n 11).

clearly asserted the benefits of good legal representation to the CCRC, and their desire to have lawyers involved.

### Lawyer understanding of the CCRC's tests and processes

Despite its relevance and importance, some participants clearly had more understanding of the RP test than others. One interview participant, for example, described it as a fresh evidence test and two participants needed prompting about the CCRC's tests. Comments made during interviews also supported our findings from the survey where nine of the 16 participants expressed concern about the clarity of the RP test.

Stage four interview participants reported that lay-clients struggled to understand the RP test, and noted its flexible and subjective nature. A couple of participants thought there was a lack of clarity over the CCRC's interpretation and application of the test, and one interviewee felt that the subjective nature of the test worked to protect the CCRC from criticism:

*It's so vague, it's so ... it allows them to do what they like. If they don't want to refer, they don't have to refer, because they can say, "Well, we know ... we've applied the predictive test and we've applied it properly" – R27*

Although participants recognised the need for a test, they were somewhat divided over its appropriateness. At one end of the spectrum, some participants suggested that the test set out in statute was necessary and appropriate. At the other end, however, a number of participants felt that the test was the wrong test and should be changed, pointing to the CCRC's low referral rate and to cases that had not been referred when, in their opinion, they should have been.<sup>49</sup> A common position during the interviews was that the test itself was sensible, but that it was being interpreted and applied too conservatively by the CCRC following previous "handbaggings" by the CoA, which they felt had made CCRC staff "obsequious", "scared", "subordinate", "captive" and "supine". This had consequences for whether legal professionals believed the SBT could be satisfied, i.e. the lower the likelihood of referral, the less likely sufficient benefit could be found. It followed that legal professionals tended to believe that the CCRC could and should do more to refer cases and challenge the CoA, and should be more willing to exist in tension with it:

*The CCRC should be a bit more willing to take a chance on cases, and a bit more willing to incur the displeasure of the Court of Appeal, and should apply not quite so tough tests as they do – R3<sup>50</sup>*

Several participants at both survey and interview stages were unclear about the EC test in no appeal cases.<sup>51</sup> Interviewees who spoke about this test generally agreed that there needed to be an exceptionality test. However, as with the RP test, some were critical of the test in practice. Some participants felt that the bar for exceptionality was too high, agreeing with Hodgson *et al's* finding that the CCRC tends to interpret the EC test narrowly.<sup>52</sup>

As with the RP test, lawyers suggested that a lack of clarity around ECs meant that the test was difficult for applicants to understand. This seems to be supported by the large number of no appeal cases the CCRC received, and the high proportion of those that were rejected.<sup>53</sup> Some participants also implied that misunderstanding the tests, and the CCRC more broadly, may cause applicants to apply too early (i.e., without previously applying to the CoA and/or considering renewing their application to appeal to the full court). This also poses problems assessing eligibility for funding, and the appropriate scope of any necessary investigative work.

<sup>49</sup> There were also participants who had no feelings either way and a minority who felt that both the test and its application were wrong. As one solicitor put it: "You've got, in my view, the wrong test, and then even if it was the right test, they don't apply it correctly. But when they're applying the wrong test incorrectly, it's just hopeless" (R19).

<sup>50</sup> Following the Westminster Commission on Miscarriages of Justice, the CCRC welcomed the suggestion that the RP test be reviewed, but argue that the test itself is deferential, rather than CCRC staff. See <https://appgmiscarriagesofjustice.wordpress.com/commission-on-miscarriages-of-justice/> and <https://ccrc.gov.uk/ccrc-response-to-report-of-westminster-commission-on-miscarriages-of-justice/>

<sup>51</sup> Ibid

<sup>52</sup> Hodgson *et al* also suggested that lawyers were uncertain about the application of the CCRC's exceptional circumstances test when advising clients about their eligibility for case review at the CCRC. Hodgson, Horne and Soubise (n 10).

<sup>53</sup> Around 40% of applications received are 'no appeal' cases (ibid). Hodgson *et al* noted that the evidence could suggest that lawyers do first advise their clients to appeal their conviction before applying to the CCRC, as well as the difficulty applicants faced in finding a lawyer to appeal their conviction, leading them to apply directly to the CCRC.



### Assessing the quality of applications

Although it was difficult to identify detailed trends due to different ways of recording outcomes, the data at both stages one and two indicated that those who were not legally represented were proportionately more likely to submit applications that were ineligible for review according to CCRC criteria. For example, across the whole time period analysed in stage two:

- 23% (15 of 64 applicants) of cases where the applicant was legally represented were ineligible for review, compared to 57% (124 of 216 applicants) of non-legally represented applicants.
- In 70% of cases where the applicant was legally represented (45 of 64 cases), the case was allocated for review, compared to 40% (87 of 216 cases) of non-legally represented applicants.
- The numbers around referral rates were very small, with five cases involving legal representation, and four cases not involving legal representation resulting in a referral across the whole time period (i.e. a total of nine out of 280 cases). Though the numbers are very small, this suggests that those who are legally represented were proportionately more likely to have their cases referred at a 7.8% rate of represented applicants (five of 64 cases), compared to 1.9% of non-legally represented applicants (four of 216 cases).<sup>54</sup>

This phenomenon could be explained not only by the quality of the application but also by the possibility that lawyers were cherry picking cases, as suggested in Part III and as recognised by both legal professionals and CCRC staff, above.

When examining the CCRC case file records, it became apparent that legal representatives assisted in explaining issues/grounds to clients, suggesting potential lines of enquiry to the CCRC and providing realistic advice. The legal advisers who were most helpful set out the basis of the application clearly and were responsive to CCRC requests for further information. 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. For example, in one case in time period A, a lawyer was criticised for submitting “a poor application prepared and not amended for submission to the CCA. Simply redirected to us. It is not clear what the submissions are suggesting.”

We sought to build on Hodgson and Horne’s previous research by using similar categories to analyse the effectiveness or value of legal representation in these circumstances.<sup>55</sup> We found that a small majority of legal representatives made either reasonable or successful<sup>56</sup> submissions (33 of 64 legally represented applicants). The findings also support Hodgson and Horne’s assessment that legally represented applicants were more likely to have their cases sent for review than applicants who were not legally represented. The fact of being sent for review means that the CCRC will almost invariably use its extensive powers to conduct investigations beyond the scope of the possible grounds identified by the applicant/lawyer.<sup>57</sup> As these investigations increased the likelihood that material would be discovered that could lead to a referral, converting the initial review into full case review is significant. In three of the five cases that resulted in a referral where the applicant was represented, the eventual narrow basis of the referral was identified by the CCRC as a result of suggested avenues of enquiry raised by the lawyer. Thus, the combination of a legal representative identifying a line of enquiry, coupled with the CCRC’s powers of investigation, appears to have operated in applicants’ favour.

We found that the biggest strengths in lawyer-led applications were that the majority were apposite, well-structured and involved liaising with the client. However, some lawyer-led applications could have been improved by providing lists of documents that could assist the CCRC (though these may have been beyond the scope of the legal adviser’s knowledge), and by more clearly and explicitly stating how CCRC referral criteria were met.

<sup>54</sup> It should be noted that a referral rate of 9 out of 280 cases produces a referral rate of 3.2% of all cases between 2011 and 2014 that were reviewed.

<sup>55</sup> Hodgson and Horne (n 7)

<sup>56</sup> Where reasonable means that there are issues to investigate that are capable of leading to a referral, and ‘unsuccessful’ means that the case was not referred to the Court of Appeal.

<sup>57</sup> In 208 of the 280 files reviewed, the CCRC used their powers to gather information from public agencies, which often included (in 154 cases) the court files. Furthermore, the CCRC sought further materials from other parties in a significant number of cases: from the Crown Prosecution Service in 113 cases, from the police in 87 cases and from lawyers in 38 cases. Whenever an issue of witness credibility was raised, the CCRC tended to automatically perform ‘credibility checks’ by reviewing (where relevant) applications to the Criminal Injuries Compensation Authority and Social. After 2012, the CCRC was regularly drawing documents from CACTUS (their link to the Court of Appeal documents). However, our data set finishes at 2014, and the CCRC has made attempts to streamline casework since that time, including a Whole System Review in 2015, meaning that the level and nature of enquiry made may have changed.

We further noted a correlation between levels of activity and reasonable or successful submissions being made – i.e. the more lawyer activity, the greater the chance of success in terms of either further investigations being conducted, or a referral to the CoA. A further point of interest was that the data recorded a decrease in the number of lawyer-led applications that were considered to be either inactive or to contain poor submissions towards the end of the research period. Furthermore, the quality of representations, according to suggested CCRC indicators of quality,<sup>58</sup> also seemed to increase as numbers of legally represented applicants decreased. This might suggest that although the number of legally represented applicants has decreased, the quality of representations made by legal advisers has increased. This could be a result of market contraction, meaning that the service has become more specialised/niche among firms who conduct potential CCRC casework, even though lawyers have less time from a costs perspective to undertake extensive work on CCRC case files.

During the focus groups with CCRC staff, we sought to explore whether participants had noticed any changes to the quality of applications with legal representation, particularly since the 2014 cuts to legal aid, and how those changes had been perceived and interpreted by CCRC staff. The general consensus was, in contrast to our findings, that while there was some variation between applications, overall, the quality of lawyer-led applications had deteriorated.<sup>59</sup> In making this point, participants drew on their experiences of casework, as in the examples below:

*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' – CR5*

The variable quality of applications had implications for CRM and administrator workloads, with extra time and effort required to organise materials and locate key information, but this also had potential knock-on effects on other cases. This supports lawyers' suggestions at stages three and four that *skilled* lawyers undertaking thorough casework had benefits for applicants and the CCRC in terms of focus and efficiency. Although participants generally struggled to pinpoint changes in representation to a particular time period, there were some indications that 2014 was a watershed moment. One focus group participant attributed changes in representation to de-skilling within firms or to the replacement of professionals by student or charitable groups, while another suggested that there was a noticeable difference between the quality of applications received from Northern Ireland (where the funding regime is different) and those from England and Wales. Participants in the focus group were all too well aware of the increase in the number of unrepresented applicants and the impact this had on the quality of applications.

### Reviews, decisions and statements of reasons

Stage four participants felt that, overall, the CCRC and its work represented a great improvement on the previous position. Several participants, however, expressed concerns about the quality of decision-making and waiting times at the CCRC, the latter often attributed to the CCRC being "inundated" (R35) and, therefore, over-burdened by unrepresented applicants. The legal professionals in our sample described sometimes waiting for up to eight years for decisions on cases that had passed to review stage, and waits of over two years were said to be common. In doing so, several participants stressed the severe consequences of delays for applicants, some of whom had died while waiting for a decision. One paralegal also noted the negative psychological effects on applicants who saw other cases prioritised over their own. These issues contributed to low morale among legal representatives, which compounded issues of sustainability related to funding.

As well as concerns over waiting times and delays, some interviewees raised concerns about the review process itself, including a lack of transparency in the CCRC's processes. We also found that the complexity of the review process took some time for us to fully understand when we were reviewing files, in spite of the detailed guidance that the CCRC had offered us. Nine of 16 survey participants reported that the CCRC's review process lacked clarity. Five experienced, senior solicitors who were interviewed at stage four further indicated that they did not really know how the

<sup>58</sup> See guidance for applicants on CCRC website: <https://ccrc.gov.uk/publications/application-guidance/>

<sup>59</sup> Two participants were less sure that the quality of applications had decreased, noting that representation had always been variable. One explained: "I think the quality of legal representation has always been variable. You know, there have always been cases where the applicant is notionally legally represented, but that really is little more than acting as a kind of postal service. So, whether that's changed I don't know" (R11). Another felt that it was "difficult to assess that quality issue" and suggested that, in their view, the quantity of legal representation was the bigger issues (R8).

CCRC's decision-making processes worked and, in some cases, the obscurity of the review process had bred suspicion about the quality and quantity of work done at the CCRC. Whilst some lawyers had been impressed with the professionalism of CCRC decision statements, others felt that the quality of reviews and decisions had deteriorated:

*In recent times, I have been met with decision notices which are three or four pages, almost like a summary judgement of refusal, which had left me utterly furious at the lack of interest and care – R27*

Some stage four participants suggested that CCRC caseworkers were more focused on getting through cases than finding grounds for appeal, especially with resource pressures and waiting times at the CCRC, and did not spend adequate time reading the cases. CCRC staff who participated in stage five found this viewpoint very disappointing, and indicated that they all experienced considerable job satisfaction when they did identify a case that might be referred to the CoA.

Lawyers' incomplete understanding of CCRC tests and procedures was also picked up by CCRC staff at stage five. It was unclear to them whether lawyers did not understand existing guidance on the CCRC website or had not engaged with it. The fact that online guidance for legal representatives was potentially not being read or fully engaged with was framed as "concerning" and it was suggested that the issue would benefit from further investigation. CCRC staff expressed a willingness to work on the availability, suitability and prominence of information on the CCRC's website, and to find ways to engage legal professionals that did not conflict with their other obligations, although they implied that resources may be a barrier to doing so.

All the above issues highlight the importance of clarity and communication in an area where time-poor and funding-poor lawyers already struggle to process the SBT, and to assess the extent and nature of work required within the scope of funding allowances.

#### **Trust and communication between the CCRC and lawyers**

Legal professionals who were interviewed commonly complained about a lack of transparency and openness regarding processual decision-making at the CCRC. They also complained about unexplained delay and low levels of communication. Many interview participants expressed frustration that after an application was submitted, there was little – if any – engagement with CCRC staff. Although respondents appreciated that there were sometimes good reasons for not communicating, there was a feeling that the CCRC's willingness and/or ability to communicate had reduced over time. Legal professionals expressed concern about the impact of post-submission silence on applicants themselves, who were often anxious about the process. This all suggests that further engagement with lawyers during the review process could be beneficial to all parties, and help legal professionals manage post-submission client care.

Some interview participants expressed frustration about the quality of decision statements, while others felt frustrated by what they perceived as the CCRC's unwillingness to engage with further submissions and arguments made between the provisional and final SOR. Some legal professionals felt that this demonstrated an unwillingness at the CCRC to rethink their decisions. As one solicitor put it: "They say, "We'll listen to further representations." Fine. They do, but they take no notice" (R28).

Suspicion and feelings of distrust about the review processes were also exacerbated where mistakes had been made or cases had not been referred when lawyers felt they should have been, and some interview participants were explicit in expressing their frustrations:

*We do, I'm afraid, tend to fall out from time to time, because it's just frustrating from my part that... as far as I'm concerned, they can't see what's on the page staring them in the face – R19*

Lawyers' perceptions that the CCRC did not always come to the right decision made them feel that it was essential that they were able to hold the CCRC to account through judicial review, something participants explained was extremely difficult, if not "almost impossible" (R39, R45).<sup>60</sup> Concerns and/or frustration that the CCRC may not have been making appropriate decisions might have been

<sup>60</sup> The administrative court is reluctant to interfere with the CCRC's decision making. See *R (Charles) v Criminal Cases Review Commission* [2017] EWHC 1219 (Admin). Obtaining funding for judicial review proceedings is also problematic following the Civil Legal Aid (Remuneration) Regulations 2013. Similar concerns were raised by the Westminster Commission on Miscarriages of Justice, on p.53 of its report: <https://appgmiscarriagesofjustice.wordpress.com/commission-on-miscarriages-of-justice/>

exacerbated by the concerns expressed by some interviewees that there was an unwillingness to share evidence gathered during CCRC investigations, which was perceived by these interviewees as obstructive and unproductive. Section 23 CAA 1995 prevents the CCRC from being able to disclose much of the information gathered during the course of an investigation, but there was a feeling that more could be done to update legal representatives about lines of enquiry, and disclose relevant information in order to present the best possible case.<sup>61</sup> This would also enable lawyers to direct their limited resources in the most effective way possible.

Where lawyers did receive communications from CCRC staff, some had been disappointed by its quality. Three participants noted “mixed messages” (R10) from the CCRC, and two more said they had found the quality of letters disappointing, one describing the CCRC’s updates as “verging on contentless” (R14).

When these findings were discussed with CCRC staff, they emphasised that resourcing (which was a significant concern amongst CCRC staff) made more, or more open, communication impossible. However, CCRC staff were also concerned about the perceptions that legal professionals had in relation to communication, and one member of CCRC staff suggested that communications should be more interactive:

*There’s perhaps a balance to be struck where we could communicate a little bit more and perhaps more controlled, because it does seem to me that it’s remote. Although I know that update letters go out, they’re not communication, they’re position statements. [...]. It’s a perfectly friendly letter, but it might as well say, ‘Please don’t call,’ because it doesn’t interact –*  
CR10

One possible barrier to more open communication was the way in which independence appears to be understood by CCRC staff. Independence in CCRC decision-making was a strongly expressed core value held by CCRC staff.<sup>62</sup> One focus group participant described this in terms of a “pervading culture in the organisation that is founded on the need for independence”, noting the effect of this culture on CRMs who, recognising the need for independence, wanted to hold applicants and their lawyers “at arms-length” so as not to interfere with “the objective independent thought” that CCRC work required (CR8). There was also a suggestion – unchallenged by other participants – that this culture of independence was quite difficult for lawyers to “get their head around” given their training in adversarial criminal justice (CR11). While the CCRC is an inquisitorial body, with many stakeholders to consider, greater transparency and openness could assist legal professionals to better understand procedures, and therefore prepare the best possible case in the context of limited funding.

As noted above, it was apparent from the case file analysis at stage two that lawyers may be approaching the CCRC in an adversarial manner, not fully appreciating the nature of the CCRC and this was likely to be a problem in some cases. However, seen alongside interviews with lawyers conducted at stage four, it may be that in some cases there is not a lack of *understanding* on lawyers’ part – most lawyers know what the CCRC sees as independence – so much as a lack of *agreement* about what the role of the CCRC should be and how it should interpret things like fairness and independence.

CCRC staff also pointed to some of the more difficult relationships they had with lawyers. While most solicitors were “accommodating” (CR3), it was clear that some participants had found lawyers to be excessively argumentative and confrontational. Such confrontations also had an emotional impact on CCRC staff, one of whom noted that this could “creep into any relationship and communication with those representatives” (CR10), and could make the CCRC more reluctant to communicate with legal professionals.<sup>63</sup>

Conversely, CCRC staff felt that there were strong lines of communication that existed between themselves and applicants/families, though this was not something that we have explored in this

<sup>61</sup> See guidance in *Secretary of State for the Home Department ex parte Hickey & Ors* (No. 2) [1995] 1 WLR 734, 746. This concern was also reported by the Westminster Commission on Miscarriages of Justice: <https://appgmiscarriagesofjustice.files.wordpress.com/2021/03/westminster-commission-on-miscarriages-of-justice-in-the-interests-of-justice.pdf>; p.60

<sup>62</sup> To provide some context, the focus groups took place shortly after the decision of the Administrative Court in *R (Warner) v Secretary of State for Justice* [2020] EWHC 1894 (Admin), which commented on the CCRC’s independence, was announced.

<sup>63</sup> One participant suggested that such problems were more common in cases involving campaign group representatives where there was an “agenda” beyond representing the individual applicant (R11).

study. Some focus group participants went further, and commented that the communication between legal representatives and applicants was sometimes very weak. As one participant put it, “(t)here are some cases, more than there probably should be, where it seems like the reps and the applicants just don’t talk to each other at all” (CR6).<sup>64</sup> This kind of situation, which unsurprisingly was not mentioned by legal professionals, caused confusion on all sides and increased workloads for the CCRC. Although it was not clear from the data what the cause of such miscommunication was, it is likely that funding problems have played a role given that client care is one aspect of CCRC casework that lawyers often reported, at stage four, doing unpaid. It could also be that funding contributed to this problem if a publicly funded lawyer was no longer able to justify costs associated with the file to the LAA at the point of receiving a decision notice. In other words, lawyers may have dropped out of the process due to funding, even where an applicant wished to continue.

### Summary

Both legal professionals and CCRC staff believed that well informed legal representation offers benefits to applicants and to the CCRC. Those benefits appeared to go beyond the likelihood of a full case review being conducted, or a referral to the CoA being made. Legally represented applicants were reportedly able to benefit from better (though perhaps incomplete) knowledge about the CCRC’s processes and realistic advice, which seemed to have knock-on positive effects for CCRC case and resource management. Both legal professionals and CCRC staff placed value on the sifting work that legal professionals could do in deciding whether or not applications were eligible for review and/or were meritorious. Furthermore, evidence about the quality of applications prepared by legal representatives was inconclusive. Case file data suggested that lawyer-led applications were more focused after 2013, but CCRC staff felt that there had been a general deterioration in the quality of applications made by legal representatives. The reason for this disconnect was not clear, though it might suggest different priorities in terms of how quality is defined.

There were, however, areas in which understanding about CCRC processes could be improved, which related to concerns raised about communication between lawyers and the CCRC. Whilst the CCRC is fiercely protective of its independence, there were signs that, at times, communication between legal professionals and CCRC staff was close to breaking point, or had actually broken down. This could create vicious cycles whereby CCRC staff were more reluctant to engage with legal professionals, while that lack of engagement increased distrust about CCRC processes and decision-making among lawyers.

Both legal professionals and CCRC staff were open to improving communication; lawyers expressing a desire to do so and CCRC staff being open to reviewing how/where they communicate information, both in respect of casework and the general guidance provided on their website. All parties recognised that current resourcing issues operated as a barrier to improvements. Nonetheless, greater levels of communication could go some way to mitigate the harmful effects of public funding issues experienced by lawyers, and allow more focused, and therefore more mutually productive, representations to be made.

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<sup>64</sup> As we noted at stage two, there is also a communication issue where participants indicate in their application that they are represented when, in fact, they are not. This was briefly mentioned in one focus group.

## Part V: The CCRC, lawyers and expert witnesses

Only 34 of the 280 cases that we reviewed at stage two raised issues about the use (or otherwise) of expert evidence.<sup>65</sup> In 19 of those cases the issue was raised by the applicant's legal representative, but only six of those representatives actually conducted further investigations in the form of commissioning further expert reports, or at least pursuing conversations or other investigations with experts. It was not clear, at that stage, whether so few expert reports were commissioned as a result of difficulties locating a suitably qualified expert since fees were cut in 2013, or because lawyers did not have the time or resources to instruct and liaise with expert witnesses in this context.

The CCRC conducted further investigations into expert evidence in six of the 34 cases where there were complaints about this issue. In four of those cases, the instructed legal representatives had also conducted further investigations, which were later built upon by the CCRC. The most often cited reason for deciding against further investigation was that the application was *prima facie* ineligible for review (six of 34 applications raising the issues), or that the issue raised about expert evidence was not new (i.e. already considered at the trial or on appeal; eight of 34 applications).

### Lawyers' views about instructing expert witnesses

Both survey and interview participants reported that experts appear to be less willing to prepare reports at legal aid rates in recent years, meaning that fewer experts were available to accept instructions.<sup>66</sup> There were indications at stages two, three and four that legal professionals felt funding cuts to both their work, and the work of expert witnesses, created a barrier to investigating concerns about expert evidence. While the majority of survey participants indicated that they would commission an expert report if they were assisting an applicant who raised concerns about expert evidence, that seemed to be at odds with the case file analysis.

The interviews revealed different reasons why an expert report may not be commissioned by the legal representative, including where they decided to ask the CCRC to commission an expert, rather than doing so themselves. Another situation where an expert report was not commissioned was where the LAA had refused to grant funding. In these cases, some lawyers decided to submit an application to the CCRC in the hope that it would commission the expert. However, in others, LAA refusal meant the end of the case as further work could not be justified under the SBT. Some participants believed that the LAA was reluctant to fund experts because of perceptions about high costs (even at legal aid rates).<sup>67</sup> In some cases, interview participants feared that lower legal aid rates were risking quality.<sup>68</sup>

Where participants had managed to persuade the LAA to pay for an expert or to pay above the standard rate, they also noted the complexity, time and bureaucracy involved in doing so, and one participant explained that in order to persuade the LAA to grant funding, they had sometimes asked experts to write initial statements *pro bono*.

Interviewed legal professionals were also concerned – particularly given cashflow issues related to the inability to claim disbursements in CCRC cases described in Part II – about the pressure on firms to pay expert witnesses in a timely manner,<sup>69</sup> as the quote below indicates:

*Everybody's quite willing to help and everybody will say, "Yeah, yeah, don't worry about the invoice, that's fine." And when you say, "No, really, this could be years." They go, "Yes, that's fine, that's fine." And then five, literally five years later and he rings and he's fuming, and he says, "I've never been paid on this, what's going on?" And you say, "It's still going on." And he says, "Right pay me, I don't care, [...]" That was nearly four grand we had to pay out – R19*

<sup>65</sup> The most often cited complaint made by applicants was that they had been poorly represented by their trial lawyer (90 of 280 applications raised this issue). Other common applicant complaints (whether legally represented or not) included police malpractice (43 applicants), complaints about sentencing (36 applicants), complaints about prosecution witnesses (34 applicants) and judge/jury conduct issues (33 applicants).

<sup>66</sup> A little over 60% of survey respondents noticed changes in the use of expert evidence since expert witness fees were cut 2013. In February 2021, Dr Clarke and Dr Welsh ran two focus groups of expert witnesses. Each also reported that legal aid funding for expert witnesses is so low that some experts do shy away from doing legally aided work, and raised concerns about both sustainability and quality in relation to the work done by expert witnesses.

<sup>67</sup> Expert witnesses at n 66 were similarly concerned about perceptions around funding rates held by the LAA, alongside LAA perceptions about how long it takes to prepare an expert report.

<sup>68</sup> This concern was echoed by expert witnesses that we spoke to as part of a separate project (see n 66).

<sup>69</sup> Experts at n 66 revealed that delays and wrangling about obtaining payment from legal aid lawyers was a significant problem, and one that could sour the relationship between expert witnesses and lawyers.

Legal professionals also expressed anxiety about the level of investigation conducted by the CCRC, though our stage two findings indicated that the CCRC did make extensive use of their investigatory powers once a case had been sent for review. In a handful of cases, interview participants had lost trust in CCRC investigations altogether, explaining that they preferred to undertake investigations themselves, where funding allowed, or where experts could be persuaded to do the work *pro bono*.<sup>70</sup>

### CCRC views about instructing experts

In both focus groups, the issues that legal professionals had raised around expert witnesses were considered interesting. Discussion centred around the question of who should be instructing experts, and what the role of lawyers should be. In one group the consensus seemed to be that lawyers should be providing the CCRC with reasoning as to why an expert report would be helpful, and outlining what difference it would make to a case. Some participants thought that legal representatives might be wasting time and money in cases where they had commissioned a report themselves. One focus group participant described it as “perfectly fair” (CR11) for lawyers to suggest that the CCRC obtain expert evidence. However, another participant felt that legal professionals should be instructing expert witnesses on behalf of clients, and expressed suspicion that – perhaps because of funding issues – some lawyers attempted to pass responsibility on to the CCRC.

Where the CCRC decided not to commission an expert report, CCRC staff reported that lawyers’ reactions to that decision differed quite significantly, with some relying on the CCRC’s refusal to obtain an expert report as a ground for instigating judicial review proceedings. Previously described tension between legal professionals and CCRC staff about their respective roles was something that led to differences of opinion when it came to instructing experts, as illustrated by one stage five participant:

*If you are representing someone in making an application then I would expect you to be pushing at the edges a little bit for things that might or might not actually have a reasonable prospect of getting anywhere, whereas when you’re the CCRC and you’re being independent and objective [...]. Yes, we could go and do this DNA work, but actually if you put it in the context of the whole case there’s no way that’s going to give rise to unsafety – CR8*

CCRC staff expressed awareness about the difficulties that applicants and lawyers faced in accessing exhibits in order to instruct experts. They explained that it was something the CCRC were trying to work on and noted that “there’s no point instructing an expert, if the expert can’t get access to the very material that they need to base their view on” (CR8). At stage four, legal professionals had indeed expressed concerns about post-conviction disclosure, particularly following the judgement in *Nunn*.<sup>71</sup> Where this was mentioned, legal professionals suggested that the law was being wrongly interpreted to justify the withholding of evidence. The CCRC’s comments demonstrated an appreciation of some of the difficulties faced by legal representatives who were trying to prepare cases for CCRC submission. Given these mutual concerns, post-conviction disclosure could be an issue around which lawyers and the CCRC could come together, with the CCRC potentially offering more assistance to lawyers in this regard.

### Summary

The use of expert evidence was an area in which there was a lack of consensus amongst participants. Given all of the associated funding difficulties, some legal professionals felt it useful to be able to ask the CCRC to obtain an expert report in some cases. It seemed that some CCRC staff were sympathetic to that stance, though there was some concern about whether lawyers were conducting ‘fishing expeditions’, and also about lawyers’ reactions when the CCRC decided against commissioning an expert. Greater consensus among CCRC staff in relation to the approach that they should take in securing expert evidence could be helpful to legal professionals when they are considering whether an application should be made and/or the extent of that application.

There was, however, consensus that there was no point in instructing an expert witness where obtaining access to information and/or exhibits was problematic. This was one area in which the CCRC’s extensive powers of investigation could prove useful, and in respect of which legal professionals and the CCRC could work together more closely.

<sup>70</sup> When talking about the CCRC’s investigations, multiple people referred to Victor Nealon’s case, highlighting the importance of lawyers in cases where the CCRC did not investigate.

<sup>71</sup> [2014] UKSC 37. See discussion in *McCartney C, Speechless N. The Supreme Court, post-conviction disclosure and ‘fishing expeditions’: R (Nunn) v Chief Constable of Suffolk Constabulary & Anor* [2014] UKSC 37. *International Journal of Evidence & Proof*. 2015;19(2):120-126

## Conclusions and Recommendations

Drawing on the findings of this report, and the findings of each of our individual stage reports, our conclusions can be grouped into three categories: issues that appear to exist for (prospective) applicants; the impact of changes to funding on lawyers' ability to conduct CCRC casework; and the impact of legal aid cuts at the CCRC. Ultimately, we found that levels of legal representation have declined, that skilled legal representation is good for both applicants and the CCRC, that lawyers want to do CCRC casework but funding stands in the way of their ability to do so, and that there are areas of communication between the CCRC and lawyers that could be improved, which would thereby help applicants. As a result of those conclusions, we make recommendations in relation to funding, to the CCRC and to lawyers. We also recommend areas for further exploration.

### Improving the system for applicants

We explored the issue of who was making applications to the CCRC, and noted that increasingly fewer applicants have the benefit of legal representation when applying to the CCRC. The existence of this reduction is supported by other sources,<sup>72</sup> but our data suggested that 2014 was a watershed moment in terms of criminal defence providers in this field leaving the market. The data also suggested that market contraction resulted from cumulative funding issues, with the fee cuts introduced in March 2014 operating as a 'last straw' for some providers.

According to the case files analysed, unrepresented applicants commonly complained about poor trial representation. In one instance, the complaint was directly related to legal aid funding. There is the possibility that, as legal aid is cut, volume/quality of trial casework decreases, which increases the importance of the CCRC, and the need for properly funded appellate lawyers. **Our first recommendation is, therefore, that legal aid funding rates should be reviewed, with a view to increasing them to more realistic levels in the context of the specialised nature of CCRC casework.**

The Easy Read form appears to have made the application process much easier for applicants, but – related to declining levels of available legal advice – applicants appeared to lack clarity around CCRC procedures and grounds for review. We consider that this is likely to be associated with high numbers of 'no appeal' and/or other ineligible applications being received. Without legal advice, applicants may be less likely to know whether or not they should actually make an application to the CCRC. Similarly, there was a lack of clarity around CCRC decision notices and correspondence. **Our second recommendation is therefore that the CCRC further review these documents for clarity and utility for both legal representatives and unrepresented applicants.**<sup>73</sup> This will help unrepresented applicants better understand the process and assist lawyers – in the context of time poverty associated with funding – to have a clearer view of which investigations have been conducted, where problematic areas might exist and which, if any, further representations should be made.<sup>74</sup>

Our data suggests, in common with earlier findings,<sup>75</sup> that applicant cases without legal representation are more likely to be deemed ineligible for review than cases supported by legal representation. It also indicated that cases with legal representation are more likely to be sent for full review than cases involving unrepresented applicants. There is some indication that cases without the support of legal representation are less likely to be referred to the CoA, but this needs to be explored further for verification through greater levels of targeted CCRC data and file analysis.

Inconsistent approaches in relation to expert evidence could lead to forensic issues not being explored, with implications for the ability of applicants to have their case fully investigated (at least) and/or referred to the CoA (at most). Funding issues (in terms of both rates and procedures) seem to negatively influence the ability to find and to fund an expert of the appropriate type, quality and experience, where the case requires one. To mitigate these issues, **our third recommendation is**

<sup>72</sup> CCRC (2019) *Annual Report and Accounts*. HC2438 (Birmingham: CCRC)

<sup>73</sup> We understand that the CCRC introduced an Easy Read cover letter for long and/or complicated SORs, but that these were later phased out due to lack of applicant feedback surrounding the complexity of decision notices. We believe that a wholesale review of communicating decisions to applicants and/or their legal representatives would be helpful in this regard.

<sup>74</sup> We note that the Westminster Commission on Miscarriages of Justice came to a similar commission (at their p.58) that there was scope for improving the quality of decision notices. See <https://appgmiscarriagesofjustice.wordpress.com/commission-on-miscarriages-of-justice/>

<sup>75</sup> Hodgson and Horne (n 7); Hoyle and Sato (n 11)



that the CCRC adopt/publish a clear policy around the use of experts (and other forms of investigation).

### Supporting legal professionals to conduct CCRC casework

Funding rates and LAA procedures and bureaucracy appear to have combined to make CCRC work financially unviable and have led to market contraction in relation to legal aid providers offering assistance in CCRC casework.<sup>76</sup> This means that fewer lawyers are available to conduct CCRC casework, and that those who remain in practice in this field – and for whom the work is often loss-making – have to be more selective about the work they do. Legal professionals also seem to be less able/willing to perform *pro bono* work, although they do seem to be doing significant amounts of unpaid work (especially around filtering, and client care<sup>77</sup>).

The SBT test appeared to operate as an overly restrictive barrier to practitioners, limiting their ability to conduct as thorough initial assessments of cases as they would like to be able to perform. This issue is particularly difficult in CCRC casework as a result of the often large amount of material that needs to be reviewed, and its complexity, highlighting the need for lawyers of appropriate skill and experience to conduct the work. All of these issues contribute to the financial unviability of the work. **Our fourth recommendation is therefore that the application of SBT in CCRC casework be reviewed to allow lawyers to conduct more sifting work, and to recognise the value of that work in the system generally.**

There are serious concerns about sustainability in this area of practice, which is reflective of issues in the criminal defence sector more broadly.<sup>78</sup> This data indicates that market contraction is likely to continue without intervention in terms of funding rates and procedures. One key factor in this context was the inability to claim interim payments, and to claim payment for disbursements before file billing. Therefore, **our fifth recommendation is that interim payments (both disbursements and bills) for CCRC casework should be allowed, in order to ease cashflow for firms.** This would recognise the complexity of the casework and the length of time that reviews can take.

As in other sectors of the criminal legal aid market,<sup>79</sup> morale in relation to the conduct of CCRC casework is low. This is brought about by a combination of the economic effects of funding problems, a sense that they are not trusted by the LAA, despondency about low referral rates and frustration about what lawyers perceive to be a lack of open communication with the CCRC. To help alleviate some of these problems **our sixth and seventh recommendations are that a) the LAA should review the way in which it audits and assesses CCRC casework, and develop a more dialogic relationship with casework providers, and b) that the CCRC review engagement with legal professionals around what investigations are being conducted.**<sup>80</sup> It also seems appropriate that **our eighth recommendation is for the CCRC to review the guidance information available for legal representatives, and consider dialogic seminar style events for greater interaction, openness and engagement.** Implementing these recommendations would likely increase morale among the profession (hopefully mitigating sustainability issues), and enable legal professionals to be more confident about both satisfying the SBT and the scope of investigations that should be conducted in the context of legal aid funding.

Lawyers also need to engage with the CCRC in productive ways, so **our ninth recommendation is that legal professionals should get involved with any training and engagement events provided by, and in discussion with, the CCRC.** Participating in such activities would also avoid, or limit, the opportunity for misunderstanding between legal professionals and the CCRC, especially given their differing adversarial/inquisitorial roles. It was clear throughout this project that both legal professionals and CRMs/Commissioners were keen to uncover and rectify miscarriages of justice, but

<sup>76</sup> This should also be set in the context of more general market contraction in relation to criminal defence service providers who offer legally aided representation. See Ministry of Justice (2020) Summary Information On Publicly Funded Criminal Legal Services [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/960290/data-compendium.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf); Fouzder, M (2021) Landmark report paints bleak picture of criminal legal aid. Law Society Gazette, 12 February)

<sup>77</sup> Supporting the earlier findings of Tata and Stephen (n 15)

<sup>78</sup> See, e.g. Thornton, J. (2020). Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions. *Legal Studies*, 40(2), 230-251

<sup>79</sup> See, e.g. Dehaghani, R. and Newman, D. 2021. *Criminal legal aid and access to justice: an empirical account of a reduction in resilience*. International Journal of the Legal Profession; Newman, D & Welsh, L (2019) *The practices of modern criminal defence lawyers: alienation and its implications for access to justice*. Common Law World Review, 48 (1-2) 64-89

<sup>80</sup> This is, of course subject to s.23 CAA 1995, though we note that the Westminster Commission on Miscarriages of Justice also recommend – at p.72 - that this be reviewed (<https://appgmiscarriagesofjustice.wordpress.com/commission-on-miscarriages-of-justice/>). The CCRC were open to that recommendation in their response to the report: <https://ccrc.gov.uk/ccrc-response-to-report-of-westminster-commission-on-miscarriages-of-justice/>

misunderstanding about their different roles and challenges flows both ways. In a similar context, it seemed that one area that could prove fruitful to build relationships between the CCRC and legal professionals, with knock on effects for applicants, was in relation to working together to improve post-conviction disclosure issues. This could also mitigate lawyer's funding difficulties as it would allow earlier, and perhaps more thorough, decisions to be made about the potential benefit of cases (in the context of also revising the SBT). **Our tenth recommendation is therefore for legal professionals and the CCRC to work together in relation to post-conviction disclosure where there might be a reasonable line of enquiry to be considered.** The CCRC's powers of disclosure under s.23, and their powers to obtain information under s.17 CAA 1995 might each require review to facilitate this recommendation. We recognise that the CCRC, as an inquisitorial body, has to also consider the interests of other stakeholders, but a clearly developed policy in this area could be beneficial for all parties, including applicants themselves, and may help mitigate the deleterious effects of changes to legal aid funding.

The data about the quality of work performed by legal professionals in the context of these concerns was inconclusive. There is some evidence of polarisation in terms of some very experienced, niche practices at one end of the spectrum, and work-to-volume, albeit specialised, firms using junior staff at the other end. Our case file review suggested that market contraction has increased the quality of focus among lawyers conducting CCRC casework, but CCRC staff seemed to disagree with this. Indicators of quality are, of course, subjective, but it is clear that legally represented applicants have a better chance of their case at least being sent for review than applicants who are not legally represented. Lawyers' possible greater selectivity has both negative and positive aspects. Concerningly, it means that more difficult cases, where issues are not obvious, might be less likely to be reviewed by advice providers. More positively, it means that available resources are directed towards the most clearly deserving cases. There is clear benefit to the role that lawyers perform in relation to sifting casework. However, the current funding regime undermines lawyers' ability to perform that role, and there are fewer lawyers who are willing to conduct that work. Thus, there are clear areas in which the conduct of CCRC casework has been affected by changes to legal aid funding, including but not limited to, the number and types of cases that are taken on, the scope of work and investigation conducted, and sustainability and morale in the profession.

### Mitigating the impact of legal aid funding issues at the CCRC

The number of applications being made does not appear to have been affected by funding issues, but to have increased following the introduction of the Easy Read form in 2012. As fewer lawyers are willing/able to sift prospective applications, this raises the possibility of increased workload in terms of the number of ineligible applications received at the CCRC, and in terms of the need to do more work to assess the issues and ascertain whether/how much investigation needs to be done. It may also affect the referral rate if the CCRC are receiving more applications, but those applications are of decreased quality. CCRC staff also appear to be dealing with more queries from people who raise funding issues, which means they are required to explain the funding position to unrepresented applicants.

The data suggested that, in some instances, CCRC staff are being asked to conduct more investigative work that the LAA will not fund. There were mixed reactions to this in our focus groups with CCRC staff, indicating disagreement between legal professionals and CCRC staff about the way in which investigations should be conducted. The roots of this issue appear to be grounded in difficulties obtaining authority to incur funds for investigations from the LAA, and differing views about who (the CCRC or lawyers) should conduct investigations. There was some evidence that this disagreement, and poor morale generally among legal professionals, was leading to more fractious relationships between those professionals and CCRC staff. As stated above, we recommend that a clear policy setting out the expectations that the CCRC has in relation to the extent of investigations conducted by lawyers could be helpful to legal professionals, applicants, and to CCRC staff. We hope that this would not only mitigate any lack of certainty about funding for lawyers, but that it could also serve to improve lawyers' perceptions of consistency and the quality of lawyer/CCRC communications, with knock on effects for morale and sustainability. Legal professionals also need to communicate clearly with the CCRC, **so our eleventh recommendation is that legal professionals are selective about what information is sent to the CCRC, making sure that grounds are very clearly stated (either on the Easy Read form or by letter), what further investigations are considered necessary, and how that investigation will assist in determining that a RP of referral exists.**

Finally, it was clear that funding operates as a potential barrier to the CCRC being able to improve its communications and engage more with legal professionals. **Our twelfth recommendation is, therefore, that the CCRC budget be increased.**<sup>81</sup>

#### Areas for further research

Clearly this research has not taken into account the views of applicants themselves, so their voices are a significant omission. We hope to be able to add their experience into this work at a future date. We would be particularly interested not only in applicant's experiences of access to legal representation, but also in their understanding of the application process and decision documents.

Dr Clarke and Dr Welsh held two exploratory focus groups about legal aid cuts with expert witness in February 2021, but this issue would benefit from development to understand the impact of funding cuts on their work and, by implication, on lawyers, clients and their cases.

A further issue for future research relates to the CoA's introduction of its own Easy Read form. It is not yet clear whether or not this has increased the number of 'no appeal' applicants who actually go on to make an application to the CoA directly (once they have been made aware of that possibility by the CCRC).

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<sup>81</sup> In evidence to the Westminster Commission on Miscarriages of Justice, the CCRC indicated that better resourcing was needed to increase visibility and communication activities.

## Appendix 1: Applications per month by representative category (1997-2017)









