

# **Coronavirus, COVID-19, Outbreak - The Criminal Justice System Saving Access to Justice**



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## **Coronavirus, COVID-19, Outbreak - the Criminal Justice System**

### **Saving Access to Justice - Criminal Proceedings**

#### **Introduction**

This report will highlight the immediate issues facing the criminal law professions from the effects of the Coronavirus outbreak and offer solutions to support the continuing operation of the criminal courts. It is hoped that the respective representative associations - Criminal Courts Solicitors Association (CLSA), London Criminal Courts Solicitors Association (LCCSA) and the Criminal Bar Association (CBA) - are able to collectively agree the way forward supported by the Bar Council (BC) and the Law Society (LS).

The Shadow Justice frontbench should support reasonable recommendations and proposals from the professions' respective representative bodies and assist the BC and LS with lobbying the government for the immediate implementation of a package of supports to help mitigate the financial effects of the coronavirus outbreak on criminal law professions. Criminal solicitors and barristers must be able to continue providing representation to publicly funded criminal clients beyond the Coronavirus crisis. Without such support, it is inevitable that the Criminal Justice System (CJS) will collapse in very little time.

#### **The Importance of Access to Justice**

It has long been recognised that criminal solicitors and criminal barristers are a vital component in the delivery of justice. As far back as '*A Time for Change*' in 1988, the joint report by the BC and the LS stated that '*we cannot emphasise too strongly the importance that should be attached to the work done in criminal cases. Although individual cases in different fields will raise questions of general public importance, and every case is of supreme importance to the individuals who are directly involved in the outcome, the system of criminal justice is concerned with the liberty of each individual as well as the prosecution of crime*'.

#### **Background - Criminal Legal Aid (LAA)**

It is important to recognise briefly the state of criminal legal aid prior to the Coronavirus outbreak. As with most public-sector supply services it is abundantly clear that austerity, and a decade of savage cuts to criminal legal aid, has led to critically weakened structures within the CJS.

Consequently, publicly funded firms of solicitors and barristers are not well enough prepared in financial terms for the current crisis. The coronavirus outbreak could well be the final blow to access criminal to justice. Criminal firms and other criminal law advocates will be unlikely to meet their overheads unless the government puts in place urgent financial support mechanisms which go further than what is currently available.

Solicitors and barristers rely on each other for their own survival. The criminal bar is instructed by criminal solicitors. Therefore, as criminal solicitors firms fail, the criminal bar will undoubtedly fail with them.

### Criminal Legal Aid Review (CLAR)<sup>1</sup>

In December 2018 the MOJ announced a comprehensive review of criminal legal aid fee schemes. Later in February 2019, the MOJ published its post-implementation review of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO)<sup>23</sup> a *Review of Legal Aid for Inquests*<sup>4</sup> and *Legal Support: The Way Ahead - An Action Plan to Deliver Better Support to People Experiencing Legal Problems*.<sup>5</sup>

The purpose of CLAR is to provide an overarching review of the entire 'criminal legal aid cycle', from fixed fees in the Police station and Magistrates' Court, to graduated fees in the Crown Court (AGFS) and the Litigators Graduated Fee Scheme (LGFS). The review also includes a review of Very High Cost Cases (VHCC).

CLAR has two main objectives:

(1) To reform the criminal legal aid fee schemes so that they: fairly reflect, and pay for, work done; support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce; support just, efficient, and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer; are consistent with and, where appropriate enable, wider reforms; are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies; and ensure cases are dealt with by practitioners with the right skills and experience.

(2) To reform the wider criminal legal aid market to ensure that the provider market: responds flexibly to changes in the wider system, pursues working practices and structures that drive efficient and effective case progression, and delivers value for money for the taxpayer; operates to ensure that legal aid services are delivered by practitioners with the right skills and experience; and operates to ensure the right level of legal aid provision and to encourage a diverse workforce.

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<sup>1</sup> Criminal Legal Aid Review (CLAR) <https://www.gov.uk/guidance/criminal-legal-aid-review>

<sup>2</sup> Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) (CP 37, 7<sup>th</sup> February 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)

<sup>3</sup> Ministry of Justice, *Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) - Civil litigation Funding and Costs (CP 38, 7<sup>th</sup> February 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf)

<sup>4</sup> Ministry of Justice, *Final report: Review of Legal Aid for Inquests* (CP 39, 7<sup>th</sup> February 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777034/review-of-legal-aid-forinquests.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777034/review-of-legal-aid-forinquests.pdf)

<sup>5</sup> Ministry of Justice, *Legal Support: The Way Ahead - An Action Plan to Deliver Better Support to People Experiencing Legal Problems* (CP 40, 7<sup>th</sup> February 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777036/legal-support-the-way-ahead.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf)

CLAR was first published on 14<sup>th</sup> March 2019, with the CLAR Programme Overview being published shortly afterwards.<sup>6</sup>

In the early summer of 2019, the CBA balloted its membership with regards to AGFS Scheme 11<sup>7</sup> and prosecution fees. Its members voted overwhelmingly in favour of industrial action; 2586 (94.90%) voted for action in respect of prosecution fees, and 2567 (93.86%) voted for action in respect of AGFS Scheme 11.<sup>8</sup>

The threat of industrial action resulted in a proposal from the government which included an increase in prosecution fees, and a promise to accelerate certain aspects of CLAR.<sup>9</sup>

On 12<sup>th</sup> June 2019, the CBA advised its members to accept the Government's offer before going back to them for the final say. On 28<sup>th</sup> June 2019, 1,583 CBA members (60.72% of all who were balloted) voted to suspend action,<sup>10</sup> with the Plan for Accelerated Work then being published on 23<sup>rd</sup> July 2019.

CLAR continued throughout the summer of 2019. From the very outset, the Defence Advisory Panel have been informed that CLAR would report by the summer of 2020 and the Plan for Accelerated Work would report by November 2019.

In October 2019, the Government announced a General Election, with the dissolution of Parliament taking place on 6<sup>th</sup> November 2019. The Election subsequently took place on 12<sup>th</sup> December 2019, with the State Opening of Parliament taking place on 19<sup>th</sup> December 2019.

The purdah rules meant, of course, that no Government policy proposal would take place, meaning the Plan for Accelerated Work would inevitably be delayed.

In February 2020, one half of the joint package came to fruition, however the five accelerated CLAR items remained outstanding.

### CLAR: Accelerated Items

On 28<sup>th</sup> February 2020, the MOJ published an accelerated package of measures that would amend the criminal legal aid fee schemes, four months later than the MOJ originally promised.<sup>11</sup> The proposed four week consultation was originally due to

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<sup>6</sup> Ministry of Justice, *Criminal Legal Aid Review: Programme Overview* (30<sup>th</sup> April 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/799661/criminal-legal-aid-programme-overview.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799661/criminal-legal-aid-programme-overview.pdf)

<sup>7</sup> AGFS Scheme 11 apply to all Crown Court cases falling under the AGFS with a representation order granted on or after 31<sup>st</sup> December 2018.

<sup>8</sup> Criminal Bar Association, Monday Message (7<sup>th</sup> June 2019) <https://www.criminalbar.com/resources/news/special-announcement-ballot-results-07-06-19/>

<sup>9</sup> Criminal Bar Association, Monday Message (12<sup>th</sup> June 2019) <https://www.criminalbar.com/resources/news/special-message-on-the-governments-offer-12-06-19/>

<sup>10</sup> Criminal Bar Association, Monday Message (28<sup>th</sup> June 2019) <https://www.criminalbar.com/resources/news/the-ballot-result-28-06-19/>

<sup>11</sup> <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

close on 27<sup>th</sup> March 2020.<sup>12</sup> However, it has since been extended indefinitely amid the coronavirus outbreak.

It is perhaps understandable, given the chronology and historic practice of the MOJ, that the respective representative associations of both the criminal bar and criminal solicitors remain sceptical about the outcome of CLAR.

### **Criminal Solicitors' Financial State Prior to COVID-19**

Criminal Solicitors have not received any fee increase for more than twenty-five years. In February 2014 the *Otterburn Report*<sup>13</sup> warned that most firms' finances were 'precarious', with an average profit margin of around just 5%. Just weeks after the publication of that report the MOJ aimed to cut 17.5% from criminal Solicitor Legal Aid rates and further reduced the scope of legal aid.

In the end, in the face of industrial action, only half the cut (8.75%) was implemented but this has never been reinstated, despite promises both at the time and subsequently that it would be reviewed. Criminal solicitors felt, and still feel, that this was unfair as the cuts were based upon a false proposition that volumes of work would substantially increase as a result of fewer firms servicing duty solicitor scheme work.

Across the board, spending on criminal legal aid fell by 34.4% in real terms between 2011 and 2019.<sup>14</sup> The impact of this, coupled with zero rates increase for the last twenty-five years, and austerity driven cuts on an already underfunded sector, has left legal aid firms with little resources to cope with the Coronavirus outbreak.

Year on year, criminal solicitors are fighting to stay afloat against a tide financial problems, and many are closing each year. Recently, data has emerged regarding the number of defence firms who hold a contract with the LAA. In 2010, 1,861 firms held a contract compared to 1,271 in 2018. In other words, a 36% drop in firms. Similarly, since 2016 and based on the October 2019 duty solicitor data, there has been a 29% drop in duty Solicitors on the rota when comparing it to the rota for April 2020.

Up and down the country legal advice deserts already exist in the CJS arena. Furthermore, many areas are set to be without any duty Solicitors in the next 5 - 10 years unless the MOJ take positive action immediately to address this issue.<sup>15</sup> To make matters worse, many criminal defence solicitors are leaving their practice, attracted by the far higher remuneration packages on offer from the Crown Prosecution Service (CPS). Hard pressed criminal firms of solicitors simply cannot compete with the CPS in terms of retention and recruitment.

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<sup>12</sup> [https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting\\_documents/criminallegalaidconsultationdocument.pdf](https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting_documents/criminallegalaidconsultationdocument.pdf)

<sup>13</sup> Otterburn Legal Consulting LLP 'Transforming Legal Aid': Next Steps. A Report for the Law Society of England and Wales and the Ministry of Justice – February 2014.

<sup>14</sup> [Institute for Government 'Performance Tracker' of Criminal Courts 2019.](#)

<sup>15</sup> <https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-lawyers/>

Young trainee solicitors are also choosing to stay clear of the criminal defence. According to a 2016 report by the SRA, only 2.9% of trainee solicitors undertake any criminal law training and even fewer newly qualified solicitors take up positions in criminal practices on qualification. In 2010, the House of Commons Public Accounts Committee advised there is ‘...*little incentive for debt-saddled graduates to opt for a career in legal aid work...*’<sup>16</sup>

There is little wonder that we now have a generation of aspiring commercial lawyers and too few recently qualified practitioners willing to take up publicly funded work, because they cannot afford to practice in crime. Consequently, it is the poorest, those who depend on legal aid, who suffer.

### Criminal Solicitors – London

In London the recruitment and retention issues are felt more severely because young members of the profession cannot be expected to survive the cost of living in the capital with salaries averaging £25-£30,000 per annum. Additionally, those individuals are often also saddled with higher student debt if they have studied within London universities as undergraduates.

In London, recent court closures and so called ‘idle courts’ have seen lengthy delays in matters being concluded. Delayed payment processing from the LAA has impacted generally but particularly on London firms where overheads are substantially higher.

In addition, London has its own unique micro justice system. The closures of many courts and police stations now mean that there are far fewer centres covering substantially bigger numbers of the population.

If a suspect is arrested in Westminster, the trial may be in Hendon. Legal aid fees do not cover travel time or wait time. Court duty solicitors are not entitled to claim travel time or disbursements. Wait times are now much longer as fewer courts are dealing with cases.

Typically, a straightforward case can take all day to be called on, usually for reasons outside of the control of the solicitor instructed. Defendants are often brought to court by private contractors late, there are often delays in the CPS providing papers, police fail to book interpreters, and there may often be more than twenty bail applications listed in one court before a lay bench which obviously takes up the court’s time.

Extradition Courts are based in central London and are serviced by criminal solicitors on the LAA extradition duty scheme. The bills for the work undertaken by solicitors is based on the 1996 fee scheme at the rate of £45 per hour rather than a fixed fee as it would be if it were a criminal matter before the Magistrates’ Court. Such cases are billed on an *ex post facto* basis and can often be as little as £200 to the solicitor. Criminal solicitors rarely benefit if those cases are appealed (which they invariably are) because the matter effectively becomes quasi civil. As such any appeal is heard

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<sup>16</sup> [HC Committee of Public Account, \*The Procurement of Legal Aid in England and Wales by the Legal Services Commission\* \(HC 322, February 2010\) Ev 18](#)

before the Queen's Bench Division of the High Court. At which point Counsel would ordinarily be instructed.

London, being the economic centre of the UK, also attracts a much greater amount of fraud and serious cases. These cases are conducted with a level of added economic uncertainty given the LAA billing structure. If the case is determined as a Very High Costs (VHCC) there is little guarantee of full payment for works completed. Firms often take a hit in these cases.

Protest cases very often centre in the capital, in the Crown Court (low grade cases), often result in proceedings being discontinued after significant work has been conducted. Therefore, other than exceptional cases, fees are often less than £800 inclusive of VAT. Those cases are not profitable to the firm of solicitors instructed and actually cost the firm financially.

Even before the Coronavirus outbreak, many firms based in London were sinking and any profit margin was fast disappearing. The Government's Job Retention Scheme (furlough) may on the face of it offer respite, but there is a sense that some firms may see this as an opportunity to withdraw from the rut of chasing fees to enable them to cover tax and VAT liabilities owed to the revenue.

### Legal Aid Agency (LAA)

Solicitors firms are very much at the mercy of the LAA who determine the legitimacy of claims and the interpretation of the PPE rules. Solicitors often feel that decisions are based upon the premise and culture of refusal. Many hours of unpaid fee earner time are taken up arguing with the LAA to get paid for PPE.

Solicitors regularly complain that CRM7 claims<sup>17</sup> are routinely and arbitrarily slashed so that firms are not getting fairly paid for work undertaken. In no other public sector supply service does a contractor carry out work only to have their fee reduced or payment delayed as a result of an after-the-event determination.

### Solicitor Contract Payment Structure

The LAA offers providers a choice as to how they are paid for the services they are contracted to provide. Solicitors can be paid a Standard Monthly Payment (SMP) or can opt for a Variable Monthly Payment (VMP). The LAA are able to claim 'clawback' for payments made to the contracted firm in the event that work drops off.

### The Criminal Bar

Similarly to criminal solicitors, self-employed criminal barristers have not benefited from any meaningful fee increases for many years. The criminal Bar is particularly economically vulnerable from the coronavirus outbreak if they are to rely on the packages of support announced by the government.

### Self-Employed Income Support Scheme (SEISS)

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<sup>17</sup> Legal Aid Agency form CRM7 *Non-standard fee Magistrates' Court claim and Appeal*

The Government has sought to support the self-employed by the introduction of SEISS which is intended to be a direct payment by the Government (through HMRC) to the self-employed. The scheme proposes to pay 80% of profits for up to three months, capped at £2,500 per calendar month. The amount awarded is based on the last three years tax returns (or less if there are less tax returns available to calculate from).

Qualification for the scheme requires claimants to have filed a tax return for 2018 -19 and must have traded in 2019 - 20 and be trading when applying, or at least would be trading but for the coronavirus outbreak and intend to continue trading in the tax year 2020 – 21.

SEISS is only applicable to those claimants that can prove that their profits would be less than an average of £50,000 across 2016-17, 2017-18, and 2018-19. Payments began in June 2020.

SEISS has a number of drawbacks particularly relevant to the self-employed Bar. Firstly, for those claimants that were entitled to claim under the scheme, nothing at all was paid to them until June 2020. Given the financial burdens, particularly for the junior criminal Bar, such as student and professional tuition debts, relying on scant savings until the last pay-out has undoubtedly caused financial hardship.

Secondly, SEISS offers nothing at all for those post-pupillage criminal barristers that are effectively in their first year of self-employment even if they are able to file their first tax return for 2019-20 by the time the payment under the scheme is to be made.

Thirdly, those junior Barristers that only made a modest profit in the last three years but are perhaps beginning to receive more briefs and, but for the coronavirus outbreak, were expecting to do better will receive a correspondingly low payment. SEISS particularly discriminates against those whose incomes have dipped perhaps because they have taken time off for illness or for childbirth and continuing maternity leave.

Finally, claimants that made in the last tax year a profit of one penny less than the cut-off of £50,000 will receive full payment, but those that made a penny more will receive nothing at all. This will particularly effect senior juniors and silks far more than the junior criminal Bar.

A further general point relevant to the publicly-funded Bar is that some practitioners are also 'fee-paid Judges' and therefore rely, to an extent, on fees earned from sitting in the Courts or Tribunals.

Many Tribunals in certain jurisdictions have hibernated and so they are not currently receiving any income at all from that work. At the time of writing, the Government had not proposed a solution to help mitigate against losses from that income which is neither from 'employed earnings' or 'self-employed' earnings.

The judgement from 12<sup>th</sup> July 2017 of Lady Hale in the case of *O'Brien*<sup>18</sup> defined 'fee-paid Judges' as 'judicial office holders' and 'workers'. In this sense, they are neither 'employed' nor 'self-employed'. They cannot benefit therefore from the Government's Job Retention Scheme (JRS), having been stood down from sessions they were booked to sit on. Likewise, they are unable to satisfy the criteria for SEISS because fee paid judicial work is not self-employment. This group of practitioners may be particularly badly affected and must not be overlooked.

Criminal duty solicitors, that may be employed by a firm on a part-time basis to carry out the work required to cover the duty solicitor slots in their name, a not uncommon practice, but who rely on fee-paid judicial work to top up their incomes, are in a similar position. They will be significantly worse off.

The SEISS scheme had initially completely discriminated against 'directorships or other office holders' but was recently changed to include that group of the self-employed. However, it still discriminates in that it requires claimants to prove that more than half their income comes from self-employment. Even if the MOJ agrees to allow fee-paid Judges to qualify under SEISS as 'office holders', that group of practitioners who earn slightly more from the employment as duty Solicitors than they do from top-up earning as fee-paid Judges will still be failed.

### The Junior Criminal Bar

With reference to the junior criminal Bar, it is clear that the Coronavirus economic support measures do not go far enough to assist people working in that sector of the legal profession and positively exclude many from it.

Chambers are still expected to pay commercial rent to landlords and are unable to claim Business Rate Relief (BRR) because Barristers Chambers fall outside of the Government's Coronavirus outbreak support schemes. They do not satisfy the 'Retail, Hospitality or Leisure Grant Fund'. Additionally, there is no rental holiday offered to mitigate the financial effects of the Coronavirus outbreak in this regard.

This all impacts greatly upon the liabilities of the criminal Bar generally and even affects the survival of their place of work.

A recent Bar Council survey<sup>19</sup> indicated that half of all Barristers Chambers could not survive without additional financial support, the Bar Council surveyed 145 heads of Chambers. Fifty-five per cent of respondents indicated that they could only survive for another 3 to 6 months without further targeted financial support, while 81 per cent indicated that they would not last 12 months without additional financial support.

The Bar Council survey revealed three main concerns in chambers:

1. Interruption to Court work (80 per cent of respondents)

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<sup>18</sup> *O'Brien (Appellant) v Ministry of Justice (Respondent)* [2017] UKSC 46 *on appeal from: [2015] EWCA Civ 1000*

<sup>19</sup> General Council of the Bar – the Bar Council published 2<sup>nd</sup> April 2020 -Surveyed 262 largest Chambers with 145 heads of chambers responding (55%) to date.

2. Inability to generate income to pay future costs
3. Cash flow (or lack thereof) to pay current costs

The chair of the Bar Council, Amanda Pinto QC, commenting on the report said that *'we continue to urge the Ministry of Justice and Government give immediate support to the Bar, especially those in the early stages of their practices and those doing publicly funded work...'*

It is clear that chambers are doing their level best to mitigate the effects of the coronavirus outbreak. Sixty per cent of pure criminal sets have already furloughed clerks and support staff but they need much more financial support from the Government.

The particular court-based working regime of the junior criminal Bar and its patterns of work indicate a truly chronic vulnerability in the wake of the current coronavirus crisis.

The accepted average earnings of junior criminal Barristers are between £26,000 to £30,000 per annum but it would not be unusual for a newly qualified junior criminal Barrister to earn as little as £18,000 per annum.

The Government's current financial support schemes to address the effects of the Coronavirus outbreak fall far short of dealing with the issues faced by the criminal Bar.

#### The Criminal Bar's Financial Position since the Coronavirus Outbreak

As a result of the present crisis, criminal courts up and down the country have substantially postponed their workload.

Some virtual hearings are taking place in relation to all criminal Courts and these relate to matters which are supplemental or additional to the criminal trial. Examples include bail applications, applications in relation to disclosure or other procedural matters and most recently provision for so-called *Newton Hearings*.

Again, in the Magistrates' Court's, work has been significantly reduced and certainly no trials are taking place within those court centres. This effectively means that criminal Barristers are finding that their work has virtually ceased unless they have a practice which is deskbound, unlikely at the criminal Bar.

This is a point which should not be overlooked. Whilst other disciplines at the Bar might manage to offset the full effects of the crisis by undertaking written or advisory work, the criminal Bar, especially the junior criminal Bar, is very susceptible to the lack of Court work and specifically the lack of trials.

The BC and the CBA together with some circuit leaders have recently indicated that they had been actively examining alternatives to simply stopping criminal trials and in some way restarting them, but this seems unlikely to happen anytime soon.

It seems that there will be proposals in the near future for virtual trials. Although this is not the place to consider the issue fully, many in the profession would need a good deal of persuading before even contemplating the idea, particularly in relation to criminal trials.

There have been criminal pilots that have apparently proven to be something of a failure. It seems that the use of different solutions is chaotic. Issues with IT have proven to be patchy at best, which is no doubt mirrored across other sectors as participants attempt to 'home work' using broadband which is often unfit for the scale of this current, unprecedented task. In this regard, the MOJ should perhaps be cautious about making the huge financial investment that it would require before knowing that it would actually work in practice.

Whilst the implementation of virtual trials may alleviate some of the difficulties of the criminal Bar it must be stated here that there is no doubt that any steps by professional bodies, let alone the government, to introduce virtual trials will be strongly opposed by a significant number of legal professionals and academics alike.

In any event, there are grave concerns about the impact it would have on the wider justice implications. Particular concern would concentrate around the dilution of the right to be present at trial and to be able to question and challenge witnesses directly in the same Court before, if necessary the same Jury.

It is noteworthy that in March 2020, in their submissions in repose to the Coronavirus (Scotland) Bill both the Scottish Faculty of Advocates (SFA) and the Scottish Criminal Bar Association (SCBA) recognised that a suggestion being made by the Scottish Government that jury trials should be replaced with Judge only trials, at least during the currency of the crisis, would be strongly challenged. Although they recognised it would not necessarily be in the self-interest of the Bar to do so. Nevertheless, the integrity of the profession will demand the continuation of a transparent, accessible and fully participatory trial, even at the expense of the resumption of trials as a result of such a measure.

All this means the criminal Bar must anticipate that the present difficulties will continue for some time and be potentially devastating to their practises, causing real financial hardship. Significant stress will be placed upon the livelihoods and well-being of all professions, particularly the junior criminal Bar, many of whom will have entered the profession already significantly in debt as mentioned earlier.

Again, there is a particular concern about those who began training in October 2018 and are likely to be ineligible for SIESS, as they will not have started earning significant sums in the second six months of their pupillage. Consequently, the latest tax returns for the year ended April 2020, required by the Government to enable participation in the scheme, will show almost no income as discussed earlier.

There is a particular importance in relation to junior criminal Barristers in the present crisis, who are of course designated as 'key workers' carrying out essential works servicing the criminal Courts. It is right to point out that during the currency of the present Coronavirus outbreak, especially when the Courts begin to open and

operate more prolifically than they are now, the availability and good will of the criminal Bar will be vital.

It can be persuasively argued that it will be the criminal Bar and indeed advocates from both sides of the profession who will be taking the brunt of work which will suddenly begin to flow through the Courts as back logs need to be cleared. In order to be ready to take up that important work, the criminal Bar must be in a relatively fit and able state. Similarly to criminal Solicitors, many criminal Barristers are already looking to move on from the profession due to a lack of work and as a result of the poor remuneration they have received in recent years.

In order to deal with the backlog as Courts begin to function fully once again, it might be worth giving proper consideration to extending sitting days and investing in Recorders. This would help reduce the backlog and provide added opportunities for the criminal Bar to earn more fees to make up for lost earnings.

### **Proposals – Criminal Bar**

As discussed earlier, SEISS has a number of drawbacks particularly relevant to the self-employed criminal Bar. The £50,000 taxable earnings criteria misses the junior end of the criminal Bar and does even less to assist senior juniors and discounts Queen’s Counsel entirely.

It particularly fails to help criminal Barristers who have recently started practice and those who have had a break from the profession and are now returning as they simply will not have the necessary self-employment tax returns that will properly reflect their current earnings.

Those who did not file a 2018-19 return, those who filed one that contained zero or negligible earnings due to their practice commencing shortly before the end of the tax year and the inherent delay between undertaking work and receiving payment and those who were previously employed are outright excluded from the SEISS.

The junior criminal Bar and senior junior practitioners are more vulnerable from the coronavirus crisis, as they tend to rely for earnings on the type of non-urgent hearings that have now been postponed or vacated as a result of the current crisis.

Concern could also be raised also about the indirect discriminatory effect of the SEISS and whether it might in fact breach the Equality Act 2010 in that the newest entrants to the Bar and those mostly impacted are young, female, BAME and those from a disadvantaged socioeconomic background. Statistics indicate that these groups are disproportionately represented in the lower earning sectors of professional practice.

It has similarly been observed that those who took leave from the Bar related to childbirth and maternity leave or illness in 2018-19 will be disadvantaged by the SEISS.

The solution as outlined by junior criminal Barristers, through the CBA, to Amanda Pinto QC<sup>20</sup> is to allow the newly self-employed to rely on their 2019-20 tax returns.

Chambers effectively operate as Unincorporated Trade Protection Associations (UTP). As such, they fall outside of the mitigation schemes implemented by the Government to assist with the current coronavirus crisis.

Chambers should be assisted by relief being provided in relation to commercial rents and also by giving them access to the BRR package in the Government's support scheme.

Commercial landlords, including the four Inns of Court should be encouraged to provide Chambers with rent holidays and landlords generally should be directed to be more sympathetic to majority publicly funded common law and pure criminal law sets of Chambers during the present coronavirus crisis.

Fees due to the junior Bar from the CPS and moreover the LAA should be paid expeditiously. Furthermore, there should be urgent consideration in relation to the quantum of fees paid for certain aspects of work to junior criminal Barristers. The payment of legal aid should be expeditious, fair and should properly evaluate the work done and the time spent.

Measures such as these will assist with the survival of the criminal Bar. If fully implemented they would go a long way towards the preservation of access to justice. It is very often the most vulnerable who will primarily be relying upon legal aid and the presence of a cohort of talented and committed group of professionals to defend their interests. Those criminal lawyers will be needed more than ever before in the difficult times ahead as the CJS seeks to reimpose itself.

### **Proposals – criminal Solicitors**

The MOJ should immediately consider restoring the 8.75% cut, imposed in 2014. The MOJ had promised to review the cut but it has not yet done so. This is seen by many practitioners as in bad faith.

The current 'Criminal Legal Aid Review' (CLAR) should be expedited. It has constantly been put back. The CLSA and the LCCSA have had access to 'round table' discussions with the MOJ and remain sceptical about the limited nature of the Government proposals as do the LS. Although any additional funding is welcome after an investment drought of twenty-five years, the proposed increases are very small and seem to disproportionately disfavour litigants (Solicitors) for example due to the imbalance between the Advocates Graduated Fee Scheme (AGFS) and Litigators Graduated Fee Scheme (LGFS) in respect of cracked trials.

This distinct imbalance must now be addressed as it disproportionately prejudices criminal firms of Solicitors. The CLSA and the LCCSA broadly endorse the LS

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<sup>20</sup> Bar Council Chairman

proposals to improve the package although there were separate submissions from those respective associations.<sup>21</sup>

The current review intended by CLAR is simply not an adequate response either to the shorter-term crisis caused by the coronavirus outbreak or to the longer-term crisis of underfunding. Again, there should be an immediate increase in legal aid rates.

The criminal Solicitor side of the professions has experienced nearly a 40 per cent fall in volume of work due to the current crisis. There have been some savings in travel, but in turn less work. The very least the profession can expect is to be paid fairly for the work they actually undertaking.

The basic hourly fee rate for legal aid has dramatically fallen behind inflation since 1997, as the CLSA and the LCCSA point out.

It is clear that because of the sudden collapse in work due to the coronavirus outbreak there is an urgent need to ease the cash flow of criminal firms of solicitors.

The current SMP's and SVP's must be maintained at current rates. Criminal firms will be relying on those monthly payments for their very survival. There should not be any 'clawback' implemented by the LAA once the coronavirus outbreak begins to stabilise.

Again, there should be an immediate BRR available to claim for Solicitor firms, as with Barrister's Chambers. Neither are listed as within the qualifying category of premises subject to the coronavirus crisis because they are not Retail, Hospitality or Leisure Grant Fund. As most criminal lawyers are working from home or at least based at home they are having to pay business rates for premises that are not currently occupied.

It is abundantly clear that criminal firms of solicitors simply cannot continue under the existing fee structure and fee rates regime, especially given the worsening situation caused by the coronavirus crisis.

The MOJ must now intervene to ensure fair, appropriate and more considerate conduct from the LAA towards the profession during this time. Not least due to the current cash flow crisis caused by the coronavirus outbreak.

The LAA must immediately put a stop to any intended decreases in the SMP and VPM contract payments. They must reverse decreases for firms of Solicitors where those may have already recently taken place – so not to detrimentally impact upon and to maintain the equivalent of the average SMP or VPM for the last 6 months as mentioned earlier.

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<sup>21</sup> CLSA and LCCSA submissions can be seen here:  
[https://www.clsa.co.uk/index.php?q=law-society-response-to-clar-accelerated-items-consultation\\_final\\_27.03.20](https://www.clsa.co.uk/index.php?q=law-society-response-to-clar-accelerated-items-consultation_final_27.03.20)

The LAA must immediately halt any clawbacks where those have already been carried out since the start of the lockdown period, any such clawback payments already taken must be immediately reimbursed to those firms.

## **The Way Forward**

In September 2017, both ‘*The Lammy Review*’<sup>22</sup> and the *Bach Commission*<sup>23</sup> published their respective reports on our justice system.

The *Lammy Review* recommended that ‘*the Government should set a clear, national target to achieve a representative Judiciary and Magistracy by 2025. It should then report to Parliament with progress against this target biennially*’.

The *Bach Commission* recommended, amongst many other things, a statutory ‘Right to Justice’, given its finding that the ‘*justice system is in crisis*’.

What is often overlooked in the overlapping spheres of law, politics, economics and media is the notion of people. It is the people in society that make our justice system function. The CJS ‘needs a rich tapestry of people’.<sup>24</sup> It is the people within it that shape its future; our system needs a cross-selection of society delivering justice for society itself. By allowing our rich ecosystem to flourish, the system promotes efficiency, learning and implementing new ways of working.

Whilst research suggests the CJS has issues concerning succession and retention based on evidence, compounded further by cuts being a false economy, what is difficult to illustrate from an evidential point-of-view is the necessity of client choice.

Justice involves so many moving parts and it is apparent that one size simply doesn’t fit all. Given crime does not discriminate, it falls to reason to suggest crime requires administration, delivery and oversight by a true representation of society. It is even more imperative that client-choice is overwhelming at the point of interception. Often legal aid lawyers intercept clients in moments of crisis. Investing in the expansion of our tapestry in the here and now will have a direct impact on the pool of talent available to serve in the future.

## **Conclusion**

These proposals are reasonable and have been carefully considered. Moreover, they are absolutely necessary to maintain the status quo in terms of the

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<sup>22</sup> Rt. Hon David Lammy MP, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (8<sup>th</sup> September 2017).

<sup>23</sup> Lord Bach, *The Right to Justice: The Final Report of the Bach Commission* (Fabian Society, 22<sup>nd</sup> September 2017).

<sup>24</sup> <https://www.lccsa.org.uk/wp-content/uploads/2019/06/A-BRIEF-HISTORY-OF-LEGAL-AID.pdf>

representation of those alleged to have committed or are suspected of committing criminal offences.

Access to justice must be maintained and the CJS must continue to operate. Without serious and immediate intervention from the MOJ, the entire system could collapse.

Publicly funded criminal lawyers are no different to any other public sector supply service provider. The MOJ therefore has a duty to ensure service continuity during in and after the current Coronavirus outbreak. As the 'contracting authority', the MOJ must act now to ensure suppliers at risk are in a position to resume normal contract delivery once the coronavirus outbreak diminishes.<sup>25</sup>

As for access to legal advice, the future remains bleak for criminal defence. Decades of cuts has brought the criminal defence market to its knees and on the brink of extinction. Criminal lawyers are understandably sceptical about whether there is the political intent to make good on the damaging neglect the CJS has endured.

In short, cuts to criminal legal aid and the derisory rate of remuneration with regards to criminal legal aid are further compounded by the inefficiencies of the CJS after more than a decade of savage cuts. It is clear that in the professions, criminal solicitors and criminal barristers alike see these obstacles as a tax on criminal defence lawyers as a whole.

The criminal legal aid system has a negative trajectory. Unless the MOJ revisit their interim plans, they risk being unable to revive the entire system from complete collapse. Criminal lawyers fear that they cannot wait for a government with the political will and electoral mandate to deal with these issues. Criminal lawyers are right to emphasise the urgency. Investment is desperately needed now, not down the line.

The LS and BC have repeatedly warned the MOJ of the existing crisis, and the continual threat of further decline. The MOJ has been warned that certain parts of England and Wales will be without criminal defence lawyers. Justice for victims and defendants is at real risk as the fairness of a criminal trial is cast into doubt.

The notion of 'swings and roundabouts' for defence Solicitors is now out of date for both the fixed fees and graduated fees given they are based on historical data, and a basket of cases that no longer exists in the modern day criminal digital justice system, especially given the significant reduction in prosecutions.

The increasing shortage of criminal defence Solicitors is economically unsound; decades of cuts to legal aid have been a false economy. The truth is, criminal defence lawyers are in a unique position within the CJS; they know how it works and they now advise on pleas at a much earlier stage in proceedings, resulting in greater saving to the taxpayer and enabling the delivery of swift justice for victims of crime.

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<sup>25</sup> Cabinet Office – Procurement Policy Note – Supplier relief due to COVID-19 Action Note PPN 02/20 published 20<sup>th</sup> March 2020.

As our criminal justice and criminal legal aid system continues to be underfunded, there is a real risk the fairness of a criminal trial is cast into further doubt. Justice unfunded is and will continue to be justice denied. We cannot continue to sacrifice justice on the basis of cost, spend and expediency.

The late Sir Henry Brooke said that *'this is not about money for lawyers. The liberties of England are at risk'*. A rich tapestry of lawyers enables access to justice. Without access to justice, society does not have justice. Without justice, the concept of a democratic civilised society is itself placed in doubt.

## **Appendix A**

### **MOJ Consultation and Impact Assessment Documents**

Ministry of Justice, *Criminal Legal Aid Review: An Accelerated Package of Measures Amending The Criminal Legal Aid Fee Schemes* (Consultation) (28 February 2020)

[https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting\\_documents/criminallegalaidconsultationdocument.pdf](https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting_documents/criminallegalaidconsultationdocument.pdf)

Ministry of Justice, *Criminal Legal Aid Review: An Accelerated Package of Measures Amending The Criminal Legal Aid Fee Schemes* (Annex B: Equality Statement) (28 February 2020)

[https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting\\_documents/AnnexBequalitystatementFINAL.pdf](https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting_documents/AnnexBequalitystatementFINAL.pdf)

Ministry of Justice, *Criminal Legal Aid Review: An Accelerated Package of Measures Amending The Criminal Legal Aid Fee Schemes* (Impact Assessment) (28 February 2020)

[https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting\\_documents/criminallegalaidimpactassessment.pdf](https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting_documents/criminallegalaidimpactassessment.pdf)

Ministry of Justice, *Criminal Legal Aid Review: An Accelerated Package of Measures Amending The Criminal Legal Aid Fee Schemes* (Impact Assessment – Annex B: Unused Material Findings from the CPS Case File Review, Solicitor Survey and Barrister Survey) (28 February 2020)  
[https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting\\_documents/criminallegalaidIAAnnexBunusedmaterial.pdf](https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting_documents/criminallegalaidIAAnnexBunusedmaterial.pdf)

Ministry of Justice, *Criminal Legal Aid Review: An Accelerated Package of Measures Amending The Criminal Legal Aid Fee Schemes* (Impact Assessment – Annex C: Supporting Evidence from Practitioner Focus Group Discussions) (28 February 2020)  
[https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting\\_documents/criminallegalaidfocusgroupreport.pdf](https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting_documents/criminallegalaidfocusgroupreport.pdf)

## **Appendix B**

### **Criminal Legal Aid: Comparative Rates 1996<sup>26</sup> to 2020**

#### **Magistrates' Court Fixed Fees**

In general terms category 1 is a guilty plea including cases which crack (either by plea or discontinuance) before the trial date, Category 2 is for trials and category 3 is for committals. Category 1 is now split into two (1A and 1B depending on whether the case is either way (1A) or summary only)

As for category 3, there are no committals anymore. This fee therefore cannot be claimed at all. It was replaced by a fixed fee of £318 for sending cases when committals were abolished but that fee has long since been removed so that there is no fee at all for any representation in the Magistrates Court if a case is sent to the Crown Court. The most recent consultation (currently open ended) consults on reintroducing a fee for sending based on 2 hours' work, i.e. £90.

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<sup>26</sup> Figures from Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 version applicable from 1/4/1996

There is now no difference in London. There are differences in designated and non-designated areas. In designated areas (e.g. London) a higher fee is payable but no travel and waiting can be claimed whereas in non-designated areas, travel and waiting can be claimed to enhance the lower fee.

<i>Type of proceedings</i>	<i>Date/Area</i>	<i>Lower standard fee</i>	<i>Lower limit</i>	<i>Higher standard fee</i>	<i>Higher limit</i>
Category 1	1996 outside London	£148.25	£276	£357.00	£478
	1996 London rate	£191.00	£354	£453.00	£598
	2020 designated area rate	£248.71 (1A) £202.20 (1B)	£272.34	£471.81 (1A) £435.64 (1B)	£471.85
	1996 London rate inflation adjusted <sup>27</sup>	£361.23		£856.74	
	Inflation adjusted loss	31.2% (1A) 44% (1B)		44.9% (1A) 49.2% (1B)	
Category 2	1996 outside London	£262.25	£474	£601.00	£790
	1996 London rate	£336.25	£602	£755.00	£963
	2020 designated area rate	£345.34	£467.84	£723.35	£779.64
	1996 London rate inflation adjusted	£635.94		£1,427.91	
	Inflation adjusted loss	45.7%		49.3%	
Category 3	1996 outside London	£236.50	£418	£536.00	£730
	1996 London rate	£299.25	£507	£629.00	£778
	2020 – no payment at all for sending – suggested payment	£0 (current) £90 (suggested payment)		£0 (current) £90 (suggested)	
	1996 London rate inflation adjusted	£565.96		£1,189.61	

## Hourly rates

Hourly rates are used to gauge where a case comes within the fixed fee matrix in the Magistrates' Court. Crown Court fees are based on fixed fee's but special preparation is based on the hourly rate and confiscation and Court of Appeal cases are paid on the old hourly rate basis.

<sup>27</sup> <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> to 2019

### Magistrates' court proceedings

<i>Class of work</i>	<i>1996 Rate in London</i>	<i>2020 rate</i>	<i>Inflation adjusted rate</i>	<i>Percentage loss</i>
Preparation	£47.25	£45.35	£89.36	49.25%
Advocacy	£56.50	£56.89	£106.86	46.8%
Attendance at court where counsel assigned	£30.50	£31.03	£57.68	46.2%
Travelling and waiting	£24.75	£24	£46.81	48.7%
Routine letters written and routine telephone calls	£3.60 per item	£3.56	£6.81	47.7%

### Crown Court and Court of Appeal proceedings

<i>Class of work</i>	<i>Grade of fee-earner</i>	<i>1996 Rate in London</i>	<i>2020 rate</i>	<i>Inflation adjusted rate</i>	<i>Percentage loss</i>
Preparation	Senior solicitor	£55.75	£50.87	£105.44	51.75%
	Solicitor, legal executive or fee earner of equivalent experience	£47.25	£43.12	£89.36	51.75%
	Articled clerk or fee-earner of equivalent experience	£34	£31.03	£64.30	51.75%
Advocacy	Senior solicitor	£64.50	£58.86	£121.99	51.75%
	Solicitor	£56.00	£51.10	£105.91	51.75%
Attendance at court where counsel assigned	Senior solicitor	£42.25	£38.55	£79.91	51.75%
	Solicitor, legal executive or fee-earner of equivalent experience	£34.00	£31.03	£64.30	51.75%
	Articled clerk or fee-earner of equivalent experience	£20.50	£18.71	£38.77	51.75%
Travelling & waiting	Senior solicitor	£24.75	£22.58	£46.81	51.75%
	Solicitor, legal executive or fee-earner of equivalent experience	£24.75	£22.58	£46.81	51.75%
	Articled clerk or	£12.50	£11.41	£23.64	51.75%

<i>Class of work</i>	<i>Grade of fee-earner</i>	<i>1996 Rate in London</i>	<i>2020 rate</i>	<i>Inflation adjusted rate</i>	<i>Percentage loss</i>
	fee-earner of equivalent experience				
Routine letters written and routine telephone calls		£3.60 per item	£3.29	£6.81	51.75%