



House of Commons
Justice Committee

The Future of Legal Aid

Third Report of Session 2021–22

*Report, together with formal minutes relating
to the report*

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Justice Committee

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Contacts

All correspondence should be addressed to the Clerk of the Justice Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 8196; the Committee's email address is justicecom@parliament.uk.

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Summary

Since the turn of the century, successive governments have taken steps to reduce the cost of legal aid. Although the Government spent £1.76 billion on legal aid in 2019–20, it is increasingly only able to help a smaller proportion of the population on a narrower range of issues.

The Government has said that it is committed to improving access to justice and the sustainability of legal aid providers. Several significant reviews of legal aid are currently underway and are due to conclude this year. Our inquiry sought to set out the core problems within the current legal aid framework and to identify the solutions that could improve the long-term future of legal aid.

In relation to criminal legal aid, the Committee heard concerning evidence from legal aid providers, especially criminal defence solicitors, over the sustainability of the profession. Many firms are not able to recruit or retain lawyers, with a significant number leaving to join the Crown Prosecution Service. At the bar, fewer barristers are able to build their careers in publicly funded work. The structure of the fee schemes does not do enough to support lawyers to provide the best quality of service to their clients, especially at the early stages of criminal proceedings. The reliance on fixed fees for so much criminal work does not reflect the complexity of the cases that legal aid lawyers undertake. The current fee structure is not flexible enough and has not recently been reviewed or updated. Over the last decade there has been a significant decrease in the number of cases coming through and as a result legal aid providers have struggled to survive.

The adversarial nature of England and Wales' justice system relies upon the existence of a sustainable publicly funded criminal defence profession that is able to provide a high-quality service to suspects and defendants. The quality of that service is fundamental to our concept of a fair trial.

There is an urgent need to overhaul the current system so that providers are paid for all the work they do to support their clients, especially at the early stage of the process.

Civil legal aid was radically overhauled by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The current civil legal aid framework means that providers are not supported to provide early legal advice, which many witnesses stressed was crucial to preventing an individual's problems escalating. There is a real need for a more flexible scheme that allows anyone with a legal problem, who cannot afford a lawyer, to access early legal advice. Such a scheme would enable more people to get access to justice but it would also have a positive effect on court proceedings, as litigants in person would be more informed and better equipped to deal with the process. The legal aid means test and the exceptional case funding system should both be simplified and reformed. Civil legal aid providers are facing major sustainability challenges. The rates of pay make recruitment and retention difficult with the result that in many areas there are advice deserts.

There is a strong case for fundamental changes to the civil legal aid system. It should be made more flexible, so that a greater number of organisations can be provided direct

support and to ensure that there is a consistent pipeline of legal aid lawyers that are able to help the most vulnerable in society.

The Legal Aid Agency has been accused of having a “culture of refusal” by a number of witnesses. The Agency has taken some steps to improve its relationship with providers and was praised by some for its response to Covid-19. We think that the Legal Aid Agency should be empowered to place more trust in providers and to reduce the amount of unpaid administrative work they are required to do. Moreover, as part of the process of reforming legal aid, the Government should consider adjusting the Legal Aid Agency’s priorities.

1 Introduction

1. This is an important moment in the history of legal aid in England and Wales. After a decade of adjusting to the effect of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the Government and the professions are focused on trying to find solutions to improve the legal aid system and access to justice. As Richard Miller, head of the Justice Team at the Law Society, wrote in December 2020 “for the first time in two decades, it feels like the public debate is about how to improve legal aid, instead of how to stop further cuts”.¹ At the time of writing the Government has initiated the following:

- the Independent Review of Criminal Legal Aid—due to report in 2021;
- a review of the means test for legal aid, due to publish proposals in Autumn 2021; and
- an internal review of the sustainability of civil legal aid.

These reviews could provide the foundation for a positive future for legal aid over the next decade.

2. This inquiry into the future of legal aid was launched on 7 September 2020. The terms of reference were designed to evaluate the current legal aid system in England and Wales, and to look ahead to identify areas that need reform. We received more than 80 written submissions and are grateful to everyone who provided evidence.

3. The justice system in England and Wales cannot function effectively without a sustainable legal aid profession. On 24 March 2021, Lord Wolfson, Parliamentary Under-Secretary of State for Justice, told us:

The purpose of legal aid is to enable people to vindicate their legal rights. That is true for criminal legal aid and civil legal aid. We need a sufficient number of people in the profession in order to enable people to have access to that advice.²

We agree. However, on the evidence submitted to this inquiry, we are concerned that there are not enough legal aid providers in certain areas, and without urgent action, that situation is certain to worsen over the next decade. Lord Wolfson also accepted that “a system which means that people cannot vindicate their legal rights is a legal aid system that is not working”.³ Legal Service Board data suggests that 3.6 million people have an unmet legal need involving a dispute each year.⁴ The number of providers of criminal defence services is also decreasing significantly. This suggests that the current legal aid system is not working. Lord Wolfson suggested to us that the way forward will require a fundamental change of approach:

[w]e do not live in a world, and we increasingly will not live in a world, where the only way to vindicate your legal right is by going to somebody called a solicitor and ending up in a building with the word “Court” outside it. There will be other ways to vindicate your legal rights. Courts will operate in different ways.⁵

1 Richard Miller, [A turning point for legal aid?](#), Law Society Gazette, 17 December 2020

2 [Q525](#)

3 [Q525](#)

4 Legal Services Board ([LEG0049](#))

5 [Q525](#)

While we recognise the merit in this view, the rule of law and access to justice cannot wait for the Minister's vision to become reality. The Minister affirmed his, and the department's, commitment to the rule of law. That is welcome. Nevertheless, one of the best ways to judge the Government's commitment to the rule of law and access to justice will be on whether it delivers ambitious reforms to the legal aid system in response to this report and those due to be published this year.

4. Based on the evidence submitted to this inquiry, we suggest five themes, all of which are derived from the principle of access to justice, that should characterise the Government's approach to reforming legal aid:

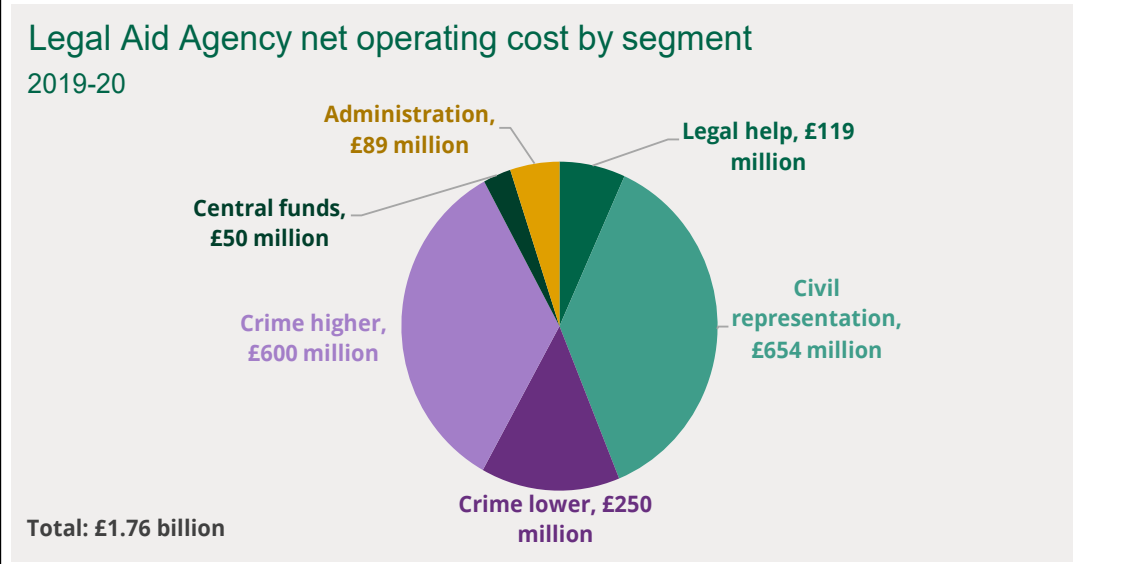
- the legal aid system should be designed around the needs of those who use it;
- the regulation of the legal aid system should prioritise the quality of the work provided and should ensure that public are supplied with the right legal work at the right time;
- the legal aid framework should enable the government to act strategically and to target support in areas where it is needed most and where it can improve the effectiveness of the courts and the justice system;
- legal aid should be regarded as a public service, which benefits all of society; and
- legal aid is critical to the fairness of the justice system, enabling those without sufficient financial means to participate on equal terms with those that can afford representation.

All the recommendations in this report are informed by these themes. Technology will also play a role in shaping the future of legal aid. We believe that technology should be used where it can be shown to make legal information and advice more accessible and where it can work to complement face-to-face services. Digital services should not, though, be inappropriately substituted for traditional advice, representation and support.

5. The Committee recognises that in relation to legal aid in particular the public will not want to see expenditure that is uncontrolled or unreasonable. There is also public debate about which areas the available legal aid expenditure should focus upon. We also acknowledge that the Government will always need to balance competing demands for resources.

Box 1: The legal aid budget

In 2019–20, net operating expenditure for the Ministry of Justice was £8.43 billion. Net operating expenditure on legal aid was around £1.76 billion or approximately 21% of the total:



Source: Ministry of Justice Annual Report and Accounts 2019–20

The role of legal aid in society

6. The case studies below, taken from organisations who submitted evidence to our inquiry, illustrate what sort of services legal aid provides.

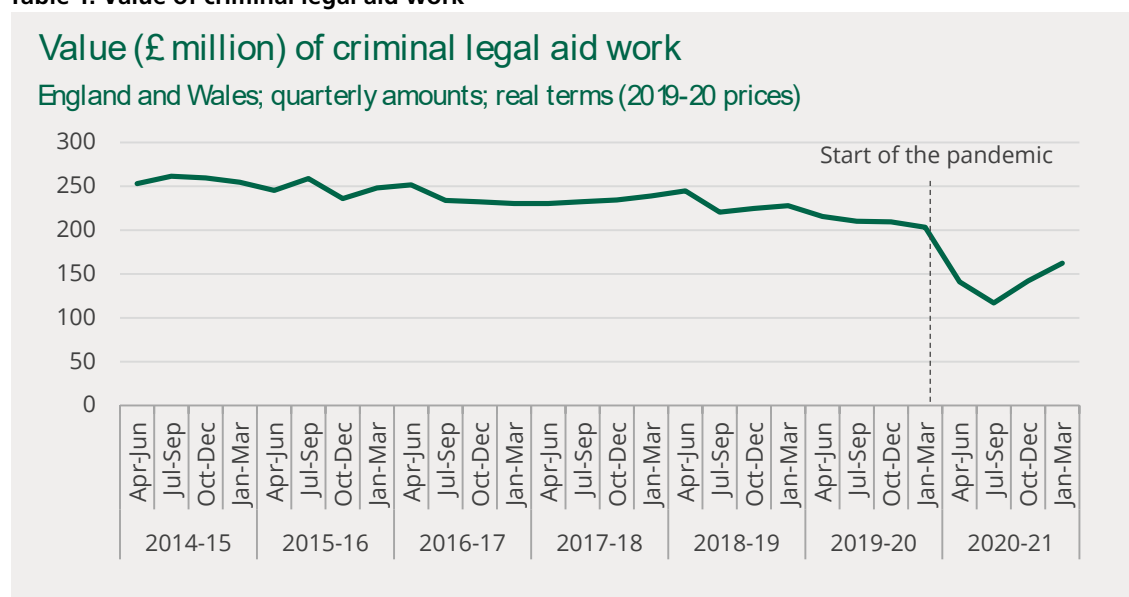
- **ACCESS SOCIAL CARE AND OTHERS:** Four people with learning disabilities in the North of England, faced 50% reduction in support packages as a result of local authority budget cuts, although their needs had not changed. The problems raised were resolved only once a lawyer was able to represent them.⁶
- **FAMILIES TOGETHER PROGRAMME:** Munir paid a local community member for legal advice and help with translation but his application for family reunion was refused. The informal advice led to mistakes and complications in subsequent applications. The mistakes were eventually explained and corrected by the Greater Manchester Immigration Aid Unit, but he had been separated from his family much longer than had the initial application been processed correctly.⁷
- **MARY WARD LEGAL CENTRE:** A carer for a relative's young children contacted the centre after the children's parent had committed suicide. They needed advice about whether there had been succession to the parent's tenancy so that the children's rights were protected and whether a transfer could let the family move away from the scene of the suicide. Since LASPO, legal aid funding is no longer available for advice about succession and rehousing. The Centre

6 Access Social Care, Choice Support, Association of Mental Health Providers, Mencap Croydon, Avenues, Mencap, Dimensions, Milestones Trust, United Response, Age UK + National Autistic Society ([LEG0062](#))

7 Dr Sascha Holden, [Cuts that Cost The Impact of Legal Aid Cuts on Refugee Family Reunion](#), Families Together, October 2021

provided legal advice to the client because of funding from Camden Council of this type. If the client had lived in another local authority area, assistance might not have been possible.⁸

Legal aid makes a difference to vulnerable people. We pay tribute to those lawyers who help people navigate the complexities of the legal system and enforce their rights.

Table 1: Value of criminal legal aid work

Source: MoJ, Legal aid statistics, January to March 2021, table 1.1; HM Treasury, [GDP deflators at market prices, and money GDP March 2021 \(Quarterly National Accounts\)](#)

9. It appears that significant reform to the criminal legal aid system is on the way. Richard Miller, head of the Justice Team at the Law Society, writing in December 2020, said “The independent element of the Criminal Legal Aid Review gives hope that the economic crisis in the criminal defence profession may finally be substantially addressed”.¹² The Criminal Legal Aid Review has already delivered some positive, if relatively modest, changes to the system. The evidence we have received on criminal legal aid indicates that the system will require significant further investment to become sustainable. However, while significant financial investment is necessary, it is not sufficient to make the criminal legal aid system work effectively for the public. Fundamental reform to key components of the criminal legal aid system is required. In particular, the system should move away from a transactional approach, prioritise providing the right level of help at the right time and focus on the quality of the service provided for the benefit of the criminal justice system and the public.

The role of criminal legal aid lawyers in the criminal justice system

10. Criminal legal aid providers provide legal services in four main areas:

- Pre-charge advice at the police station;
- Legal representation in the magistrates’ court;
- Litigation and advocacy services in the Crown Court and Higher Courts; and
- Legal advice and advocacy assistance for prisoners.¹³

The current fee regime for these services is set out in the Criminal Legal Aid (Remuneration) Regulations 2013.¹⁴

¹² Richard Miller, [A turning point for legal aid?](#) Law Society Gazette 17 December 2020

¹³ Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (2019) para 199

¹⁴ These regulations have been amended by 15 subsequent amending regulations.

11. Pre-charge advice at the police station is performed by solicitors and police station representatives. Pre-charge advice in the police station is not means tested. Dr Vicky Kemp told us that the request rate for advice rose from 45% of suspects in 2009 to 56% in 2017.¹⁵ The duty solicitor scheme provides representation to suspects who do not have their own solicitors. Duty solicitor schemes are run by the Legal Aid Agency, which contracts private firms to do the work in police stations. The Independent Review of Criminal Legal Aid's data compendium shows that between 2017 and 2019 the number of duty solicitors on the rota declined from 5,240 to 4,600.¹⁶ In that same period the average age of duty solicitors rose from 47 to 49. In 2019, only 9% of those solicitors were under 35.

12. Fees for police station advice are set out in Schedule 4 of the Criminal Legal Aid (Remuneration) Regulations 2013.¹⁷ Schedule 4 sets out the fixed fee and escape fee threshold for in-person police station advice for particular areas and schemes.¹⁸ For example, the fixed fee in Pwllheli in North Wales is £133.50 and the escape fee is £400.72. The fixed fee in Manchester is £177.90 and the escape fee is £587.11, and in central London it is £237.25 and £803.78 respectively. The regulations also set out the hourly rate used to calculate whether the escape fee threshold is reached (for example, for an own or Duty Solicitor during normal hours it is £51.28 in London and £47.45 everywhere else).¹⁹

13. Legal aid funded representation in the magistrates' court is subject to a non-contributory means test and an interests of justice test. In 2020–21, defendants received representation via legal aid in approximately 13% of magistrates' court cases.²⁰ This was down from 24% in 2012–13. In 2020, there were 57,388 trials in the magistrates' court, as opposed to 10,610 in the Crown Court. This work is largely performed by solicitors. This work is paid through a mixture of standard fees (and fee limits) and hourly rates, which are set out in Schedule 4 of the Criminal Legal Aid (Remuneration) Regulations 2013. For example the Designated Area Standard Fee for a Category 1A case, which includes for example either way guilty pleas, provides for a lower standard fee of £248.71 and a lower standard fee limit of £272.34. The relevant higher standard fee and higher standard fee limit are £471.81 and £471.85 respectively.

14. Legal aid in the Crown and the Higher Court is funded through the Litigators' Graduated Fee Scheme, the Advocates' Graduated Fee Scheme and the Very High Cost (Criminal) Cases scheme. Litigation work in the Crown Court and above is undertaken by solicitors. Advocacy work in the Crown Court and above is undertaken by solicitor advocates and barristers. There is a contributory means test that decides whether someone is eligible for legal aid in the Crown Court. At the Crown Court, legal aid was granted in approximately 93% of cases in 2019–20, and this figure was higher than in recent years, in which it has stayed around 87%.²¹ Crown Court work is normally responsible for around two-thirds of criminal legal aid expenditure even though the workload is smaller than either the Police Station Advice or the Magistrates' court work. The fees for the Advocates'

15 Dr Vicky Kemp (Principal Research Fellow at U) ([LEG0015](#))

16 Independent review of criminal legal aid, Summary Information on Publicly Funded Criminal Legal Services p48–56

17 [The Criminal Legal Aid \(Remuneration\) Regulations 2013](#)

18 [The Criminal Bills Assessment Manual](#) explains how the Escape Fee Thresholds work in police station cases para 5.13. In practice, firms get paid the work done in excess of the fixed fee threshold (in addition to the fixed fee).

19 The Criminal Legal Aid (Remuneration) Regulations 2013.

20 MoJ, [Criminal court statistics January to March 2021](#), Table M1; [Legal aid statistics quarterly January to March 2021](#): table 3.1

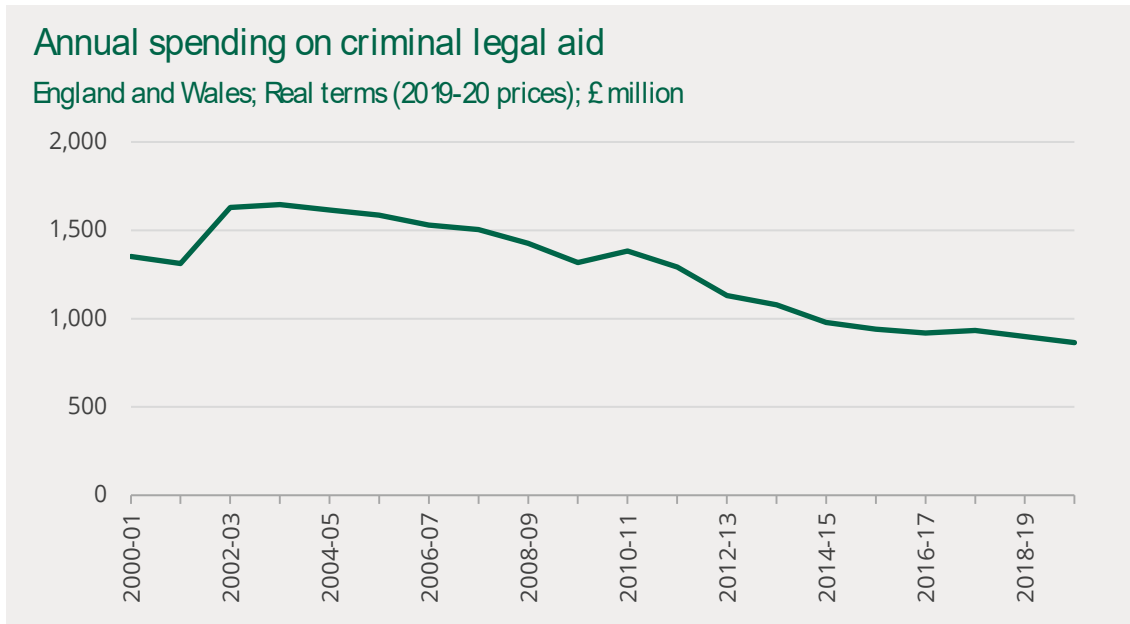
21 MoJ, [Criminal court statistics January to March 2021](#) Table C1; [Legal aid statistics quarterly January to March 2021](#): table 3.2

Graduated Fee Scheme and Litigators' Graduated Fee Scheme are set out in Schedule 1 and Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013 respectively. The mixture of graduated fees and hourly rates for these schemes means that Crown Court work is more profitable for providers than police station advice or magistrates' court representation.

15. This summary of the work of criminal legal aid lawyers serves to highlight how fundamental their work is to the criminal justice system in England and Wales. In the discussion of fee schemes, it is important to remember that the criminal legal aid system is about real people. The work of criminal legal aid lawyers secures the right of everyone in England and Wales to legal representation in a police station or a court, even if they cannot pay for representation privately. That right depends on the fact that there are criminal lawyers willing and able to work for criminal legal aid rates. As well as securing the fundamental individual right of access to legal advice, criminal legal aid lawyers provide a public service that is crucial for the effective functioning of the criminal justice system. **Reform of criminal legal aid must prioritise a whole justice system approach, to ensure that there are incentives for everyone to work towards the fair and timely resolution of criminal cases.**

Recent changes to the criminal legal aid framework

16. The rules governing criminal legal aid are contained in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act and in regulations made under that Act. The Justice Committee's 2018 report, *Criminal Legal Aid*, provides a detailed outline of some of the changes made to criminal legal aid between 2008 and 2018.²² The changes over that period contributed to a significant decrease in the amount of money spent on criminal legal aid. In real terms, criminal legal aid spending was 38% lower in 2019–20 than in 2010–11, at around £864 million versus £1.38 billion.

Table 2: Annual spending on criminal legal aid

Source: MoJ, Legal aid statistics, October to December 2020, table 1.0; HM Treasury, [GDP deflators at market prices, and money GDP March 2021 \(Quarterly National Accounts\)](#)

17. The Committee’s 2018 inquiry was prompted by the Government’s proposed changes to the Litigators’ Graduated Fee Scheme and Advocates’ Graduated Fee Scheme.

Box 2: AGFS and LGFS

The Advocates’ Graduated Fee Scheme (“AGFS”) is the fee scheme through which criminal defence advocates are paid for carrying out publicly funded work in the Crown Court and the Litigators’ Graduated Fee Scheme (“LGFS”) is the fee scheme through which criminal litigators are paid for carrying out public funded work in the Crown Court.

Source: Explanatory Memorandum to the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020 No. 903

Our predecessor Committee noted that even though the disputes between the professions and the Government over those proposals were eventually resolved, the underlying problems around the sustainability of criminal legal aid, for both solicitors and barristers, remained.²³

18. In February 2019, the Government published its Post-Implementation Review of Part 1 of LASPO. The Review estimated that the changes to criminal legal aid fees saved £140m per annum, though there was “some variability between the policies in terms of the magnitude of the savings”.²⁴ The Review noted that changes to defendant’s cost orders had been effective in reducing expenditure, and explained that central funds expenditure had fallen by £53m since 2011–12, from £101m to £48m.²⁵ The Review stated that the introduction of the £37,500 disposable income threshold in the Crown Court

23 Justice Committee, [Criminal Legal Aid](#), Twelfth Report of Session 2017–19 (HC 1069) paras 44 and 75.

24 Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (2019) para 890

25 Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (2019) para 1044

had “not significantly impacted on the volume of Crown Court defendants representing themselves” and had saved the LAA £1.6m per annum.²⁶ The report concluded that the Government planned “to undertake a broader review of criminal legal aid fee schemes as the Government believes the time is right for a more holistic review”.²⁷

19. In February 2020, as part of the Criminal Legal Aid Review, the Government launched a consultation on an accelerated package of measures to amend the criminal legal aid fee schemes (the AGFS and the LGFS).²⁸ The consultation set out a number of proposals relating to:

- how litigators and advocates are paid for work on unused material;
- how advocates are paid for work on paper heavy cases;
- how advocates are paid for cracked trials in the Crown Court; and
- how litigators are paid for work on sending cases to the Crown Court.²⁹

20. The Government published its response to the consultation on 21 August 2020.³⁰ The Government decided to proceed with the changes in the consultation, except on the issue over what litigators are paid for work on sending cases to the Crown Court.³¹ The Government decided to increase the payment from two hours’ worth of work to four hours and that payment will be made under the magistrates’ court scheme rather than the LGFS.³² On 25 August 2020, the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020 were made to bring the changes into law. The Government said that these changes would amount to an additional £35 million to £51 million per year for criminal legal aid.³³

21. In December 2020, following the publication of the Attorney General’s revised Guidelines for Disclosure, the Government launched a further consultation on remuneration for pre-charge engagement.³⁴ The consultation proposed a new unit of work for advice and assistance associated with pre-charge engagement; it would allow a defence practitioner to be remunerated where it has been agreed “between the relevant parties (prosecutors and/or investigators, suspects and suspect’s legal representatives) that pre-charge engagement may assist the investigation and a full written record of the discussions is made”.³⁵ The Government response to the consultation set out that it would proceed with the proposal and the Criminal Legal Aid (Remuneration) Regulations 2013

26 Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (2019) paras 1059–1062

27 Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (2019) para 1078

28 Ministry of Justice, [Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes](#) (2020)

29 Ministry of Justice, [Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes](#) (2020)

30 Ministry of Justice, [An accelerated package of measures amending the criminal legal aid fee schemes](#), Government Response, 2021

31 Ministry of Justice, [An accelerated package of measures amending the criminal legal aid fee schemes](#), Government Response, 2021 para 4

32 Ministry of Justice, [An accelerated package of measures amending the criminal legal aid fee schemes](#), Government Response, 2021

33 [Letter from Alex Chalk MP, Parliamentary Under Secretary of State for Justice, dated 21 August 2020, regarding an accelerated package of measures amending criminal legal aid fee schemes](#)

34 Ministry of Justice, [Criminal Legal Aid Review Remuneration for pre-charge engagement](#), (2021)

35 Ministry of Justice, [Criminal Legal Aid Review Remuneration for pre-charge engagement](#), (2021) para 19

(the Remuneration Regulations) came into force on 7 June 2021.³⁶

22. The changes made as part of the Criminal Legal Aid Review are positive and show that the Government recognises the need to make improvements to the criminal legal aid framework. It is particularly welcome that the Government has acted on pre-charge engagement. However, much more needs to be done to make criminal legal aid sustainable.

Sustainability

23. There is a consensus that the sustainability of criminal legal aid providers is a real problem. Speaking to the Committee on 20 December 2020, the Lord Chancellor outlined the thinking behind the Independent Review of Criminal Legal Aid, explaining that it would “allow a much longer-term solution to be brought to bear, not just about advocates’ fees, important though they are, but about the way in which solicitors are remunerated for their important work at the police station, to really get under the skin of the existential issues that are affecting criminal practice and make a sustainable difference for criminal legal aid”.³⁷ The Independent Review of Criminal Legal Aid’s Terms of Reference, as noted above, are focused on looking at “the Criminal Legal Aid System in its entirety” and this reflects the Government’s aim to address the issues of sustainability.³⁸ The Independent Review has gathered a significant amount of data on the issue of sustainability, as has the APPG on Legal Aid’s Westminster Commission on Legal Aid.³⁹

24. The Independent Review of Criminal Legal Aid’s data compendium shows that since 2014/15 the number of criminal legal aid firms in England and Wales has decreased by 19% (from 1,510 in 2014/15 to 1,220 in 2019/20).⁴⁰ The number of solicitors working for criminal legal aid firms declined between 2014/15 and 2018/19 by 20%, while the number of practising solicitors grew by 9%.⁴¹

25. Richard Miller, head of the Justice Team at the Law Society, summarised the problem of sustainability facing solicitors:

CLAR was first announced in 2018 to address what even then was seen as an urgent problem, with an ageing criminal defence profession and areas where there were no lawyers under 35 doing the work at all. Duty schemes are collapsing. One in the north-west collapsed and had to be combined with a neighbouring scheme, and others are down to their last three or four lawyers. [...] We had 1,122 firms holding a criminal legal aid contract as of 14 December. That is 150 fewer firms than in 2019, so 12% of the supply base has gone in the course of a year.⁴²

36 Ministry of Justice, [Government Response: Criminal Legal Aid Review - Remuneration for pre-charge engagement](#), (2021)

37 Justice Committee, [Oral evidence: The work of the Lord Chancellor](#), HC 225 Tuesday 1 December 2020, Q177

38 [Terms of Reference for the Independent Review of Criminal Legal Aid](#) (2021)

39 Independent review of criminal legal aid, Summary Information on Publicly Funded Criminal Legal Services; APPG on Legal Aid, Inquiry into Sustainability, [workforce survey](#)

40 Independent review of criminal legal aid, Summary Information on Publicly Funded Criminal Legal Services p8

41 Independent review of criminal legal aid, Summary Information on Publicly Funded Criminal Legal Services p23

42 [Q91](#)

26. Barristers face similar problems. Derek Sweeting QC, Chair of the Bar Council, said:

People are coming to the criminal Bar, staying for 10 years or less and then leaving in numbers, so we have a sandwich with no meat in the middle, which is comprised of young members of the Bar with not much experience and older members of the Bar who are ageing, and we have very little in the middle.⁴³

Without significant reform there is a real chance that there will be a shortage of qualified criminal legal aid lawyers to fulfil the crucial role of defending suspects and defendants. This risks a shift in the balance between prosecution and defence that could compromise the fairness of the criminal justice system.

Recruitment and retention

27. In terms of recruitment, the Criminal Law Committee of the Birmingham Law Society cites the following factors to explain the lack of new entrants to criminal practice, for both solicitors and barristers:

- Poor rates of remuneration compared to nearly any other area of law;
- Frequent unsocial hours;
- Often mentally and emotionally damaging work, for which there is little support;
- Poor work/life balance;
- High demands of regulatory compliance;
- The low standing of criminal defence lawyers in public discourse.⁴⁴

28. These factors also contribute to the difficulty of retaining staff. Birmingham Law Society told us entire cohorts of pupil barristers at local chambers choose not to practice in crime, even though they are being drawn to the profession by criminal work.⁴⁵ Emma Fenn, a barrister at Garden Court Chambers in London, said that they faced similar problems: “every year, out of three or four pupils, we virtually never get a chance to retain them in crime because they get a taste of it and the fees, and they immediately want to work in one of our other areas”.⁴⁶ James Mulholland QC, Chair of the Criminal Bar Association (CBA), stressed that many criminal barristers are leaving because of substantial student debts.⁴⁷

29. Dr James Thornton, Lecturer in Law at Nottingham Trent University, provided written evidence based on interviews with 29 criminal defence litigators and advocates in England and Wales. Thornton reported that:

Very few of the criminal legal aid lawyers I interviewed in my study could see much of a future in criminal legal aid due to current payment rates, both in terms of direct cuts and the impact of inflation. From the most

43 [Q90](#)

44 Birmingham Law Society ([LEG0024](#))

45 Birmingham Law Society ([LEG0024](#))

46 [Q267](#)

47 [Q250](#)

The risk we run at the Bar, which is a brilliant job, is that we don't get many thanks or very much money and that the job will still attract people when you cut the pay. Back in the day, being a barrister was deemed to be something of a hobby profession for wealthy white men and we do not want to see the profession returning to that. We should be able to look kids in the eye and say you can work in the publicly funded Bar, you won't be rich but you will be able to do it. I'm reaching the stage where I cannot say that to young people.⁶⁴

40. Tony McDaid, vice-president of the Birmingham Law Society, made the same point:

Unless you come from a background where your parents have money, there's no way that you can sustain a career in a criminal practice, in a solicitors law firm, or indeed certainly at the Bar, unless you've got some funds coming in from other means. It's absolutely desperate.⁶⁵

The justice system needs talented lawyers from all backgrounds to choose to practise criminal law and for the professions to be able to retain them. In 2018, our predecessor Committee stated “that current difficulties in recruitment to the Criminal Bar could have a negative impact on future recruitment to, and diversity within, the judiciary—in particular for judicial office holders in the criminal courts”.⁶⁶ This inquiry's evidence has reaffirmed those concerns.

Fee schemes

41. A number of witnesses criticised the structure of the existing fee schemes for criminal legal aid work, and in particular the role of fixed fees.⁶⁷ The Carter Review in 2006 instigated a comprehensive move away from payment for publicly funded legal services on the basis of hourly rates to a system of fixed or graduated fees.⁶⁸ Since then certain areas of criminal legal aid work, for example at the police station and the Magistrates Court, have been paid predominantly through fixed fees.⁶⁹

Quality and complexity

42. Dr Vicky Kemp, Principal Research Fellow at the University of Nottingham, argued that the inadequate fixed fee for police station work has proved particularly problematic:

[S]olicitors complain that the fee is not sufficient to cover the cost of providing advice and assistance to detainees, particularly when dealing with serious and complex cases.[...] These changes have not only impacted on the financial viability of solicitors' firms but have also had a negative impact on the quality of criminal legal aid services and in providing access to justice.

64 APPG on Legal Aid, Westminster Commission on Legal Aid, [first Oral Evidence Session Sustainability of the Criminal Legal Aid Profession](#), 29th October 2020

65 [Criminal Law Roundtable 8 February 2021](#)

66 Justice Committee, Criminal Legal Aid, Twelfth Report of Session 2017–19 (HC 1069) paras 87

67 For example, Dr Roxanna Dehaghani (Senior Lecturer in Law at Cardiff University); Dr Daniel Newman (Senior Lecturer in Law at Cardiff University) ([LEG0022](#))

68 Fixed or graduated fees for criminal legal aid predate the Carter Review. See House of Commons Constitutional Affairs Committee, [Implementation of the Carter Review of Legal Aid](#), Third Report of Session 2006–07 paras 53–57

69 See paras 9–12 above

In relation to police station work, for example, many firms now concentrate on the police interview only and do not get involved in the wider issues concerning the detention of their clients.⁷⁰

43. Dr Roxanna Dehaghani and Dr Daniel Newman, both from Cardiff University, provided written evidence containing extracts from interviews with practitioners which set out the impact of inadequate fixed fees on the quality of the work provided:

So you probably work out how much work you need to do on a case and know that you're, you know, the fixed fee comes nowhere near it. So, yeah, again sometimes that may impact on the way that you prepare the case. It's possible. Yeah. Especially when you're busy. You know, because you, in order to try to make a living out of this, the only way round [sic] the fixed fees is to have a lot of work. So that the volume increases, so that you're still getting lots of work in. And sometimes when that happens, because you're so busy, you can't give a certain client enough time that they really should deserve on their case. We try our best, but sometimes it doesn't happen.⁷¹

Dehaghani and Newman's evidence also cites an interviewee who explains that on less serious cases "there's no incentive to go out and do anything above and beyond what you're expected to do".⁷² Kerry Hudson, the Director at Bullivant law, told the APPG on Legal Aid's Westminster Commission that "the complexity of the work done on fixed fees has increased in a way that it could have not been anticipated by the fixed fees system".⁷³ Transform Justice's evidence to us argued that the current fee structure "provides no financial incentive to improve quality or take on complex cases (and maybe a disincentive)".⁷⁴ In relation to police station work, Transform Justice argued that the fixed fee structure "creates a financial incentive for the most experienced lawyers to do the least complex police station cases because they tend to be quickest, for defence representatives to spend the minimum required time on any case, and for work to be delegated to representatives (not lawyers) who may lack the experience to deal with complex cases and who may work freelance for an unregulated company".⁷⁵

44. A study commissioned by the Criminal Cases Review Commission (CCRC) found that legal aid payment rates had a detrimental effect on the willingness of lawyers to take on CCRC casework.⁷⁶ A number of participants in the study highlighted that the rates of pay were not proportionate to the complexity of the work and the staffing resources required. On 25 May 2021, the Chair of the CCRC, Helen Pitcher, told us that 10% of applicants have legal representation.⁷⁷ She added that when an application is made with the support of a legal representative, it makes the CCRC's work more straightforward.⁷⁸

70 Dr Vicky Kemp (Principal Research Fellow at U) ([LEG0015](#))

71 Dr Roxanna Dehaghani (Senior Lecturer in Law at Cardiff University); Dr Daniel Newman (Senior Lecturer in Law at Cardiff University) ([LEG0022](#))

72 Dr Roxanna Dehaghani (Senior Lecturer in Law at Cardiff University); Dr Daniel Newman (Senior Lecturer in Law at Cardiff University) ([LEG0022](#))

73 APPG on Legal Aid, Westminster Commission on Legal Aid, [first Oral Evidence Session Sustainability of the Criminal Legal Aid Profession](#), 29th October 2020

74 Transform Justice ([LEG0013](#))

75 Transform Justice ([LEG0013](#))

76 University of Sussex ESRC report, [The Criminal Cases Review Commission: Legal Aid and Legal Representatives](#) (2021) p17

77 Justice Select Committee, [Oral evidence: Private prosecutions: safeguards](#), HC 248 Tuesday 25 May 2021 Q108

78 Justice Select Committee, [Oral evidence: Private prosecutions: safeguards](#), HC 248 Tuesday 25 May 2021 Q108

45. Dr James Thornton's evidence highlights how inadequate fixed fees impact on the morale of the workforce and on the quality of the work:

Several criminal legal aid firm partners I interviewed considered all police station advice work as a loss-leader and/or most if not all magistrates court work as cashflow rather than profit-making. One admitted to having only made a profit in a previous year because of two substantial Crown Court trials. A fee system that appears to encourage the view that large parts of a lawyer's work is financially worthless and to focus on Crown Court work above everything else seems problematic for morale and retention, but also the administration of justice more generally.⁷⁹

46. Crown Court work is statistically a relatively small proportion of the total work within the criminal justice system.⁸⁰ It is also right to recognise that every system will have some anomalies. However, as Thornton notes that "the temptation to follow such financial rewards and avoid such financial punishments is greater when fees are lower and margins are consequently tighter".⁸¹

47. The predominance of inadequate fixed fees in the current framework is problematic. The structure of the fees does not reflect the complexity of the work required, nor does it incentivise firms to take on the most difficult cases at an early stage. *The Government should reform the fee structure to prioritise quality over quantity and to allow criminal defence lawyers to spend more time on the most difficult cases at the earliest possible stage. There is a risk to the fairness of the criminal justice system if lawyers are not willing to take on the most complex cases because of the low rates of pay. There are also clear benefits for the operation of the criminal justice system if more work can be done at an early stage to make progress on a case.*

Focus on Crown Court work

48. Kerry Morgan, Director at Morgan Brown and Company Solicitors in Manchester, told us that fixed fees were the main problem facing criminal legal aid. She also supported the view that they created a focus on major Crown Court trials:

[i]f you're a firm that's got some big Crown Court trials you'll make a lot of money. If you're doing the bread and butter stuff you won't make any money, and it is swings and roundabouts. When we used to get paid for what we did, the firms that did a good job, the firms that did the work, the firms that did the quality, got paid for it. And what's happening now is everyone is clambering for this big case and, 'the less work I do on that big case, the more money I'll make.' And that's not how it should be.⁸²

49. Dehaghani and Newman's evidence also highlight how the fee system focuses attention on the Crown Court. They cite an extract from an interview with a practitioner who explained:

79 Dr James Thornton (Lecturer in Law at Nottingham Trent University) ([LEG0034](#))

80 See table 3 below

81 Dr James Thornton (Lecturer in Law at Nottingham Trent University) ([LEG0034](#))

82 [Criminal Law Roundtable 8 February 2021](#)

[S]ay a two-hour trial in a magistrates' court, where you're not going to get into a higher standard fee, then you're going to get two hundred and seventy quid, plus about maybe fifty quid travelling weight. So three hundred pounds for a trial. With two hearings and all the prep. So you lose money hand over fist on your general police station work, unless you've got a load of people in, and you get picking up standard fee. Standard fee in the police station's... a hundred and sixty-nine. Pounds. And that's regardless of how many times you've got to go back. So you can do up to, I think it's sixteen hours' worth of work, for your hundred and sixty-nine pounds. So you lose money on that, you lose money on the magistrates' court, and you make your money on the odd Crown Court case which happily falls within one of the four well-paid categories. So my colleagues just dealt with a case which was a higher-paid category. In that case it was a long trial, but we got paid fifteen thousand pounds. Comparative case on the lower category you get paid fifteen hundred pounds.⁸³

50. Transform Justice's evidence argued that the system focus on the Crown Court creates "perverse financial incentives".⁸⁴ Increasing the fees paid for police station work could have a number of benefits for the criminal justice system. Transform Justice's evidence points out that "if a defendant pleads not guilty to an offence which will be tried in the Crown Court, then changes their plea to guilty after the start of the trial, the solicitors' firm will get a much higher fee than if the defendant pleaded guilty at an early stage".⁸⁵ We do not know if this happens or on what scale, but the broader point that the current system leads to a focus on Crown Court work, at the expense of other work, was made by a number of witnesses.⁸⁶

51. **The Committee's inquiry on court capacity has focused on the Crown Court where the delays are the most acute. In that context, it is imperative that the criminal legal aid system should be structured to facilitate resolution of cases at the earliest possible stage in the process.**

Rebalancing the system

52. The current fixed fee structure needs to be re-evaluated. As Transform Justice's evidence notes, it is difficult to pin down how the fees impact on the quality of defence work, but the overall impression created by the evidence submitted is that the current system is not working.⁸⁷ The "swings and roundabouts" approach does not always enable providers to do their best for their clients, nor is it helping to sustain the profession. *The criminal legal aid system should be restructured so that it enables legal aid lawyers to provide effective representation at every stage of the process, works for complex cases and sustains providers in all areas of England and Wales. The Government should reduce the role of fixed fees within the legal aid system to ensure that high-quality work at every stage of proceedings and on complex cases is fairly remunerated.*

83 Dr Roxanna Dehaghani (Senior Lecturer in Law at Cardiff University); Dr Daniel Newman (Senior Lecturer in Law at Cardiff University) ([LEG0022](#))

84 Transform Justice ([LEG0013](#))

85 Transform Justice ([LEG0013](#))

86 Dr Roxanna Dehaghani (Senior Lecturer in Law at Cardiff University); Dr Daniel Newman (Senior Lecturer in Law at Cardiff University) ([LEG0022](#)); Dr James Thornton (Lecturer in Law at Nottingham Trent University) ([LEG0034](#)); [Criminal Law Roundtable 8 February 2021](#)

87 Transform Justice ([LEG0013](#))

53. **The current criminal legal aid system does not provide enough incentives for legal representatives to take early action to progress cases through the system as quickly as possible. The legal aid fee structure should incentivise early engagement between defence lawyers and the police and the CPS. We note that the Government has sought to make changes to pre-charge engagement, but more changes are needed. The current system does not do enough to recompense lawyers for taking on complex cases at the police station and at the magistrates' court. Investing more in early engagement will lead to savings to the public purse, as cases would be resolved at an earlier stage, which could free up capacity across the criminal justice system.**

The throughput of work and the impact on sustainability

54. One of the major themes of the evidence to the Committee is that the reduction in the number of cases going through the criminal justice system has had a negative impact on the sustainability of criminal legal aid. Dr Vicki Kemp highlighted that the income of solicitors working in criminal legal aid has reduced because the number of arrests has fallen by over half, from 1.4 million in 2010/11 to 670,000 in 2018/19.⁸⁸ The number of cases going through the Crown Court has also decreased in that time. In 2010–11, 38,114 cases were received by the Crown Court and in 2018–19 this figure was 25,063.⁸⁹ Emma Fenn, barrister at Garden Court Chambers, told the Committee that the combination of low charging rates and low number of Crown Court trials are having an adverse effect on the workload and career development of recently qualified junior barristers.⁹⁰

55. Another connected point is that the situation is worse in some areas of England and Wales. Criminal legal providers in some areas of the country are struggling because there is not the volume or the quality of the work that there is elsewhere. Dehaghani and Newman suggest that providers in Cardiff have suffered disproportionately from changes to criminal legal aid because the city does not have the same amount or type of work as larger cities in England.⁹¹ This reinforces the Law Society's analysis of the LAA Duty Solicitor Scheme data, showing that certain areas of England and Wales were likely to face a shortage of criminal duty solicitors.⁹²

56. Release Under Investigation (RUI), introduced by the Policing and Crime Act 2017 and which the Government has proposed to amend through the Police, Crime, Sentencing and Courts Bill, has also caused difficulties for legal aid lawyers. A number of witnesses have argued that RUI has led to delays in charging cases. Stephen Davies, a solicitor at Tuckers, outlined in written evidence that he has regularly had cases where suspects have “waited 1–2 years to find out they have been charged with serious offences”.⁹³ This, Davies argues is “nothing other than a cash flow nightmare” for legal aid providers.⁹⁴ Hollie Collinge, a solicitor advocate from Brighton, told the Committee that the combination of RUI and the need to examine data as part of the investigatory process has been a “perfect storm” leading to delays in cases being charged and progressing through the system.

88 Dr Vicky Kemp (Principal Research Fellow at U) ([LEG0015](#))

89 MoJ, [Criminal court statistics October to December 2020](#), Table C1

90 [Q250](#)

91 Dr Roxanna Dehaghani (Senior Lecturer in Law at Cardiff University); Dr Daniel Newman (Senior Lecturer in Law at Cardiff University) ([LEG0022](#))

92 The Law Society, [Criminal duty solicitors: a looming crisis](#), 7 July 2021

93 Tuckers Solicitors LLP ([LEG0101](#))

94 Tuckers Solicitors LLP ([LEG0101](#))

During the APPG on Legal Aid's evidence session on criminal legal aid, Kerry Hudson, the Director at Bullivant law outlined the impact of Release Under Investigation on legal aid lawyers:

RUI is one of the worst things that has ever happened to the system. It hit us in the face in 2017, and overnight we had to come up with a system to manage hundreds of cases that sit in our drawers for years at a time. The fixed fee for the initial interview and all the time in between that interview and the charging, you must basically do that work pro-bono. The burden on a firm is huge and whether or not you get that case going to court, later on, is completely up to luck.⁹⁵

A number of other witnesses also told the Committee that the police are not making charging decisions quickly enough, and that when combined with level of fixed fees, that the result is that a significant number criminal legal aid providers are not generating enough income to be sustainable.⁹⁶

57. The table below shows how much the criminal legal aid workload has changed in the last decade:

Table 3: the Criminal legal aid workload and expenditure in 2020–21, as compared with 2011–12

Criminal legal aid workload and expenditure in 2020-21, as compared with 2011-12							
England and Wales; Expenditure in £000's (2019-20 prices)							
		Workload			Expenditure		
		2011-12	2020-21	Change	2011-12	2020-21	Change
Crime Lower	Police station advice	794,074	570,466	-28%	£196,421	£114,587	-42%
814,399	Magistrates' courts	490,652	227,522	-54%	£246,547	£91,393	-63%
£224,164	Advice & assistance on appeals	3542	957	-73%	£4,895	£1,642	-66%
	Prison law	42,681	15,372	-64%	£26,203	£16,505	-37%
	Civil work associated with crime	1282	82	-94%	£526	£37	-93%
Crime Higher:							
Crown Court	Crown Court litigator schemes	132,570	67,114	-49%	£388,560	£191,563	-51%
136,907	Crown Court advocate schemes	114,873	65,525	-43%	£254,803	£128,839	-49%
£328,560	Crown Court legacy schemes	6,460	4,268	-34%	£21,397	£8,158	-62%
Other Crime Higher	Very High Cost Crime cases	314	4	-99%	£92,683	£3,842	-96%
	Court of Appeal, Senior Court Costs	5,778	2,614	-55%	£10,123	£6,123	-40%
	Total crime	1,592,226	953,924	-40%	£1,242,156	£562,689	-55%

Source: MoJ, Legal aid statistics quarterly: January to March 2021, tables 1.1, 2.1, 2.2

58. The recent changes to the way that cases progress through the criminal justice system further highlights the need to keep the fee structure under regular review. *The Government needs to ensure that the legal aid framework is able to respond and adapt to changes in volume and practice over time in the criminal justice system.*

95 APPG on Legal Aid, Westminster Commission on Legal Aid, [first Oral Evidence Session Sustainability of the Criminal Legal Aid Profession](#), 29th October 2020

96 [Criminal Law Roundtable 8 February 2021](#)

access legal aid. The Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 stated that the £37,500 threshold had “estimated to have achieved £1.6m in savings”.¹⁰³ The Review also noted that the threshold had ensured that those “who can afford to pay their own litigation fees do so while those lacking the financial capacity to do so receive funding”.¹⁰⁴

64. The Post-implementation Review noted that the evidence received suggest that the lack of flexibility to the eligibility requirements more generally was a problem and that the lack of uprating of financial thresholds meant that unrepresented defendants were becoming increasingly common in the magistrates’ court.¹⁰⁵

65. The Review also noted concerns over the perceived inequalities of those who fail the financial eligibility test and then are acquitted in the Crown Court and then can only recoup their fees at legal aid rates. This has been described as the ‘Innocence Tax’.¹⁰⁶ The Proposals for the Reform of Legal Aid in England and Wales (LAR) reforms, undertaken by the Coalition government, changed the rules for acquitted defendants so “that anyone who elected to pay privately were no longer entitled to recoup their privately paid representation fees if they were acquitted”.¹⁰⁷ The Review noted that the changes to what acquitted defendants could recoup had contributed to annual central funds expenditure falling by £53m since 2011–12—from £101m to £48m in 2017–18.¹⁰⁸

66. The evidence received by the Committee has been highly critical of the effect of the means test on the criminal justice system. James Mulholland QC, Chair of the Criminal Bar Association, told us that:

The means test was set about eight years ago, in 2013, so we are talking about £37,000 of disposable income, and above that no legal aid whatsoever. In terms of access to justice, that is appalling. It is a complete contradiction in access to justice. It is called denial of justice in reality. We should get rid of the means test.¹⁰⁹

67. Hollie Collinge, solicitor advocate at Kellys Solicitors in Brighton, told us that in her experience defendants that could not secure legal aid often then decided against paying for representation:

If the idea is genuinely that somebody should pay because they can pay, then why do we find ourselves in a position where, if one of our clients fails the means test and is no longer eligible for legal aid, as soon as we talk about

103 Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (2019) para 1067

104 Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (2019) para 1068

105 Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (2019) para 1077

106 The Bar Council ([LEG0073](#))

107 Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (2019) para 1025

108 Ministry of Justice, Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (2019) para 1044

109 [Q254](#)

the very reasonable private rates at which they could pay, they are unable to and they say, “No, thanks. We will represent ourselves”? That happens very often.¹¹⁰

The central finding of the Law Society’s 2018 Report, *Paying for legal help when ineligible for criminal legal aid*, was that “the means testing of legal aid is set at a level that can require people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living”.¹¹¹ ***The Government should evaluate whether the money saved by the means test is justified when weighed against its impact on the fairness of criminal justice system. If the means tests for the magistrates’ court and the Crown Court are to remain then the current eligibility thresholds should be addressed and thereafter automatically uprated every year in line with inflation.***

68. The Magistrates Association’s written evidence outlines that its membership, when surveyed reported significant increases in the number of unrepresented defendants in remand cases, trials and sentencing hearings.¹¹² The Magistrates Association’s survey reported that “an average of over 90% of respondents felt unrepresented defendants negatively affected the court hearing, putting them at an unfair disadvantage in respect of most hearings in magistrates’ court”.¹¹³ The official figures indicate that legal aid grants in the magistrates’ court have decreased. In 2019–20, defendants received representation via legal aid in approximately 18% of magistrates’ court cases.¹¹⁴ This was down from 24% in 2012–13.¹¹⁵ There is no official data on the number of unrepresented litigants in the Magistrates’ Court. We recommend that HMCTS should ensure that this data is collected and its impact on the effectiveness of court proceedings is monitored. In the Crown Court, at first hearings in 2020, 94% of defendants were represented by an advocate (i.e. a barrister), 5% had a solicitor but no advocate (or unknown advocate representation), and 2% had no solicitor and no advocate (or unknown advocate representation). At the Crown Court, legal aid was granted in approximately 93% of cases in 2019–20, and this figure was higher than in recent years, in which it has stayed around 87%.¹¹⁶

69. In relation to the rule which means that acquitted defendants can only recover costs at legal aid rates, the so-called “innocence tax”, we are concerned that this rule does not strike a fair balance between prosecution and defence. We recognise that the measure has contributed to some savings to central funds, but those savings do not outweigh the damage to the fairness of the criminal justice system.¹¹⁷ Our recent report on private

110 [Q254](#)

111 The Law Society and Loughborough University, [Report on the affordability of legal proceedings for those who are excluded from eligibility for criminal legal aid under the Means Regulations, and for those who are required to pay a contribution towards their legal costs](#), (2018)

112 Magistrates Association ([LEG0035](#))

113 Magistrates Association ([LEG0035](#))

114 MoJ, [Criminal court statistics October to December 2020](#), Table M1; [Legal aid statistics quarterly October to December](#): table 3.1

115 Please note that this does not give a perfect representation of the proportion of defendants receiving legal aid at criminal courts for the following reasons: cases received by the court in a given period might not be the same cases that appear in the legal aid figures for grants of representation; legal aid grants for representation at magistrates’ courts includes some civil cases, while the court caseload figures are for criminal cases only; cases involving multiple defendants will show up once in the caseload figures but could appear more than once in the legal aid grants figures; and these figures exclude services provided through legal aid at the pre-court stage: for example, advice at the police station.

116 MoJ, [Criminal court statistics January to March 2021](#), Table C1; [Legal aid statistics quarterly January to March 2021](#): table 3.2

117 Transform Justice ([LEG0013](#)) The Bar Council ([LEG0073](#)) Young Legal Aid Lawyers ([LEG0095](#))

prosecutions noted that at present private prosecutors are able to recover their costs from central funds without being capped at legal aid rates.¹¹⁸ They are able to recover costs even if the prosecution does not secure a conviction. *The Government’s response to our report on private prosecutions concluded that the rules should be changed to level down what private prosecutors can recover from central funds.*¹¹⁹ *Our view is that this is the wrong approach. The right approach would be to make the system fairer by levelling up and removing the cap on what reasonable costs acquitted defendants may recover from central funds.*

Young suspects and legal aid

70. Dr Vicky Kemp’s evidence to us suggested that there ought to be an ‘opt-out’ rather than ‘opt-in’ approach to legal advice for young suspects.¹²⁰ Charlie Taylor’s 2016 Youth Justice Review made the same recommendation:

I propose that children should not be required to make a decision about seeing a solicitor. Rather there should be a presumption that a solicitor is called and legal advice is provided, unless the child expressly asks not to.¹²¹

71. Charlie Taylor also recommended that the Ministry of Justice “should review the fee structure of cases heard in the youth court in order to raise their status and improve the quality of legal representation for children”.¹²² A number of submissions to us supported Taylor’s recommendations.¹²³

72. Kate Aubrey-Johnson’s evidence to us proposed that youth court work should be remunerated at higher rates than the adult magistrates’ court and that police station funding needs to include additional funding for police station engagement in cases with child suspects.¹²⁴ Just for Kids Law’s evidence argues that the “interest of justice test in criminal legal aid fails to protect children and risks their access to a fair trial”.¹²⁵ They also argue in favour of a presumption that all children, including 16 and 17-year-old children, should be protected by a presumption of grant of criminal legal aid.¹²⁶ Transform Justice also makes the point that the current fee regime does not reflect the complexity of youth courts’ work:

The youth court has the power to impose up to two years custody—much greater powers than the magistrates’ court. Defendants under 18 are all vulnerable, and are often extremely challenging to represent. But lawyers get paid no more to deal with a serious assault trial in the youth court than they do for a theft trial in the magistrates’ court.¹²⁷

118 Justice Committee, Private prosecutions: safeguards Ninth Report of Session 2019–21, HC 497

119 Justice Committee Private prosecutions: safeguards: Government Response to the Committee’s Ninth Report Tenth Special Report of Session 2019–21. HC 1238 para 3

120 [Q186](#); Dr Vicky Kemp (Principal Research Fellow at U) ([LEG0015](#))

121 Charlie Taylor, Review of the Youth Justice System in England and Wales (2016) para 69

122 Charlie Taylor, Review of the Youth Justice System in England and Wales (2016) para 104

123 Kate Aubrey-Johnson (Chair at MoJ Youth Advocacy Working Group) ([LEG0099](#)), Just for Kids Law ([LEG0055](#))

124 Kate Aubrey-Johnson (Chair at MoJ Youth Advocacy Working Group) ([LEG0099](#))

125 Just for Kids Law ([LEG0055](#))

126 Just for Kids Law ([LEG0055](#))

127 Transform Justice ([LEG0013](#))

can be used to increase the accessibility of legal advice to suspects and defendants. The Government should also consider developing a scheme to enable criminal legal aid providers to upgrade their digital capacity.

Conclusion

79. The Committee's separate inquiry into Court Capacity received evidence that indicates that it is likely that the number of criminal cases going through the justice system is likely to increase significantly over the next decade.¹⁴⁰ The number of police officers is due to increase significantly and the Institute for Government told the Committee that their modelling indicates that will lead to a 15% increase in the number of cases that need to be heard and consequentially a 15% increase in the capacity required in the courts by 2023.¹⁴¹ CREST Advisory also told us that their modelling projected that there will be an increase in more serious cases, with a higher charge rate, coming into the criminal justice system.¹⁴² If the capacity of both the police and the courts increase significantly over the next decade, this will have knock on effects on criminal legal aid providers. **The increase in throughput could be positive for criminal legal aid providers, however, we have real concerns that the current legal aid framework would not be able to rise to the challenge of a significant increase in demand. We are concerned that in certain areas there simply may not be enough lawyers to do the work. Even if there are enough in the next few years, with rising levels of student debt, the longer-term pipeline looks much more problematic, especially in terms of the next generation of mid-career practitioners, who are needed for the most complex publicly funded cases. Moreover, the current fee structure does not provide much of an incentive for defence practitioners to invest time in complex cases before they reach the Crown Court. Unless, the system provides more of an incentive to work on complex cases at every stage of the process, it is likely that practitioners will have to focus on quantity over quality.**

80. **Successive governments have prioritised efficiency and costs over the quality of the criminal justice system. The Committee's inquiry into Court Capacity has highlighted the difficult situation facing the courts at the start of the pandemic. Unless there is significant change to criminal legal aid, there is a real risk that the balance between defence and prosecution, which is at the heart of our adversarial justice system, will be unfairly tilted in favour of the prosecution. The fairness of the criminal justice system depends on a criminal legal aid system that is properly funded and that is structured to enable lawyers to provide high-quality work on the most complex cases at every stage of the process. The Government's response to the independent review of criminal legal aid must ensure that criminal lawyers are paid for all the work they do to represent their clients and that fees and rates are regularly reviewed so that the profession can remain sustainable for the long-term.**

140 [Q10](#)

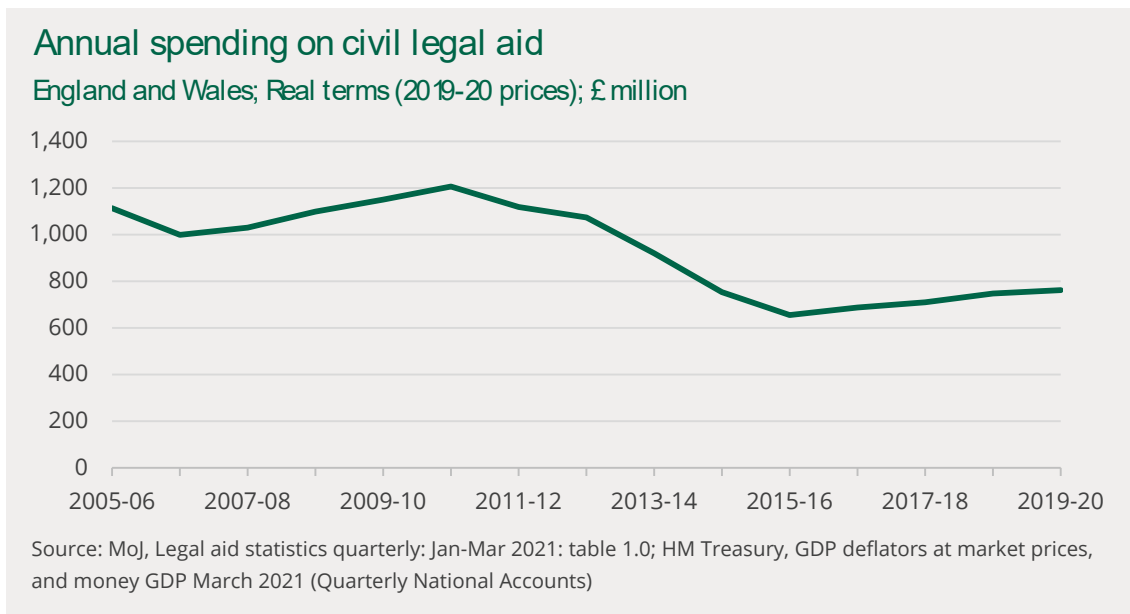
141 [Q21](#)

142 [Q25](#)

3 Civil legal aid

81. The civil legal aid system in England and Wales is in a difficult place. The sector is still, nearly a decade after the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, adjusting to the dramatic reduction in the level of civil legal aid provision that took effect in April 2013. The civil legal aid system, which was established to help those who needed to enforce their legal rights but did not have the means to pay for advice or representation, is now able to help a much smaller proportion of the population than it once could.¹⁴³ This has resulted in significant savings to the legal aid budget, but witnesses told us that reform and investment to secure access to justice in a number of areas is required.

Table 5: Annual spending on civil legal aid



82. The 34% decrease in civil legal aid expenditure between 2009–10 and 2019–20 is in part due to the decrease in the number of legal help cases supported by legal aid. Legal help is when a solicitor provides legal advice and negotiates with the other party. The table below shows how the number of legal help cases has changed since 2009–10.

Table 6: Legal help and controlled legal representation matters started, England and Wales; annual and quarterly total volume

Legal help and controlled legal representation matters started England and Wales; annual and quarterly total volume						
Financial Year	Family	Immigration	Mental health	Social welfare	Other	matter starts
2009-10	308,838	98,539	38,109	422,703	65,626	933,815
2010-11	268,659	82,787	34,623	351,364	48,001	785,434
2011-12	232,390	60,792	39,578	306,890	40,118	679,768
2012-13	204,247	52,371	41,407	244,521	31,224	573,770
2013-14	43,104	28,157	42,242	49,769	10,388	173,660
2014-15	43,828	30,362	42,737	44,760	9,890	171,577
2015-16	37,748	31,653	38,946	40,235	9,512	158,094
2016-17	35,390	29,111	37,692	36,301	8,800	147,294
2017-18	32,956	26,609	36,101	36,662	8,790	141,118
2018-19	33,825	29,126	35,493	33,615	9,719	141,778
2019-20	33,823	33,499	35,647	29,685	9,841	142,495
2020-21 (p)	29,453	25,579	33,846	17,385	9,649	115,912
<i>Change 2009-10 to 2019-20</i>	<i>-89%</i>	<i>-66%</i>	<i>-6%</i>	<i>-93%</i>	<i>-85%</i>	<i>-85%</i>

Source: MoJ, Legal aid statistics quarterly: Jan-Mar 2021: table 5.1

Notes: 1. Social welfare includes 'debt', 'housing' and 'welfare benefits'; 2. Data include Solicitors, Not for profit organisations and Specialist telephone advice service (excludes Community legal advice centre).

(p) = provisional

Legal aid also supports legal representation, which covers the work done by a solicitor to prepare a case and for a barrister to provide representation in court. The number of legal aid certificates granted for civil representation decreased from 168,414 in 2009/10 to 115,797 in 2019–20.¹⁴⁴ As with criminal legal aid, a key question is whether the current system strikes the right balance between early legal advice and legal representation. In 2010, Citizens Advice published a report which claimed that every £1 spent on early advice saved between £2.34 - £8.80, depending on the type of legal issue.¹⁴⁵ It is arguable that, despite the savings achieved since 2010, the removal of early advice in a number of areas has rendered the civil legal aid system less effective and efficient.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

83. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) radically reduced the provision of civil legal aid in England and Wales. Part 1 of LASPO, which

144 Legal aid statistics: January to March 2021: table 6.2

145 Citizens' Advice (July 2010) Towards a business case for legal aid: Paper to the Legal Services Research Centre's eighth international research conference ; Garden Court Chambers ([LEG0044](#))

made changes to the scope of civil legal aid and the eligibility criteria, took effect on 1 April 2013. Our predecessor Committee published a report on the changes to civil legal aid in March 2015.¹⁴⁶ That report concluded that LASPO had only delivered on one of its four aims: to make significant savings on the cost of the scheme.¹⁴⁷ The Committee stated that LASPO had failed to:

- discourage unnecessary and adversarial litigation at public expense;
- target legal aid to those who need it most; and
- deliver better overall value for money for the taxpayer.¹⁴⁸

The report also concluded that “the faulty implementation of the legal aid changes” had harmed access to justice for some litigants.¹⁴⁹

84. The report also raised concerns over the following issues relating to impact of LASPO on civil legal aid:

- Improving the public awareness of civil legal aid and particular services on offer;¹⁵⁰
- The fact that the number of exceptional case funding applications granted was far below the Ministry of Justice’s estimate;¹⁵¹
- The ability of victims of domestic violence to access legal aid;¹⁵²
- The sustainability of publicly-funded legal services and the lack of data on the ‘advice desert’;¹⁵³
- The rise in the number of litigants in person—particularly in private family law cases;¹⁵⁴
- The fall in the number of mediations for separating couples; and
- The cost of only being able to help people that have reached crisis point rather than offering early advice due to the limits on the scope of civil legal aid.¹⁵⁵

146 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311

147 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 para 181.

148 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 para 181. Paragraph 183 of the report also notes that “the changes appear at best to have had effect in discouraging unnecessary and adversarial litigation at public expense”.

149 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 para 179.

150 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 paras 18–28

151 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 paras 33–47

152 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 paras 67–72

153 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 paras 87–89

154 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 paras 95–138

155 Justice Committee, [Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), Eighth Report of the Session 2014–15, HC 311 paras 166–173

85. In February 2019, the Government published its *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, which outlined the effect of the changes to civil legal aid.¹⁵⁶ The report noted that “there has been a decrease in both the volume of and spend on civil legal aid cases since the implementation of LASPO”.¹⁵⁷ The report pointed out that LASPO “has undoubtedly played a key part in this, but other factors (such as wider changes in society and the justice system in particular) are also involved”.¹⁵⁸ The report stated that the changes to the scope of private family law is estimated to have saved £160m.¹⁵⁹

86. In relation to the four core objectives of LASPO, the report made the following conclusions:

- On overall spending, the report concluded that LASPO had been a “key driver (amongst others), in the reduction in legal aid expenditure, which has fallen by over 20% since April 2013”.¹⁶⁰
- On discouraging unnecessary and adversarial litigation at public expense, the report noted that there had been “mixed success”.¹⁶¹
- On targeting legal aid at those who need it most, the report stated that “it is impossible to say with certainty if the LASPO changes achieved this objective” and “it is clear that in some areas improvements could be made to ensure legal aid is accessible to people in most need, when they most need it”.¹⁶²
- On delivering better overall value for money for the taxpayer, the report concluded “that the evidence indicates that the range of changes have achieved greater overall value for money for the taxpayer”.¹⁶³ It also noted that to determine the value for money of LASPO, the Ministry of Justice “must obtain a better understanding of this purported cost transference to other Government departments”.¹⁶⁴
- The report highlighted that stakeholders had raised the issue of the sustainability of legal aid and that the Government’s view was that “the data available suggests that current provision is sufficient”.¹⁶⁵ The Government conceded in the report that “more research is required to consider the long-term future for how legal aid

156 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019)

157 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 146

158 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 146

159 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 680

160 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 1140

161 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 1141

162 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) paras 1149 and 1152.

163 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 1160

164 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 1163

165 Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 1162

services are delivered”.¹⁶⁶

87. The report identified six broad themes from the concerns raised by stakeholders:

- That limitations on the scope of legal aid limit the availability of early advice which means that problems escalate before they can be addressed;
- Many people who need legal aid cannot access it;
- Exceptional case funding does not work;
- The fees are inadequate;
- There has been a rise in the number of litigants in person; and
- There are advice deserts where people cannot access advice.¹⁶⁷

It is frustrating, and yet unsurprising, that many of the concerns raised over the operation of the civil legal aid system by our predecessor Committee in 2015, and by Government’s post-implementation review in 2019, have been highlighted in evidence to this inquiry on the future of legal aid in 2021.

Early advice and scope

88. A number of witnesses to the Committee emphasised that the limited scope of civil and family legal aid means that individuals with legal problems are not able to access advice early enough to stop their problems escalating. The Chair of the Bar Council, Derek Sweeting QC also told us that for civil matters, early legal advice is “absolutely key” as it can stop problems escalating and if they do escalate, they can be better informed as to what to focus on.¹⁶⁸

Box 3: Scope

Scope, in this context, means the type of legal problem or case for which legal aid is generally available. When a matter is in scope, civil and family legal aid meets the cost of legal services (subject to means and merits tests). Prior to LASPO, the scope of civil and family legal aid was governed by the Access to Justice Act 1999. A matter was within scope unless specifically excluded by the Act.¹² Under LASPO this approach was reversed: now only those matters specifically listed in the 2012 Act are in scope. The types of legal problems still in scope are set out in Schedule 1 of LASPO.

Source: House of Commons Library, [Legal Aid: the review of LASPO Part 1](#), Number 43720, 7 May 2020

89. Our inquiry into Court Capacity has highlighted that a number of civil jurisdictions have faced problems caused by the growing number of outstanding cases. Richard Miller, head of the Justice Team at the Law Society, stressed that early advice can solve matters and stop them getting to courts in the first place.¹⁶⁹ Miller also argued, in line with a

¹⁶⁶ Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 1162

¹⁶⁷ Ministry of Justice, [Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), (2019) para 1165

¹⁶⁸ [Q107](#)

¹⁶⁹ [Q73](#)

number of witnesses, that early advice means that when cases do enter the system they could be disposed of more efficiently. Ian Townley, Director and Head of Costs at Broudie Jackson Canter, explained that often a client would seek advice just before their court date, which means that the client gets sent to a hearing “to tell the judge that they are trying to get legal aid, and the judge will vacate that hearing and re-list another one”.¹⁷⁰ **The Government should take a whole justice system approach to the reform of the civil legal aid framework. The provision of early advice can help to make the courts work more effectively.**

Social welfare law

90. ‘Social welfare law’ includes issues relating to housing, debt, welfare benefits and employment. LASPO removed most of these areas from the scope of legal aid and specified limited areas where public support remained available.

Box 4: Changes to scope of social welfare law by LASPO

LASPO removed most housing cases from the scope of legal aid. It kept within scope those cases where there is a risk of homelessness, repossession or eviction, as well as housing disrepair that poses a risk of serious harm to an individual.

LASPO removed most areas of debt law from the scope of the scheme. Legal aid remains available—via the civil legal aid telephone gateway—for three main areas:

- proceedings where, as a result of mortgage arrears, the client’s home is at immediate risk of possession;
- proceedings regarding orders for the sale of the home;
- bankruptcy proceedings initiated by creditors where the potential bankrupt estate includes the home of the potential bankrupt or his/her family.

LASPO removed all welfare benefit proceedings from the scope of legal aid for advice and assistance, except for:

- Legal Help for appeals to the Upper Tribunal and Higher Courts, when the case involves a point of law;
- civil representation for appeals relating to council tax reduction schemes, which replaced council tax benefit under the Welfare Reform Act 2012.

LASPO removed all employment cases from scope, except those concerning discrimination and victims of trafficking and modern slavery.

Source: House of Commons Library, [Legal Aid: the review of LASPO Part 1](#), Briefing Paper no 43720, 7 May 2020

91. The Bar Council’s evidence advocates the re-introduction of legal aid for social welfare issues:

Someone might be evicted from their home for not paying their rent, due to their benefits having been wrongly stopped. Restoring legal aid for early advice on benefits matters would mean that the eviction stage would never

be reached. Legal aid intervention at an early stage is cheaper than only having legal aid when the matter has escalated to crisis point and the matter is more expensive to put right.¹⁷¹

A number of witnesses stressed that LASPO's approach to scope created barriers between linked and overlapping areas of law. Broudie Jackson Canter, a law firm based in the North-West, argued that the scope of civil legal aid now means that "the piecemeal system seems to have created a scenario where advice cannot be given under Legal Aid until a catastrophic failure is immediate".¹⁷² The Housing Law Providers Association's evidence made a similar point, and highlighted the results of a survey of its members which found that: 93.6% of providers stated that LASPO had had a mostly negative affect on the scope of the work that their organisation has traditionally done for clients.¹⁷³ Their evidence added that the majority of the responders explained that two issues were responsible: firstly, the removal from the scope of legal aid funding of most early advice, particularly in respect of welfare benefits, and secondly, the restrictions which have now been placed on providers' ability to pursue disrepair claims on behalf of their clients.¹⁷⁴

92. Simon Mullings, Co-Chair of Housing Law Practitioners Association, told us that removing welfare benefits advice from the scope of legal aid was a "false economy".¹⁷⁵ He also stressed that it was having an impact on the sustainability of the profession as many providers would do the work on a pro-bono basis which is very difficult to do on an ongoing basis.¹⁷⁶ Simon Mullings argued this was part of the reason that the number of suppliers had decreased from over 360 in 2010 to 260 in 2020.¹⁷⁷ He also emphasised that in his experience "the absence of early legal advice leads to negative outcomes for vulnerable people".¹⁷⁸ Part of the problem, he said, is that housing law is extremely complex, and this limits the effectiveness of other forms early advice and support for those with housing problems. He explained that in housing law cases "you pretty much have to wait for a notice of possession to be granted before we can work with tenants".¹⁷⁹ Jo Underwood, Head of Strategic Litigation at Shelter, described the current approach to housing law as a "crisis-driven" approach whereby legal aid is "generally only available for your case at a point where it is unavoidable that you have to get to court".¹⁸⁰

93. Simon Mullings was positive about the operation of the possession duty scheme, describing it as a "real boon" as it covers virtually every county court in the jurisdiction, but stressed that any equivalent for debt and welfare meant that there big gaps in the system.¹⁸¹ ***The Government should consider whether the model of the possession duty scheme should be used in other areas of the civil justice system where there are significant numbers of litigants in person. Non-means tested advice at court on the day of hearing could provide an economical way of offering some legal support to vulnerable***

171 The Bar Council ([LEG0073](#))

172 Broudie Jackson Canter ([LEG0012](#))

173 Housing Law Practitioners Association ([LEG0100](#))

174 Housing Law Practitioners Association ([LEG0100](#))

175 [Q284](#)

176 [Q284](#)

177 [Q284](#)

178 [Q286](#)

179 [Q287](#)

180 [Q361](#)

181 [Q279](#)

litigants. We commend the Government and the Legal Aid Agency on their work on the duty scheme, but ask that they learn the lesson that schemes which are “assertive and flexible”, as Simon Mullings described the possession duty scheme, are what is needed.

94. Chris Minnoch, Chief Executive Officer, Legal Aid Practitioners Group, made the point that early advice will not provide a complete solution in all cases.¹⁸² He argued that the problem is that the current approach to advice is not strategic enough. He cautioned that a focus on making improvements that were “cost neutral” would not provide the strategic approach that is needed, as shifting funding to early advice from representation, for example, would fix one part at the expense of another.¹⁸³ Chris Minnoch also stressed that the restricted scope of social welfare law means that housing providers, for example, cannot provide the wraparound support that could resolve the underlying problems that an individual is facing.¹⁸⁴

Family law

95. LASPO removed private family law from the scope of legal aid with five main exceptions:

- Proceedings in the domestic violence category (e.g. non-molestation and occupation orders);
- Proceedings involving children, financial provision and other family proceedings where domestic violence and/or child abuse could be evidenced against a set of evidence requirements set out in regulations (the ‘domestic violence evidence gateway’);
- Proceedings in which a judge makes a child party to proceedings;
- Proceedings in connection with orders to prevent international child abduction;¹⁸⁵ and
- Proceedings to secure the return of an abducted child, or proceedings involving various cross-border issues under EU and international law.¹⁸⁶

Dr Mavis Maclean, senior research fellow at the University of Oxford, told us that even though these exceptions were designed to protect children, in practice, many private family law cases, which are out of scope as they don’t fall within one of the exceptions, affect children.¹⁸⁷ Maclean argued that a considerable number of highly conflicted private law disputes, may put children at risk, and in such “cross over” cases “it is hard to see the justification for any distinction in legal aid eligibility”.¹⁸⁸ The changes to scope had a significant impact on the number of legal aided family cases.

182 [Q316](#)

183 [Q316](#)

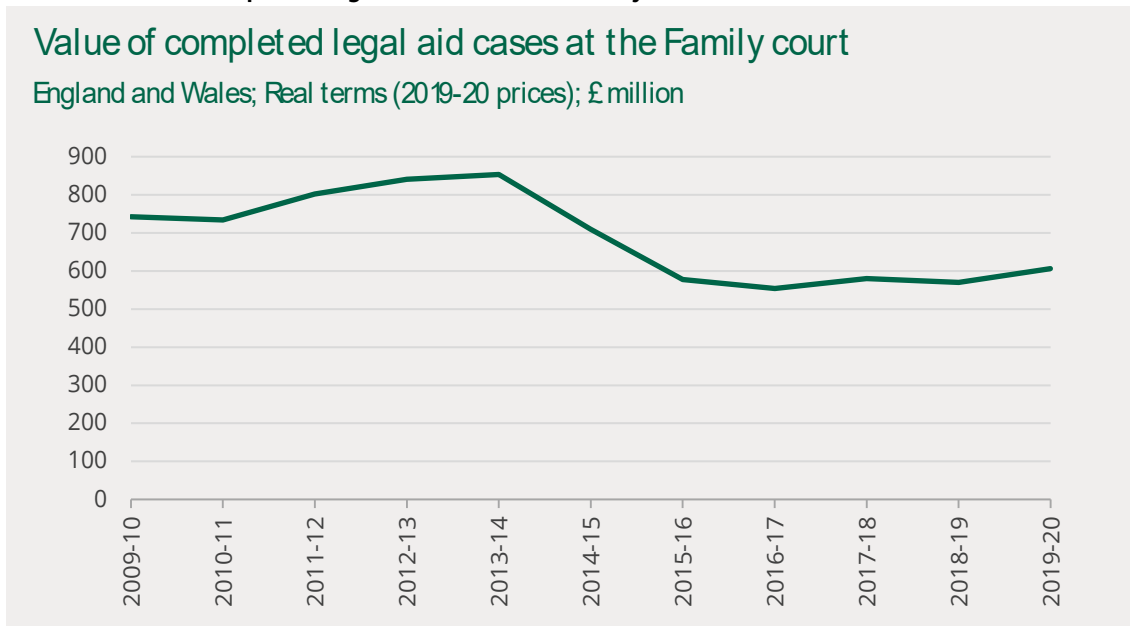
184 [Q318](#)

185 There was also a later amendment to ensure orders to prevent domestic child abduction remain in scope.

186 House of Commons Library briefing, Legal Aid: the review of LASPO Part 1, 43720 (2020) p.20

187 Dr Mavis Maclean (Senior Research Fellow at University of Oxford) ([LEG0018](#))

188 Dr Mavis Maclean (Senior Research Fellow at University of Oxford) ([LEG0018](#))

Table 7: Value of completed legal aid cases at the Family court

Source: MoJ, Legal aid statistics, October to December 2020, tables 5.3, 6.5 and 6.7; HM Treasury, [GDP deflators at market prices, and money GDP March 2021 \(Quarterly National Accounts\)](#)

96. In relation to the timing of advice, Dr Mavis Maclean’s evidence points out that research into legal needs has indicated that early legal advice from legal practitioners helps to resolve family issues more quickly.¹⁸⁹ Resolution, an organisation that represents family lawyers and family justice professionals, sets out in its evidence that its members “wish to see more people early on and divert them from court if at all possible”.¹⁹⁰ Elsepth Thomson, from Resolution, explained in a roundtable discussion that early advice enable lawyers to explain the process and to provide a “reality check” on what might be achieved by going to court.¹⁹¹ Elsepth Thomson also argued that current framework does not enable a focus on the most-deserving cases.¹⁹²

97. In limiting the availability of legal aid for private family law, the Government hoped that separating couples would use mediation instead of the courts. Instead, as Professor Anne Barlow and Dr Jan Ewing, both from the University of Exeter, set out in their evidence, LASPO had “the unintended consequence of significantly reducing family mediation starts and increasing the number of cases issued in court”.¹⁹³ The legal aid statistics shows that in 2011–12 there were 15,357 mediation starts, and in 2019–20 there 7,562.¹⁹⁴ Professor Anne Barlow and Dr Jan Ewing argue that legal advice before and alongside mediation would increase the numbers using mediation and the numbers that would settle in mediation.¹⁹⁵ National Family Mediation’s written evidence states that they do not support enabling individuals to access early legal advice through legal aid.¹⁹⁶

189 Mavis Maclean (Senior Research Fellow at University of Oxford) ([LEG0018](#))

190 Resolution ([LEG0060](#))

191 [Family Law Roundtable 14 December 2020](#)

192 [Family Law Roundtable 14 December 2020](#)

193 Professor Anne Barlow (Professor of Family Law and Policy at University of Exeter); Dr Jan Ewing (Research Fellow at University of Exeter) ([LEG0054](#))

194 [National Statistics Legal aid statistics: January to March 2021](#)

195 Professor Anne Barlow (Professor of Family Law and Policy at University of Exeter); Dr Jan Ewing (Research Fellow at University of Exeter) ([LEG0054](#))

196 National Family Mediation ([LEG0021](#))

They argue that separating couples require expert input but not necessarily ‘legal’ input.¹⁹⁷ Anne Barlow, argued that in practice legal advice and counselling can work well together at an early stage to set things off in a positive way.¹⁹⁸

98. On 26 March 2021 the Government launched the Family Mediation Voucher Scheme that provides a contribution of up to £500 towards the mediation costs for eligible cases, supporting people in resolving their family law disputes outside of court where appropriate.¹⁹⁹ The vouchers are not means tested but only cases involving a child are eligible. The scheme is worth £1 million, meaning that 2000 families will benefit. **The Committee welcomes the introduction of the Family Mediation Voucher Scheme. It is a positive step and recognises that more needs to be done to help separating parents. We believe that if early legal advice was available alongside mediation, this would result in an increase in the numbers using mediation successfully.**

The future of early advice

99. There are positive signs that the Government recognises the value of early legal advice. However, the measures taken so far, including the Legal Support Action Plan, only appear to scratch the surface of the problem. It is clear from the evidence that we have received that there are significant numbers of people in England and Wales with legal problems who would benefit from early legal advice but cannot afford to pay for it themselves. The evidence received on both social welfare law and private family show that the current legal aid framework provides barriers that inhibits early legal advice for those that need it. There is both a moral and an economic case for improving this situation. As Lord Wolfson said in his evidence on 26 March: “I fully accept that a system which means that people cannot vindicate their legal rights is a legal aid system that is not working”.²⁰⁰ Without early legal advice, individuals in complex areas of civil law, such as housing and family law, cannot find out what their rights are, let alone vindicate them. But even in purely economic terms, the focus of the current system is strategic and does not enable talented and committed legal aid lawyers to provide the support that their clients need. The rules on scope do not permit legal aid resources to be focused on where they are most needed, neither in terms of the most vulnerable cases nor in terms of those could most easily be resolved by timely advice. However, we also recognise that returning to old pre-LASPO approach is not the way forward either. ***We suggest that the civil legal aid system needs an updated version of the Green Form scheme, which was introduced in 1973, that would allow individuals to understand their rights and be directed to the services that are most appropriate for their situation. One suggestion we have received is that the Government could develop and pilot an ambitious and economically viable early advice scheme, that enables individuals to access timely legal and expert advice. Rather than being constrained by issues of scope, such a scheme should be strategically targeted at those who would most benefit from early advice.***

100. An early advice scheme would not solve many of the problems facing those in the civil justice system who cannot afford legal representation. The limits on scope will still mean that many cannot access the representation and advocacy that they need. Nevertheless, given the existing legal framework, a significant expansion in the provision of early advice

197 National Family Mediation ([LEG0021](#))

198 [Family Law Roundtable 14 December 2020](#)

199 Ministry of Justice, [Family Mediation Voucher Scheme](#), 26 March 2021

200 [Q525](#)

would at least give those unable to access legal aid a clearer sense of their legal position. An early advice scheme, making the best use of technology, could make sure that more of those entitled to legal aid are able to access it. Nimrod Ben-Cnaan, Head of Policy and Profile, Law Centres Network, explained to us that legal aid has “become a secret service”.²⁰¹ It could also help to triage individuals to direct them to the best form of dispute resolution for their situation.²⁰²

101. A possible model for such a scheme would be Resolution’s “family law credit” as proposed their 2015 Manifesto for Family Law. The credit would enable someone that meets criteria for legal aid for family mediation to have “an initial meeting with a family lawyer to help them gather evidence they need in order to access legal aid, or to discuss their options”.²⁰³ As Resolution point out help at this stage would mean that, even if they end up representing themselves, they would still be able to benefit from a discussion that set out their options. In our view, a modern version of the green form scheme should, as Nimrod Ben-Cnaan set out, enable lawyers to respond “to the presenting problems rather than trying to fit a problem into a pre-defined list of services that you are allowed to give”.²⁰⁴

Litigants in person

102. One of the main cross-cutting issues covered in both the future of legal aid and court capacity inquiries has been the growing number of litigants in person in the courts in England and Wales. Overall in the Family court in 2020, 47% of parties in cases which had at least one hearing at the Family court had legal representation.²⁰⁵ This figure has been gradually declining since 2011, when 62% of parties had legal representation.²⁰⁶ Respondents were the least likely to have representation, with 34% unrepresented in 2020, compared with 19% of applicants.²⁰⁷

Impact on court capacity

103. Kevin Sadler Acting Chief Executive, HM Courts and Tribunals Service told us on 26 March that non-legally aided cases take about the same amount of court time as legally aided cases. Kevin Sadler explained “while individual cases might take longer, in the quantum the work we have done suggested that it does not take any longer for a private law family case without legal aid, or rather without representation, as it were, compared to a case with representation”.²⁰⁸ A number of witnesses suggested that the practical impact of litigants in person on the courts is significant. Elspeth Thomson, from Resolution, outlined that litigants in person often are not able to put a bundle together, which leaves judges trawling through attachments which takes up time.²⁰⁹ Elspeth Thomson also explained that hearings often take longer because the arguments aren’t as focused, or as relevant, as they would be if they were presented by lawyers.²¹⁰ Thomson emphasised that the cases involving litigants in person often concern serious matters.²¹¹ Professor Anne Barlow,

201 [Q363](#)

202 Professor Anne Barlow, Family Law Roundtable, 14 December 2020

203 Resolution [Manifesto for Family Law](#) (2015)

204 [Q371](#)

205 Ministry of Justice [Family court statistics](#)

206 Ministry of Justice [Family court statistics](#)

207 Ministry of Justice [Family court statistics](#)

208 [Q534](#)

209 [Family Law Roundtable 14 December 2020](#)

210 [Family Law Roundtable 14 December 2020](#)

211 [Family Law Roundtable 14 December 2020](#)

from the University of Exeter, stressed that one of things that can most help the court is for legal advice to help a litigant in person narrow down the issues as much as possible.²¹² Jess Mant, lecturer in law from Cardiff University, explained that litigants in person are often vulnerable and find themselves in court as it is their last resort.²¹³ Jess Mant argued that the growing number of litigants in person has had “an effect on, basically, how the entire court system operates”.²¹⁴ A number of witnesses also stressed that private family law cases often feature one side with representation and one without and makes it difficult for the judge to ensure that proceedings are fair.²¹⁵ Jo Underwood pointed out that in housing law, often the landlord has advantages both in terms of technology and legal representation over the tenants.²¹⁶

104. Jess Mant identified three possible solutions to the growing numbers of litigants in person: more training and support for litigants in person, to rely on non-legal support (non-legal advice and McKenzie friends for example), or to reform court processes to make them more inquisitorial.²¹⁷ On 5 August 2020 the Ministry of Justice’s panel report, *Assessing risk of harm to children and parents in private law children cases*, argued that to protect children in private family law cases, the court should shift from an adversarial approach to an investigative problem-solving approach.²¹⁸ The report argues that an approach which “take an investigative, problem-solving approach based on open enquiry into what is happening for the child and their family” would be “beneficial all private law children’s cases, even those without safeguarding concerns”.²¹⁹ Dr Mavis Maclean cautioned against the implications of a shift to a more inquisitorial system:

Two people have a different view of the situation and have the right to say so in what is known as the adversarial system. They can do it much more efficiently if they have someone to help them who knows what is relevant and how to put it forward. If you take that right away by giving that control to the judge, that is a massive step to take. You cannot do it without totally retraining your judiciary. You cannot do it without providing the judiciary with an investigative staff. We have Cafcass (Children and Family Court Advisory and Support Service), but it is already totally overstretched. Having sat with them for a while I think that they do extraordinarily good work, but there is no way they can take over the entire inquisitorial process. To my mind, it would be the worst possible thing to do because, to achieve anything, you would have to spend a fortune.²²⁰

Jacky Tiotto, Chief Executive Officer, Cafcass, told us that the litigants in person without any early advice contribute to delays and pressures within the courts:

We are going to have to rethink the legal advice available to families in proceedings. Litigants in person do struggle with the system. They struggle to understand what they need to do and they struggle sometimes with the

212 [Family Law Roundtable 14 December 2020](#)

213 [Family Law Roundtable 14 December 2020](#)

214 [Family Law Roundtable 14 December 2020](#)

215 Resolution ([LEG0060](#)) - Professor Anne Barlow Family Law Roundtable 14 December 2020

216 [Q369](#)

217 Dr Jess Mant (Lecturer in Law at Cardiff University) ([LEG0032](#))

218 Ministry of Justice, [Assessing Risk of Harm to Children and Parents in Private Law Children Cases](#) (2020)

219 Ministry of Justice, [Assessing Risk of Harm to Children and Parents in Private Law Children Cases](#) (2020) p172

220 [Q176](#)

reports we write and the recommendations we make. I think that takes resource out of the system, ironically, and we need to put it back. It is a combination of investment and rethinking how early you support families.²²¹

Jacky Tiotto also explained that removing legal aid creates more demand on Cafcass' services.²²² We note what Kevin Sadler told the Committee. **The weight of evidence, however, is that inaction on the rising number of litigants in person is not an option. Many of the policy responses to the issue involve increasing the resources of the courts or other agencies involved in the system. With the impact of the pandemic likely to lead to greater number of litigants in person in the family courts and in tribunals, we urge the Government to consider providing more accessible and effective forms of support.**

Data

105. Nimrod Ben-Cnaan outlined that one of the main barriers to improving the situation for litigants in person was that there is not enough data on their experience in the justice system.²²³ Dr Mavis Maclean told us that “we need know more about litigants in person” and pointed to research in Australia that showed that a high proportion suffered from mental health conditions.²²⁴ Dr Natalie Byrom told the Committee that since 2010 the Ministry of Justice had been resisting calls to collect better data on litigants in person and in particular that the department had failed to model the effect that they have on the court system.²²⁵ Dr Byrom suggested that this failure made it harder to make the case to the Treasury for more funding for legal representation. Kevin Sadler wrote to the Chair after the session on 26 March with data comparing the number of weeks taken to dispose of family cases where both sides are represented and where both sides are unrepresented.²²⁶ The letter explained that “the most recent figures for 2020 suggest that the duration of cases where neither party was represented and those where both were represented was the same”. He also noted that “in previous years, the duration has tended to be longer for those cases where both applicant and respondent are legally represented”. We are grateful to Kevin Sadler for drawing these figures to our attention, however, they do not disprove the point made to us that cases take longer in terms of the amount of court time taken in each hearing. Further, they do not challenge the qualitative analysis put forward by a number of witnesses, and detailed above, which suggests that litigants in person represent a challenge for court capacity in a number of ways. Moreover, comparing cases in this way is, we would suggest, a rather simplistic way of analysing the impact of legal advice. **We continue to be disappointed with the Ministry of Justice's approach to gathering data on access to justice. From the evidence we heard, the data they hold may not adequately reflect the impact of litigants in person on court time and throughput. We remain concerned that the inability to produce high-quality data on the impact of legal advice on access to justice means that the chances of the Treasury granting additional funding for legal advice and representation are slim.**

221 [Q424](#)

222 [Q425](#)

223 [Q368](#)

224 [Q175](#)

225 [Q164](#)

226 Letter from Kevin Sadler to Sir Bob Neill - Justice Committee Wednesday 24 March 2021

The legal support action plan

106. The Government’s legal support action plan, launched in February 2019, aimed to take a number of steps to improve legal support including: “effective signposting”, telephone support and support for litigants in person. On 20 January 2021, Alex Chalk, the Minister then responsible for legal aid, wrote to the Committee to provide an update on the allocation of Legal Support for Litigants in Person (LSLIP) grant funding.²²⁷ The letter sets out that the £3.1 million has been fully allocated “to not-for-profit organisations at local, regional and national levels to enhance support to litigants in person, with the aim of understanding more about how they can, collectively, support people”.²²⁸ The Minister explained that local and regional streams of the LSLIP programme are now underway and that “eight further projects have been identified, whereby £2 million is going towards helping some of the most vulnerable people to address their legal problems”.²²⁹

107. The Government has since 2014 supported the Litigant in Person Support Strategy (LiPSS), which is a collaboration between a number of organisations that provide support to litigants. LiPSS submitted evidence to the Court Capacity inquiry.²³⁰ Their evidence points out that the increase in the number of litigants in person has “slowed down proceedings, increased costs, and risked inadvertent influence over the outcome of a hearing due to ineffectual advocacy and lack of procedural knowledge”.²³¹ Their evidence details the particular issues facing litigants in person during the pandemic and the effect of the greater reliance on remote hearings. It also emphasises that preparedness and awareness of what to expect at a hearing are vital to navigating the court system.²³² LiPSS praise the guidance and information provided by HMCTS on Gov.uk and highlights the Advicenow platform that organisations within LiPSS have been updating to help litigants throughout the pandemic.²³³ However, LiPSS also raise concerns over the signposting in remote hearings and guidance.²³⁴ On 24 June 2021, Lord Wolfson wrote to us to set out that it had developed an online signposting pilot intervention for those with housing disrepair problems.²³⁵ ***We welcome steps to support litigants in person. We encourage the Government to consider whether the scale of these projects and grants should be increased.***

108. The Law Society’s written evidence to us argues that the Government’s Action Plan workstreams, on early legal advice have lacked clarity and have not developed quickly enough.²³⁶ Nimrod Ben-Cnaan described them as “underpowered for the scale of need created by LASPO”.²³⁷ Nimrod Ben-Cnaan argued that the court reform programme needs to do more to help litigants in person. Once you get beyond the issue of digital access to the court, which the reform programme is addressing, the issue of legal capability will

227 [Letter from Alex Chalk MP, Parliamentary Under-Secretary of State for Justice, dated 20 January 2021, regarding full awarding of the legal support for litigants in person grant](#)

228 [Letter from Alex Chalk MP, Parliamentary Under-Secretary of State for Justice, dated 20 January 2021, regarding full awarding of the legal support for litigants in person grant](#)

229 [Letter from Alex Chalk MP, Parliamentary Under-Secretary of State for Justice, dated 20 January 2021, regarding full awarding of the legal support for litigants in person grant](#)

230 [Written evidence from the Litigant in Person Support Strategy \(LiPSS\) COC0067](#)

231 [Written evidence from the Litigant in Person Support Strategy \(LiPSS\) COC0067](#)

232 [Written evidence from the Litigant in Person Support Strategy \(LiPSS\) COC0067](#)

233 [Written evidence from the Litigant in Person Support Strategy \(LiPSS\) COC0067](#)

234 [Written evidence from the Litigant in Person Support Strategy \(LiPSS\) COC0067](#)

235 [Letter from Lord Wolfson, Parliamentary Under-Secretary of State, dated 24 June 2021, regarding Legal Support Online Signposting Pilot for Housing Disrepair](#)

236 [The Law Society of England and Wales \(LEG0070\)](#)

237 [Q364](#)

Box 6: Exceptional Case Funding

LASPO also introduced a revised Exceptional Case Funding (ECF) scheme. Its purpose is to provide legal aid for cases that do not fall within the scope of civil and family legal aid but where:

- failure to do so would be a breach of the individual's Convention rights (within the meaning of the Human Rights Act 1998);
- failure to do so would be a breach of any rights of the individual to the provision of legal services that are enforceable EU rights; or,
- it is appropriate to provide legal aid, having regard to any risk that failure to do so would be a breach of such rights.

ECF may also be available for advocacy at an inquest into the death of a member of an individual's family, provided the Director of Legal Aid Casework has made a wider public interest determination in relation to the individual and the inquest. Those applying for legal aid via ECF are still subject to means and merits tests.

Source: House of Commons Library, [Legal Aid: the review of LASPO Part 1](#), Briefing Paper no 43720, 7 May 2020 p.18

116. The Public Law Project's report, *Improving Exceptional Case Funding: Providers' Perspectives*, published in January 2020, surveyed legal aid lawyers on the scheme and reported that:

- 77% of respondents disagreed that ECF is effective in ensuring that people can access legal aid when it is needed (61% 'strongly disagreed')
- 64% of respondents made between 0–5 applications in the last year (20% made none)
- Nearly 50% of respondents have only made between 1 and 5 applications since the scheme was introduced
- 39% of respondents said they do not make ECF applications on behalf of their clients.²⁵⁷

The report points out that even through applications have increased, the 2018/19 saw 3018 applications (there were 1516 in the first year), this continues to be short of the 5000 to 7000 that the Government had initially anticipated.²⁵⁸ Further, a relatively small proportion of applications are made by individuals as opposed to legal aid providers; there were 560 applications by individuals in 2018/19. The Public Law Project's written evidence submits that the changes made since 2019 are "not sufficient to ensure that legal aid providers are able to use the ECF scheme".²⁵⁹

117. Bail for Immigration Detainees' written evidence explains that it has set up a project that makes ECF applications for individuals.²⁶⁰ Bail for Immigration Detainees' describe the process as cumbersome and complex. In their experience the process requires the input of lawyers and this means that the work has to be conducted with the risk that they

257 Joe Tomlinson and Emma Marshall, [Improving Exceptional Case Funding: Providers' Perspectives](#), Public Law Project (2020)

258 Joe Tomlinson and Emma Marshall, [Improving Exceptional Case Funding: Providers' Perspectives](#), Public Law Project (2020) p.3

259 Public Law Project ([LEG0045](#))

260 Bail for Immigration Detainees ([LEG0081](#))

The Housing Law Providers Association point out that the Solicitors' guideline average hourly rates produced by HMCTS are £251.67 in London, £174.67 nationally (grade 2) and yet the hourly rate for a County Court claim at legal aid rates is £63.²⁷⁷ Ian Townley told us that the remuneration aspect in terms of sustainability is key as his own firm struggles to retain staff. Further, he explained that his firm has gone from 90% legal aid work to around 35% to 40%. Chris Minnoch added that more data was needed on the providers of civil legal aid beyond the number of organisations and the number of contacts. In particular, it is important to know, he stressed how much publicly funded work firms are doing as a proportion of their overall work. The APPG is currently conducting a survey of legal aid providers, which will undoubtedly improve this situation. ***The Government should collect and publish more detailed data on the providers of civil legal aid, in particular it should capture how much publicly funded work each provider is doing each year.***

The Bar Council's report on civil legal aid, published in January 2021, indicates that senior practitioners in civil legal aid are now earning less than they were at the start of their careers.²⁷⁸ They outline that many are choosing to stop doing publicly funded work or compensate by taking on more cases. Their report outlines that "legal aid barristers are finding that in order to support their practice they are having to work all-nighters, weekends and 60 or 70 hour working weeks". The report summarises the main concerns of practitioners at the Bar in terms of sustainability at the junior end as: the ability to recruit and retain the strongest candidates for publicly funded work, the impact on social mobility at the Bar and burnout.²⁷⁹

Advice deserts

123. The Law Society work on "Legal aid deserts", which highlights the lack of providers in a number of areas of civil legal aid, was reinforced by several submissions. In particular, several pointed out that in certain areas of the country there are shortages of providers of legal aid advice on housing law, community care and immigration law. The research undertaken by Dr Jo Wilding, a postdoctoral researcher at the University of Brighton working on the immigration legal aid market, was cited by a number of submissions.²⁸⁰ In her written evidence, she emphasised that the issues of sustainability can be traced back to the Carter reforms in 2007, which introduced fixed fees for a range of civil legal aid work.²⁸¹ She emphasised that for housing and immigration cases the fixed fee does not take reflect the complexity of the cases that are not within scope (as shorter cases are not out of scope). This has had a major impact on the market, according to her research, as providers focus on the cases that attract hourly rates meaning those funded by fixed fee cases struggle to access good quality lawyers. In terms of recruitment, Dr Wilding cites a number of examples, including Wiltshire, Devon and Cornwall where providers are unable to do immigration legal aid work because of an inability to recruit and attract applicants. In her view, these areas will not be able to recover through market-based procurement and instead "targeted government intervention in the form of grant funding" alongside other measures to improve sustainability is needed.²⁸²

277 Housing Law Practitioners Association ([LEG0100](#))

278 Bar Council, [Running on Empty - Civil Legal Aid Report](#) (2021)

279 Bar Council, [Running on Empty - Civil Legal Aid Report](#) (2021)

280 For example: Bail for Immigration Detainees ([LEG0081](#)); Law Centres Network ([LEG0056](#))

281 Dr Jo Wilding (ESRC Postdoctoral Research Fellow at University of Brighton) ([LEG0009](#))

282 Dr Jo Wilding (ESRC Postdoctoral Research Fellow at University of Brighton) ([LEG0009](#))

124. The Refugee Council's evidence states that these gaps in service provision are a major concern as they mean that individuals that need and are eligible for legal aid are not able to get the advice they require at an early stage and have to desperately search for a suitable provider.²⁸³ They explain that when asylum seekers are dispersed to areas of the country with no providers in proximity this effectively restricts their access to justice.²⁸⁴

125. Access Social Care, a charity that provides free advice to those with social care needs, highlight that only 20% of local authorities have a legal aid community care lawyer.²⁸⁵ Community care lawyers enable individuals that are entitled to publicly funded care are able to challenge the decisions of public authorities. They argue that the shortage is not a product of a drop in the need for legal assistance but a product of the legal aid framework. They point out that the figures on non-family civil legal cases show a sharp drop in cases from 488, 329 in 2009–10 to 39,488 in 2019–20 (table 8 below puts this figure in context). Access to Social Care emphasise that in their experience legal aid firms are unwilling to take cases that were unlikely to progress beyond the legal help stage and were told that “casework for individuals is becoming impossible”.²⁸⁶ They point out that their legal team has an extremely high success rate. The lack of provision means that in community care public bodies are not being held to account, and they argue that “the rights and corresponding duties to provide social care might as well not exist”.²⁸⁷ Access Social Care argue that the fixed fee system does not work, a point echoed by many of submission from immigration specialists. They argue the fee scheme creates perverse quality incentives such as to delegate Legal Help work to inexperienced caseworkers and makes it hard to recruit.

283 Refugee Council ([LEG0040](#))

284 Refugee Council ([LEG0040](#))

285 Access Social Care ([LEG0042](#))

286 Access Social Care ([LEG0042](#))

287 Access Social Care ([LEG0042](#))

Table 8: Legal help and controlled legal representation matters started

Legal help and controlled legal representation matters started England and Wales; annual and quarterly total volume						
Financial Year	Family	Immigration	Mental health	Social welfare	Other	Total matter starts
2009-10	308,838	98,539	38,109	422,703	65,626	933,815
2010-11	268,659	82,787	34,623	351,364	48,001	785,434
2011-12	232,390	60,792	39,578	306,890	40,118	679,768
2012-13	204,247	52,371	41,407	244,521	31,224	573,770
2013-14	43,104	28,157	42,242	49,769	10,388	173,660
2014-15	43,828	30,362	42,737	44,760	9,890	171,577
2015-16	37,748	31,653	38,946	40,235	9,512	158,094
2016-17	35,390	29,111	37,692	36,301	8,800	147,294
2017-18	32,956	26,609	36,101	36,662	8,790	141,118
2018-19	33,825	29,126	35,493	33,615	9,719	141,778
2019-20	33,823	33,499	35,647	29,685	9,841	142,495
2020-21 (p)	29,453	25,579	33,846	17,385	9,649	115,912
<i>Change 2009-10 to 2019-20</i>						
	-89%	-66%	-6%	-93%	-85%	-85%

Source: MoJ, Legal aid statistics quarterly: Jan-Mar 2021: table 5.1
Notes: 1. Social welfare includes 'debt', 'housing' and 'welfare benefits'; 2. Data include Solicitors, Not for profit organisations and Specialist telephone advice service (excludes Community legal advice centre).

126. Sustainability issues for civil legal aid providers are sufficiently serious to justify a complete overhaul of the system. A number of witnesses have highlighted that a combination of number of fundamental problems rather than one or two specific issues contribute to the unsustainability of civil legal aid. Furthermore, this lack of sustainability is having a knock-on effect on the ability of those entitled to legal aid to access lawyers to provide advice and representation. We welcome the fact that the Government is undertaking a review to look at these issues in the round. That said, the success of that review will depend on whether it is able to put forward the radical solutions needed to make civil legal aid sustainable again. We received evidence to suggest that an internal review may not be adequate to that task. If that proves to be so, an independent review may be required, along the lines of the Independent Criminal Legal Aid Review, to acquire the evidence base needed for far-reaching changes.

127. The basis for the radical change required in civil legal aid requires the Government to establish the level of need for civil legal aid services in England and Wales. Once that is established, the Government needs to ensure that suppliers of legal aid services have the capacity to meet that need. We agree with a number of witnesses that the current model of predominantly funding services by funding individual cases, often via fixed fees, will not enable providers to meet the need or demand for legal aid services. As Richard Miller told us “it is a bit strange that we have a system where the Legal Aid Agency makes decisions on each individual case, leading to extensive bureaucracy, which of course has a cost in itself”.²⁸⁸ *Instead, a more flexible and proactive approach*

million adults lack basic digital skills, such as being able to complete online forms or locate relevant websites”.²⁹² The Young Legal Aid Lawyers state that “digital or telephone advice will exclude some of the most vulnerable”.²⁹³ The Mary Ward Legal Centre explain that most of their clients do not have the technology to instruct them from home and that even if they have smart phones they do not always have sufficient credit or data to send over key documents or to send over signed forms.²⁹⁴

132. Justice Collaborations told us that the charitable sector was in a weak position to switch to remote working and digital services when the pandemic hit.²⁹⁵ Roger Smith, visiting professor at London South Bank University and a former director of JUSTICE, set out that while many providers of advice, such as Law Centres, were able to move to working remotely but many have struggled with their IT needs and have not been able to innovate in the way that they deliver services.²⁹⁶ He stresses that for the smallest community-based operations, upgrading their technological capacity will add significant financial pressures. For example, he points out that in the long-term, many may need to upgrade to commercial-level standard case management systems. He emphasises that providers will need to collaborate to share the best solutions for these technological challenges. He also argued that it is crucial for technology to be blended with traditional methods of helping people.²⁹⁷ The Joint Council for the Welfare of Immigrants argues that the Government should help smaller providers and Not-for-Profits upgrade their IT infrastructure as this could lead to longer term savings elsewhere.²⁹⁸

133. The Divorce Surgery, an Alternative Business Structure, argue that technology should be used to gather evidence through secure client portals that asks clients questions and enables them to upload the relevant material.²⁹⁹ The Employment Legal Advice Network point out that it is a problem that there is no resource that enable vulnerable clients to exchange documents and that solutions for this issue should be a priority.³⁰⁰

134. JUSTICE’s written evidence makes the case for an Online Advice Platform. They argue that the court reform programme provides the opportunity for an integrated specialist advice platform through an online advice portal.³⁰¹ They suggest that an Online Advice Platform could be a prominent part of HMCTS Online, thereby highlighting lay users what services are available. They point out that one main benefits of such a service is that it could help to remove geographical boundaries.³⁰² A point also made by Simon Mullings, from the Housing Law Providers Association, who saw it as part of the solution to legal advice deserts.³⁰³ The portal could accommodate a range of different practitioners with expertise in the relevant area of the law, including legal aid-funded providers. JUSTICE stressed that the proposed platform should not detract from the provision of face-to-face advice, which in their view remains the best option in most circumstances.

292 LawWorks ([LEG0088](#))

293 Young Legal Aid Lawyers ([LEG0095](#))

294 Mary Ward Legal Centre ([LEG0050](#))

295 Justice Collaborations ([LEG0067](#))

296 Professor Roger Smith ([LEG0008](#))

297 A point also made by Dr Jess Mant (Lecturer in Law at Cardiff University) ([LEG0032](#))

298 Joint Council for the Welfare of Immigrants ([LEG0046](#)) A point also made by Simon Mulling [Q304](#)

299 The Divorce Surgery ([LEG0017](#))

300 Employment Legal Advice Network ([LEG0028](#))

301 JUSTICE ([LEG0089](#))

302 JUSTICE ([LEG0089](#))

303 [Q303](#)

135. The Legal Service Board’s evidence outlines that their research shows that prior to pandemic legal aid clients are more likely to access services face-to-face than other users of legal services.³⁰⁴ Their survey found that 68% of legal aid users received the service face-to-face in comparison to 41% of the overall sample.³⁰⁵ As a result, they stressed that “the opportunities afforded by technological innovation need to be balanced against the risks posed to consumers and the risks of digital exclusion”.³⁰⁶ They also note that “culture” appears to be the biggest impediment to technological innovation for legal aid providers but they that could be at the “forefront of this cultural change within the sector”.³⁰⁷

136. Derek Sweeting QC, Chair of the Bar Council, told us that us that digital exclusion should not be used as an excuse for not innovating in the delivery of legal services:

Being able to deliver some initial legal advice at the very least, or advice during the course of a case, or case progression of documents, through that sort of platform is certainly something we should be looking at. Simplifying our procedures so that that can be done sensibly is the sort of concomitant activity that we need to think about going out of the pandemic.³⁰⁸

137. **Online legal services should not be seen as a replacement for traditional face-to-face services, especially when such a high proportion of those who qualify for legal aid do not always have reliable access to digital technology. That said, we agree with a number of submissions that have suggested that there is a significant opportunity to use technology to both expand the capacity of providers and to extend the reach of legal aid providers to more people. *The Government should support legal aid providers to upgrade their digital infrastructures. This should include helping smaller providers and Not-for-Profits procure the necessary hardware and case management software that could help them expand their capacity. The Government should also establish an Online Platform for Legal Advice, as suggested by JUSTICE, that is given prominence by HMCTS online that directs people to advice provided by legal aid providers.* Expanding the availability and accessibility of online advice by legal aid providers, particularly at an early stage, could serve to both enhance existing face-to-face services and extend the reach of providers.**

304 Legal Services Board ([LEG0049](#))

305 Legal Services Board ([LEG0049](#))

306 Legal Services Board ([LEG0049](#))

307 Legal Services Board ([LEG0049](#))

308 [Q119](#)

Agency has competing priorities: “speedy access to legal aid, but don’t spend a penny over what you should”.³²¹ A number of witnesses cited the qualification of the Agency’s accounts by the National Audit Office in 2013 as being responsible for their stringent approach to applications.³²² Ian Townley explained that this leads to a process of initial refusal and appeals, which means that when legal aid is eventually granted, it has cost the provider time and money.

143. The Legal Aid Practitioners Group’s (LAPG) evidence contains results of a 2019 survey of its members on the work of the Legal Aid Agency.³²³ It found that 86% of those surveyed had recent experience, within twelve months, of incorrect refusals of substantive certificates.³²⁴ They explain that these refusals mean that legal aid providers have to decide whether to appeal and risk not being paid. They argue that the LAA’s culture of refusal is leading to sustainability issues as the perception of a culture of refusal is one of the reasons that providers drop-out of the legal aid market.³²⁵ Their evidence notes that the results of the survey led to positive engagement with the Agency and a number of changes being made. Chris Minnoch, Chief Executive of LAPG, told us on 23 February that the Agency “is changing for the better”.³²⁶

144. Guy Beringer CBE QC’s, Chair of the Legal Education Foundation, evidence to us (submitted in a personal capacity), Chair of the Legal Education Foundation, argues that the Agency’s approach is inefficient:

The current system appears to presume that providers cannot be trusted to apply the rules on eligibility and cannot be trusted to maximise the number of good outcomes achieved from the resources available. Providers are accordingly micro-managed at every stage of the process, resulting in government processing 400,000 applications and 1 million bills. There is no net value to the public purse in doing this.³²⁷

The Law Society’s written evidence makes a similar point arguing that the Agency’s processes are onerous, bureaucratic and time consuming and the net result is that “time is presently spent by practitioners on form filling that could be better spent assisting clients”.³²⁸

145. A number of submissions suggested that the Legal Aid Agency should change its approach to auditing. The Bar Council’s evidence suggests ‘dip sampling’, where the LAA ask for detailed evidence in a sample of cases to check that solicitors and barristers are properly claiming the legal aid fee for the case, rather than requiring to see detailed evidence for every claim, as a possible solution.³²⁹

146. Dr Jo Wilding’s written evidence argued that the Agency current approach to auditing is poorly focused and creates costs that are disproportionate. In particular, she argues that the disproportionate effect of their approach is particularly acute for high-quality providers as there is “no earned autonomy (in the form of reduced audit activity) for providers

321 [Q330](#)

322 Chris Minnoch [Q328](#)

323 Legal Aid Practitioners Group ([LEG0096](#))

324 Legal Aid Practitioners Group ([LEG0096](#))

325 Legal Aid Practitioners Group ([LEG0096](#))

326 [Q330](#)

327 Guy Beringer ([LEG0014](#))

328 The Law Society of England and Wales ([LEG0070](#))

329 The Bar Council ([LEG0073](#))

receiving the highest marks on peer review”.³³⁰ She also pointed out that the current system means that “higher level of work you do, the more time you spend on unpaid admin and dealing with audit activity and assessment activity”.³³¹ Dr Wilding highlights that the Agency’s approach is problematic because it contributes to the high transactions costs of legal aid providers. She told us that the current approach generates unpaid administration costs which eliminates any money that could be made on the substantive work on the file. Dr Jo Wilding suggested moving to a system of earned autonomy where “you get less audit activity when you have shown yourself to be a reputable provider”, which would enable the Agency to assess the level of risk presented by each individual provider and then tailor the amount of audit activity.³³²

147. Hollie Collinge, Solicitor Advocate, Kelly’s Solicitors, Brighton, told the Committee on 9 February that the Legal Aid Agency imposed a significant burden on smaller firms and suggested that earned autonomy could be beneficial:

We file review each other’s work within the firm, and that is on top of quite heavy scrutiny of our bills by the agency. If I may say so, they are often inaccurately assessed. They go to and fro for unbelievable reasons. I think it would make sense to look at the work that is generated by the Legal Aid Agency to audit files, when firms are operating on the smallest of margins and there could be some earned leeway after a long period of very good practice. I think it would help, and it would save funding as well.³³³

148. A connected issue is that the existing system does not focus enough on the quality of the work provided. Transform Justice’s evidence explains that peer reviews occur relatively infrequently and only examine case files, which provide an incomplete picture.³³⁴ They argue that the Agency should focus more on the quality of service and ensuring that small firms are not overburdened. Guy Beringer’s evidence argues that a focus on quality should mean that the Agency focus on expanding the capacity of good providers by enable them to “invest in infrastructure (IT and case management), knowledge management, staff training and best practice”.³³⁵ The Joint Council on the Welfare of Immigrants said that in their experience the Agency’s priority was on minor contractual breaches rather than on the quality of advice by providers.³³⁶

149. Jane Harbottle, Chief Executive of the Legal Aid Agency, when asked about the idea of system of “earned autonomy” for providers with a good record, rejected the idea:

[a]n important role of the agency, alongside access to commissioning services, is stewardship of the legal aid fund and taxpayers’ money. So far, over the course of the last two years that I can speak to, the focus has been to improve processes and reduce bureaucracy for all our providers, and not necessarily a subset of providers. I would not necessarily be keen to

330 Dr Jo Wilding (ESRC Postdoctoral Research Fellow at University of Brighton) ([LEG0009](#))

331 [Q204](#)

332 [Q204](#)

333 [Q256](#)

334 Transform Justice ([LEG0013](#))

335 Guy Beringer ([LEG0014](#))

336 Joint Council for the Welfare of Immigrants ([LEG0046](#))

introduce a two-tier legal aid system, because I am not sure that would be helpful for providers, for the agency or for clients trying to navigate the system.³³⁷

Jane Harbottle then explained what is being done to reduce the burden of the Agency's auditing:

Increasingly, we have adopted a more risk-based approach, and we adopt a risk-based approach now across most of our processes in the agency itself. For a lot of firms, it will now mean perhaps one contract visit per year. It is only if, using data, we can see issues with regard to eligibility or significant claiming issues that we would endorse or commission further reviews of that particular provider. In fact, in the last year, our audit activities reduced by around 16%. In short, we want to improve the relationship and improve the experience for all of our providers, not necessarily a subset of them.³³⁸

150. We welcome the Legal Aid Agency's work to respond to legal aid providers concerns in relation to the "culture of refusal". We also recognise their commitment to ensure that taxpayers' money is managed properly. We acknowledge that the staff and leadership at the Legal Aid Agency have limited scope to alter the fundamental dynamics that determine their role within the broader legal aid system. *Nevertheless, we believe that the evidence submitted indicates that the Government and the Ministry of Justice need to reevaluate the Legal Aid Agency's priorities. By asking the Agency to prioritise the "error rate" over other considerations, particularly access to justice and the sustainability of providers, the Government risks missing the wood for the trees. The Government's work on the sustainability of both criminal and civil legal aid should consider how to empower the Legal Aid Agency to take a more flexible and proactive approach to funding legal aid. The Government should ensure that providers are not required to conduct disproportionate amounts of unpaid work to apply for funding.*

151. *The Government should consider creating a system of earned autonomy that places more trust in the decision making of providers with strong records of high-quality decision making. The Agency's processes should have some incentives for providers to work towards gradually reducing the burden of administrative requirements. Given the difficulties facing legal aid providers, placing greater trust in their ability to decide on eligibility would expand their capacity which would be beneficial for access to justice.*

152. A number of submissions suggested that the Legal Aid Agency should, as well as changing its approach to funding, change in a number of other ways. The Public Law Project recommend that the Legal Aid Agency be given the mandate and resources to monitor the level of unmet legal need.³³⁹ The Legal Service Board's evidence states that "3.6 million people have an unmet legal need involving a dispute each year".³⁴⁰ Dr Vicky Kemp's evidence to the Committee emphasises that the Legal Services Commission, unlike the Legal Aid Agency, had "the Legal Services Research Centre (LSRC), an internationally recognised and influential leader in the field of access to justice research" within it.³⁴¹ At present, the responsibility for legal aid policy and research lies within the Ministry of

337 [Q515](#)

338 [Q515](#)

339 Public Law Project ([LEG0045](#))

340 Legal Services Board ([LEG0049](#))

341 Dr Vicky Kemp (Principal Research Fellow at U) ([LEG0015](#))

Justice. The Bar Council’s written evidence expressed frustration over the boundary of responsibility between the Legal Aid Agency and the Ministry of Justice.³⁴² They imply that the division between operational matters, which the Agency is responsible for, and policy, which is the responsibility of the Ministry of Justice are “inter-related and it is frustrating to raise an issue in one forum only to be told it needs to be raised in a different forum”.³⁴³

153. It was also suggested that the Legal Aid Agency should reinstate its trainee scheme, which according to Nimrod Ben-Cnaan would mean that there would be a “fixed cohort of new legal aid lawyers coming into the system every year”.³⁴⁴ Chris Minnoch, Chief Executive of Legal Aid Practitioners Group, told us that it would make a real difference if the Agency could provide help to firms specific and direct and help to bring in trainees, and suggested the Legal Education Foundation’s Justice First Fellowship scheme could provide a potential model.³⁴⁵ ***The Government should consider enabling the Legal Aid Agency to provide specific support to legal aid providers to bring in trainees. This support should be targeted to areas where there is a particular shortage of specialist advice.***

154. Chris Minnoch also told the Committee that the digital interface used for billing and application between civil legal aid providers and the Agency is “not fit for purpose”.³⁴⁶ The Joint Council for the Welfare of Immigrants set out that the online application process is cumbersome and prone to outages and errors.³⁴⁷ Some praised the shift to using online billing processes prompted by Covid-19 but asked that the agency consider a move towards fully automated billing of Legal Help files. Resolution raised concerns over the Government’s proposal to transfer the assessment of all civil legal aid bills to the Legal Aid Agency.³⁴⁸ Resolution told us they could see the benefits of a simplified and faster system of payment, but they “remain concerned about the training of staff who are taking over a role previously undertaken by judges who had been involved in the cases they were assessing and were aware of the work that had to be done”.³⁴⁹ The Government’s consultation closed on 10 May 2021.

155. The Legal Aid Agency’s future role will be determined by the outcome of the Government’s work on the sustainability of criminal and civil legal aid. At present, the Agency bears the brunt of previous Governments’ focus on efficiency and savings, and the result is an untenable dynamic between legal aid providers and the body that funds legal aid. ***If the Government were to accept the recommendations we have made on how to approach criminal and civil legal aid it will be necessary to address the Legal Aid Agency’s priorities, its institutional capacity and how it uses its resources. The Government should consider whether the Legal Aid Agency should expand its data collection and publication in order to better inform the development of legal aid policy.***

342 The Bar Council ([LEG0073](#))

343 The Bar Council ([LEG0073](#))

344 [Q363](#)

345 The Legal Education Foundation, The Justice First Fellowship

346 [Q309](#)

347 Joint Council for the Welfare of Immigrants ([LEG0046](#)) A point also made by Resolution ([LEG0060](#))

348 Resolution ([LEG0060](#))

349 Resolution ([LEG0060](#))

Conclusions and recommendations

Criminal legal aid

1. Reform of criminal legal aid must prioritise a whole justice system approach, to ensure that there are incentives for everyone to work towards the fair and timely resolution of criminal cases. (Paragraph 15)
2. The changes made as part of the Criminal Legal Aid Review are positive and show that the Government recognises the need to make improvements to the criminal legal aid framework. It is particularly welcome that the Government has acted on pre-charge engagement. However, much more needs to be done to make criminal legal aid sustainable. (Paragraph 22)
3. Without significant reform there is a real chance that there will be a shortage of qualified criminal legal aid lawyers to fulfil the crucial role of defending suspects and defendants. This risks a shift in the balance between prosecution and defence that could compromise the fairness of the criminal justice system. (Paragraph 26)
4. *There appears to be a growing imbalance between the ability of criminal defence firms to recruit and retain staff and that of the Crown Prosecution Service. It is fundamental to our adversarial justice system that criminal defence services have sufficient resources to provide high-quality representation to suspects and defendants. We recommend that the Government consider linking legal aid fees to the rates of pay of the Crown Prosecution Service.* (Paragraph 32)
5. *The lack of any increase to criminal legal aid fees for solicitors over the past 20 years needs to be addressed. Sir Christopher Bellamy's current review, commissioned by the Government, gives an opportunity to do this. Thereafter, fees and rates should be regularly reviewed in line with inflation, otherwise the gap will build up over time and become harder to address.* (Paragraph 34)
6. The criminal justice system will be stronger if able and experienced advocates at the criminal bar are able to do publicly funded legal aid work. The gap between private and public rates has grown substantially in the past decade, and while a significant gap is to be expected, we agree with Criminal Bar Association's interim submission to the Independent Review of Criminal Legal Aid that there needs to be a connection between the two. Further, in assessing the fees paid to advocates, it is important to remember that the total fees do not translate directly to earnings, as barristers have to pay considerable overheads, expenses and chambers fees out of the gross fee. The Government should take this into account when considering how to reform the criminal legal aid system. (Paragraph 37)
7. *There are serious problems with the current fee schemes for criminal legal aid. The fees and rates do not reflect the work required. The schemes should be reformed to ensure that they offer a fair rate for the work required and are subject to regular review.* (Paragraph 38)
8. The justice system needs talented lawyers from all backgrounds to choose to practise criminal law and for the professions to be able to retain them. In 2018,

our predecessor Committee stated “that current difficulties in recruitment to the Criminal Bar could have a negative impact on future recruitment to, and diversity within, the judiciary—in particular for judicial office holders in the criminal courts”. This inquiry’s evidence has reaffirmed those concerns. (Paragraph 40)

9. The predominance of inadequate fixed fees in the current framework is problematic. The structure of the fees does not reflect the complexity of the work required, nor does it incentivise firms to take on the most difficult cases at an early stage. *The Government should reform the fee structure to prioritise quality over quantity and to allow criminal defence lawyers to spend more time on the most difficult cases at the earliest possible stage. There is a risk to the fairness of the criminal justice system if lawyers are not willing to take on the most complex cases because of the low rates of pay. There are also clear benefits for the operation of the criminal justice system if more work can be done at an early stage to make progress on a case. The Government should reform the fee structure to prioritise quality over quantity and to allow criminal defence lawyers to spend more time on the most difficult cases at the earliest possible stage. There is a risk to the fairness of the criminal justice system if lawyers are not willing to take on the most complex cases because of the low rates of pay. There are also clear benefits for the operation of the criminal justice system if more work can be done at an early stage to make progress on a case.* (Paragraph 47)
10. The Committee’s inquiry on court capacity has focused on the Crown Court where the delays are the most acute. In that context, it is imperative that the criminal legal aid system should be structured to facilitate resolution of cases at the earliest possible stage in the process. (Paragraph 51)
11. *The criminal legal aid system should be restructured so that it enables legal aid lawyers to provide effective representation at every stage of the process, works for complex cases and sustains providers in all areas of England and Wales. The Government should reduce the role of fixed fees within the legal aid system to ensure that high-quality work at every stage of proceedings and on complex cases is fairly remunerated.* (Paragraph 52)
12. The current criminal legal aid system does not provide enough incentives for legal representatives to take early action to progress cases through the system as quickly as possible. The legal aid fee structure should incentivise early engagement between defence lawyers and the police and the CPS. We note that the Government has sought to make changes to pre-charge engagement, but more changes are needed. The current system does not do enough to recompense lawyers for taking on complex cases at the police station and at the magistrates’ court. Investing more in early engagement will lead to savings to the public purse, as cases would be resolved at an earlier stage, which could free up capacity across the criminal justice system. (Paragraph 53)
13. *The Government needs to ensure that the legal aid framework is able to respond and adapt to changes in volume and practice over time in the criminal justice system.* (Paragraph 58)
14. Our 2019–21 Report on the effect of Covid-19 on the legal professions discussed measures taken to provide additional income during the early stages of the

pandemic. The impact of Covid-19 means, however, that the need to take action to improve the criminal legal aid framework is now even more urgent than it was when the Government set up the Criminal Legal Aid Review in 2018. (Paragraph 61)

15. *The Government should evaluate whether the money saved by the means test is justified when weighed against its impact on the fairness of criminal justice system. If the means tests for the magistrates' court and the Crown Court are to remain then the current eligibility thresholds should be addressed and thereafter automatically uprated every year in line with inflation.* (Paragraph 67)
16. *The Government's response to our report on private prosecutions concluded that the rules should be changed to level down what private prosecutors can recover from central funds. Our view is that this is the wrong approach. The right approach would be to make the system fairer by levelling up and removing the cap on what reasonable costs acquitted defendants may recover from central funds.* (Paragraph 69)
17. *We recommend that the Government implement the recommendations of the Taylor Review of Youth Justice: to review the fee structure of cases heard in the youth courts in order to raise their status and improve the quality of legal representation for children and to introduce a presumption that children should receive free legal representation at the police station.* (Paragraph 73)
18. *The Government should consider how technology can be used to increase the accessibility of legal advice to suspects and defendants. The Government should also consider developing a scheme to enable criminal legal aid providers to upgrade their digital capacity.* (Paragraph 77)
19. Successive governments have prioritised efficiency and costs over the quality of the criminal justice system. The Committee's inquiry into Court Capacity has highlighted the difficult situation facing the courts at the start of the pandemic. Unless there is significant change to criminal legal aid, there is a real risk that the balance between defence and prosecution, which is at the heart of our adversarial justice system, will be unfairly tilted in favour of the prosecution. The fairness of criminal justice system depends on a criminal legal aid system that is properly funded and that is structured to enable lawyers to provide high-quality work on the most complex cases at every stage of the process. The Government's response to the independent review of criminal legal aid must ensure that criminal lawyers are paid for all the work they do to represent their clients and that fees and rates are regularly reviewed so that the profession can remain sustainable for the long-term. (Paragraph 79)

Civil legal aid

20. It is frustrating, and yet unsurprising, that many of the concerns raised over the operation of the civil legal aid system by our predecessor Committee in 2015, and by Government's post-implementation review in 2019, have been highlighted in evidence to this inquiry on the future of legal aid in 2021. (Paragraph 86)
21. The Government should take a whole justice system approach to the reform of the civil legal aid framework. The provision of early advice can help to make the courts

work more effectively. (Paragraph 88)

22. *The Government should consider whether the model of the possession duty scheme should be used in other areas of the civil justice system where there are significant numbers of litigants in person. Non-means tested advice at court on the day of hearing could provide an economical way of offering some legal support to vulnerable litigants. We commend the Government and the Legal Aid Agency on their work on the duty scheme, but ask that they learn the lesson that schemes which are “assertive and flexible”, as Simon Mullings described the possession duty scheme, are what is needed.* (Paragraph 92)
23. The Committee welcomes the introduction of the Family Mediation Voucher Scheme. It is a positive step and recognises that more needs to be done to help separating parents. We believe that if early legal advice was available alongside mediation, this would result in an increase in the numbers using mediation successfully. (Paragraph 97)
24. *We suggest that the civil legal aid system needs an updated version of the Green Form scheme, which was introduced in 1973, that would allow individuals to understand their rights and be directed to the services that are most appropriate for their situation. One suggestion we have received is that the Government could develop and pilot an ambitious and economically viable early advice scheme, that enables individuals to access timely legal and expert advice. Rather than being constrained by issues of scope, such a scheme should be strategically targeted at those who would most benefit from early advice.* (Paragraph 98)
25. The weight of evidence, however, is that inaction on the rising number of litigants in person is not an option. Many of the policy responses to the issue involve increasing the resources of the courts or other agencies involved in the system. With the impact of the pandemic likely to lead to greater number of litigants in person in the family courts and in tribunals, we urge the Government to consider providing more accessible and effective forms of support. (Paragraph 103)
26. We continue to be disappointed with the Ministry of Justice’s approach to gathering data on access to justice. From the evidence we heard, the data they hold may not adequately reflect the impact of litigants in person on court time and throughput. We remain concerned that the inability to produce high-quality data on the impact of legal advice on access to justice means that the chances of the Treasury granting additional funding for legal advice and representation are slim. (Paragraph 104)
27. *We welcome steps to support litigants in person. We encourage the Government to consider whether the scale of these projects and grants should be increased.* (Paragraph 107)
28. We recognise that the Government is making progress in improving legal support and information for litigants in person, but we caution the Government that such measures should not be seen as an alternative to tailored legal advice. We are aware that in areas such as benefits, non-legally qualified specialist advisors can provide appropriate assistance. However, as long as our system is characterised by complex legal frameworks and an adversarial justice system, the availability of individualised legal advice and support will remain necessary. (Paragraph 108)

29. We welcome the decision to remove the £100,000 cap. However, we regret that it was ever necessary for a victim of domestic violence to have litigate to obtain legal aid because of the Government's failure to ensure that the means test is regularly updated. (Paragraph 110)
30. *We welcome the Government's decision to review the means test for both civil and criminal legal aid. There is a strong consensus among witnesses that any revised means test for civil legal aid should be simpler, for example by using passporting, should be set at an objectively defined poverty line and should be regularly updated. The vast majority of taxpayers are not eligible for civil legal aid, and for those that are, it is often difficult to access.* (Paragraph 114)
31. The Exceptional Case Funding system should be reformed. (Paragraph 118)
32. We recognise the strength of Richard Miller's suggestion that judges should be empowered to make a direction that an individual needs representation and that it should be binding on the Legal Aid Agency to provide exceptional case funding in that case. Such an approach could increase access to justice for the most vulnerable litigants and improve the efficiency and effectiveness of court proceedings. (Paragraph 118)
33. Civil legal aid, like criminal legal aid, needs the Government to take decisive action to change the approach set by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at the start of the last decade. Without such a step, the sector will continue to struggle to attract new recruits. (Paragraph 120)
34. *The Government should collect and publish more detailed data on the providers of civil legal aid, in particular it should capture how much publicly funded work each provider is doing each year.* (Paragraph 122)
35. Sustainability issues for civil legal aid providers are sufficiently serious to justify a complete overhaul of the system. A number of witnesses have highlighted that a combination of number of fundamental problems rather than one or two specific issues contribute to the unsustainability of civil legal aid. Furthermore, this lack of sustainability is having a knock-on effect on the ability of those entitled to legal aid to access lawyers to provide advice and representation. We welcome the fact that the Government is undertaking a review to look at these issues in the round. That said, the success of that review will depend on whether it is able to put forward the radical solutions needed to make civil legal aid sustainable again. We received evidence to suggest that an internal review may not be adequate to that task. If that proves to be so, an independent review may be required, along the lines of the Independent Criminal Legal Aid Review, to acquire the evidence base needed for far-reaching changes. (Paragraph 127)
36. The basis for the radical change required in civil legal aid requires the Government to establish the level of need for civil legal aid services in England and Wales. Once that is established, the Government needs to ensure that suppliers of legal aid services have the capacity to meet that need. We agree with a number of witnesses that the current model of predominantly funding services by funding individual cases, often via fixed fees, will not enable providers to meet the need or demand for legal aid services. As Richard Miller told us "it is a bit strange that we have

a system where the Legal Aid Agency makes decisions on each individual case, leading to extensive bureaucracy, which of course has a cost in itself". *Instead, a more flexible and proactive approach is required. The Government should fund more training opportunities for legal aid lawyers to ensure that there those willing to pursue a career in publicly funded work are able to. The Government should provide more direct grants to organisations who can be relied upon to provide a high-quality and economical viable service. The Government should set up and run more duty schemes to help the vulnerable litigants within the justice system who have not been able to secure the services of a lawyer. The Government should ensure that fees for publicly funded work are regularly uprated in line with inflation.* (Paragraph 128)

37. However, it is not a question of simply raising fees, but rather making better use of the resources available. We believe that the best way of ensuring value of money is to focus on expanding the capacity of those providers who are able to offer a high-quality service to the public at a relatively low cost when compared to the private sector. By doing this, we can reduce backlogs and help people solve legal problems more quickly. In certain areas of civil law, in particular immigration, community care and housing, we are concerned that the impact of Covid-19 will lead to a growing need for legal aid work, but that there will not be sufficient providers able to help. In those areas, we recognise that unless the civil legal aid review produces very speedy results, it is likely that individuals will be prevented from pursuing meritorious claims. The Lord Chancellor should consider using his powers under section 2 of LASPO to make direct grants to organisations to fulfil the statutory duty to ensure that legal aid is made available. (Paragraph 129)
38. Online legal services should not be seen as a replacement for traditional face-to-face services, especially when such a high proportion of those who qualify for legal aid do not always have reliable access to digital technology. That said, we agree with a number of submissions that have suggested that there is a significant opportunity to use technology to both expand the capacity of providers and to extend the reach of legal aid providers to more people. *The Government should support legal aid providers to upgrade their digital infrastructures. This should include helping smaller providers and Not-for- Profits procure the necessary hardware and case management software that could help them expand their capacity. The Government should also establish an Online Platform for Legal Advice, as suggested by JUSTICE, that is given prominence by HMCTS online that directs people to advice provided by legal aid providers.* Expanding the availability and accessibility of online advice by legal aid providers, particularly at an early stage, could serve to both enhance existing face-to-face services and extend the reach of providers. The Government should support legal aid providers to upgrade their digital infrastructures. This should include helping smaller providers and Not-for-Profits procure the necessary hardware and case management software that could help them expand their capacity. The Government should also establish an Online Platform for Legal Advice, as suggested by JUSTICE, that is given prominence by HMCTS online that directs people to advice provided legal aid providers. (Paragraph 137)

Legal aid agency

39. We commend the Legal Aid Agency for its work supporting legal aid providers since the start of the pandemic. The approach taken by the Agency and its staff shows that it can be flexible and proactive if the circumstances allow. *We recommend that the Agency continues with this approach in the future. We would also suggest that the Agency considers whether any of the changes made to deal with the pandemic should be made permanent.* (Paragraph 140)
40. We welcome the Legal Aid Agency's work to respond to legal aid providers concerns in relation to the "culture of refusal". We also recognise their commitment to ensure that taxpayers' money is managed properly. We acknowledge that the staff and leadership at the Legal Aid Agency have limited scope to alter the fundamental dynamics that determine their role within the broader legal aid system. *Nevertheless, we believe that the evidence submitted indicates that the Government and the Ministry of Justice need to reevaluate the Legal Aid Agency's priorities. By asking the Agency to prioritise the "error rate" over other considerations, particularly access to justice and the sustainability of providers, the Government risks missing the wood for the trees. The Government's work on the sustainability of both criminal and civil legal aid should consider how to empower the Legal Aid Agency to take a more flexible and proactive approach to funding legal aid. The Government should ensure that providers are not required to conduct disproportionate amounts of unpaid work to apply for funding.* (Paragraph 150)
41. *The Government should consider creating a system of earned autonomy that places more trust in the decision making of providers with strong records of high-quality decision making. The Agency's processes should have some incentives for providers to work towards gradually reducing the burden of administrative requirements. Given the difficulties facing legal aid providers, placing greater trust in their ability to decide on eligibility would expand their capacity which would be beneficial for access to justice.* (Paragraph 150)
42. *The Government should consider enabling the Legal Aid Agency to provide specific support to legal aid providers to bring in trainees. This support should be targeted to areas where there is a particular shortage of specialist advice.* (Paragraph 153)
43. *If the Government were to accept the recommendations we have made on how to approach criminal and civil legal aid it will be necessary to address the Legal Aid Agency's priorities, its institutional capacity and how it uses its resources. The Government should consider whether the Legal Aid Agency should expand its data collection and publication in order to better inform the development of legal aid policy.* (Paragraph 155)

Formal minutes

Wednesday 21 July 2021

Members present:

Sir Robert Neill, in the Chair

Rob Butler	Maria Eagle
Angela Crawley	Kate Hollern
James Daly	Dr Kieran Mullin

The following declarations of interest relating to the inquiry were made:³⁵⁰

The Chair declared a non-pecuniary interest in that he was a non-practicing barrister and a consultant to a law firm.

Rob Butler declared a non-pecuniary interest in that he was a former non-executive director of HM Prison and Probation Service and a Magistrate Member of the Sentencing Council.

James Daly declared a non-pecuniary interest in that he was a practicing solicitor.

Maria Eagle declared a non-pecuniary interest in that she was a non-practicing solicitor.

Draft Report (*The future of Legal Aid*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 155 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Third Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available (Standing Order No. 134).

[Adjourned till Tuesday 7 September at 2.00 pm

³⁵⁰ For a full record of interests declared in relation to this inquiry see the formal minutes for the inquiry pertaining to meetings on 26 January 2021, 9 February 2021, Tuesday 23 February 2021, Tuesday 2 March 2021, Tuesday 16 March 2021, and Wednesday 24 March 2021.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Tuesday 12 January 2021

Callyane Desroches, Strategy and Insight Manager, Crest Advisory; **Thomas Pope**, Senior Economist, The Institute for Government [Q1–41](#)

Beverley Higgs JP, Chair, Magistrates Association; **Richard Miller**, Head of Justice, The Law Society; **Derek Sweeting QC**, Chair, The Bar Council [Q42–121](#)

Tuesday 26 January 2021

Dr Hannah Quirk, Reader in Criminal Law, Kings College London; **Dr Natalie Byrom**, Director of Research and Learning, The Legal Education Foundation [Q122–167](#)

Dr Vicky Kemp, Principal Research Fellow, University of Nottingham; **Dr Mavis Maclean CBE**, Senior Research Fellow, University of Oxford; **Dr Jo Wilding**, ESRC Postdoctoral Research Fellow, University of Brighton [Q168–211](#)

Tuesday 09 February 2021

Daniel Bonich, Chair, Criminal Law Solicitors Association; **James Mulholland QC**, Chair, Criminal Bar Association; **Hollie Collinge**, Solicitor Advocate; **Emma Fenn** Barrister [Q212–267](#)

Tuesday 23 February 2021

Jane Russell, Committee Member, Employment Law Bar Association; **Simon Mullings**, Co-Chair, Housing Law Practitioners Association [Q268–312](#)

Mr Chris Minnoch, Chief Executive Officer, Legal Aid Practitioners Group; **Ian Townley**, Director and Head of Costs, Broudie Jackson Canter [Q313–332](#)

Tuesday 02 March 2021

Dame Vera Baird DBE QC, Victims' Commissioner for England and Wales; **Penelope Gibbs**, Director, Transform Justice; **Jodie Blackstock**, Legal Director, JUSTICE [Q333–357](#)

Nimrod Ben-Cnaan, Head of Policy and Profile, Law Centres Network; **Jo Underwood**, Head of Strategic Litigation, Shelter [Q358–374](#)

Tuesday 16 March 2021

David Lloyd, PCC for Hertfordshire and Criminal Justice System Lead, Association of Police and Crime Commissioners; **DCC Tony Blaker**, Digital First Lead, Criminal Justice Committee,, National Police Chiefs' Council [Q375–387](#)

Phil Copple, Director General of Prisons, HM Prison and Probation Service; **Rebecca Lawrence**, Chief Executive Officer, Crown Prosecution Service [Q388–409](#)

Tony Cooper, Chief Operating Officer, ACAS; **Jacky Tiotto**, Chief Executive Officer, Cafcass; **Laura Bee**, Industrial Officer and Group Secretary for the Justice Sector Group, Public and Commercial Services Union (PCS)

[Q410–442](#)

Wednesday 24 March 2021

The Lord Wolfson of Tredegar QC, Parliamentary Under-Secretary of State, Ministry of Justice; **Kevin Sadler**, Acting Chief Executive, HM Courts and Tribunals Service; **Jane Harbottle**, Chief Executive, Legal Aid Agency; **Jelena Lentzos**, Deputy Director, Legal Aid Policy, Ministry of Justice

[Q443–540](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

LEG numbers are generated by the evidence processing system and so may not be complete.

- 1 APPEAL ([LEG0085](#))
- 2 ATLEU (Anti Trafficking and Labour Exploitation Unit) ([LEG0097](#))
- 3 Access Social Care ([LEG0042](#))
- 4 Access Social Care; Choice Support; Association of Mental Health Providers; Mencap Croydon; Avenues; Mencap; Dimensions; Milestones Trust; United Response; and Age UK + National Autistic Society ([LEG0062](#))
- 5 Advice Sector Panel, Administrative Justice Council ([LEG0063](#))
- 6 Astin, Ms Diane (Consultant Solicitor/Lecturer in Legal Practice, Deighton Pierce Glynn/Brunel University) ([LEG0093](#))
- 7 Aubrey-Johnson, Kate (Chair, MoJ Youth Advocacy Working Group) ([LEG0099](#))
- 8 Bail for Immigration Detainees ([LEG0081](#))
- 9 Baldwin, Dan ([LEG0016](#))
- 10 Barlow, Professor Anne (Professor of Family Law and Policy, University of Exeter); and Ewing, Dr Jan (Research Fellow, University of Exeter) ([LEG0054](#))
- 11 Beringer, Guy ([LEG0014](#))
- 12 Birmingham Law Society ([LEG0024](#))
- 13 Broudie Jackson Canter ([LEG0012](#))
- 14 CORE Coalition; Amnesty International UK; Traidcraft Exchange; UNISON; and Business and Human Rights Resource Centre ([LEG0090](#))
- 15 Consortium of Expert Witnesses to the Family Courts ([LEG0075](#))
- 16 Coram Children's Legal Centre ([LEG0069](#))
- 17 Cousins, Naomi (PhD Student, University of Manchester); Garland, Dr Fae (Senior Lecturer in Law, University of Manchester); and Lamont, Dr Ruth (Senior Lecturer in Child and Family Law, University of Manchester) ([LEG0025](#))
- 18 Crowther, Ms Olivia (Director and Solicitor, Shearer and Co Solicitors Ltd) ([LEG0004](#))
- 19 Dehaghani, Dr Roxanna (Senior Lecturer in Law, Cardiff University); and Newman, Dr Daniel (Senior Lecturer in Law, Cardiff University) ([LEG0022](#))
- 20 Eaton, Mrs Debbie ([LEG0087](#))
- 21 Employment Legal Advice Network ([LEG0028](#))
- 22 FNF Both Parents Matter Cymru ([LEG0084](#))
- 23 Families Need Fathers - because both parents matter ([LEG0092](#))
- 24 Flack, Mr William (Freelance/Consultant Solicitor, Matthew Gold and Morrison Spowart Solicitors) ([LEG0010](#))
- 25 Garden Court Chambers ([LEG0044](#))
- 26 Hammersmith and Fulham Law Centre ([LEG0052](#))
- 27 Helen Bamber Foundation ([LEG0064](#))

- 28 Housing Law Practitioners Association ([LEG0100](#))
- 29 Howard League for Penal Reform ([LEG0094](#))
- 30 INQUEST ([LEG0091](#))
- 31 Immigration Law Practitioners' Association ([LEG0020](#))
- 32 Independent Advisory Panel on Deaths in Custody ([LEG0036](#))
- 33 Islington Law Centre (housing unit) ([LEG0023](#))
- 34 JUSTICE ([LEG0089](#))
- 35 Joint Council for the Welfare of Immigrants ([LEG0046](#))
- 36 Just for Kids Law ([LEG0055](#))
- 37 Justice Collaborations ([LEG0067](#))
- 38 Kalayaan ([LEG0039](#))
- 39 Keith Borer Consultants ([LEG0019](#))
- 40 Kemp, Dr Vicky (Principal Research Fellow, U) ([LEG0015](#))
- 41 Law Centres Network ([LEG0056](#))
- 42 LawWorks ([LEG0088](#))
- 43 Leader, Dr Kate (Lecturer, York Law School) ([LEG0038](#))
- 44 Legal Action Group ([LEG0083](#))
- 45 Legal Aid Practitioners Group ([LEG0096](#))
- 46 Legal Services Board ([LEG0049](#))
- 47 Leigh Day ([LEG0043](#))
- 48 Maclean, Mavis (Senior Research Fellow, University of Oxford) ([LEG0018](#))
- 49 Magistrates Association ([LEG0035](#))
- 50 Mant, Dr Jess (Lecturer in Law, Cardiff University) ([LEG0032](#))
- 51 Marcus, Judge Philip (Retired Judge of the Jerusalem Family Court, Israel, Independent Researcher) ([LEG0031](#))
- 52 Mary Ward Legal Centre ([LEG0050](#))
- 53 Ministry of Justice ([LEG0102](#))
- 54 Mission and Public Affairs Council, Church of England ([LEG0007](#))
- 55 NACCOM ([LEG0057](#))
- 56 National Family Mediation ([LEG0021](#))
- 57 Norfolk Community Law Service ([LEG0048](#))
- 58 Public Law Project ([LEG0045](#))
- 59 Refugee Council ([LEG0040](#))
- 60 Resolution ([LEG0060](#))
- 61 Rights of Women ([LEG0051](#))
- 62 Ross, Mr Robbie (Director , Solicitor HCA, Ross Solicitor Ltd) ([LEG0047](#))
- 63 Royal College of Occupational Therapists ([LEG0074](#))
- 64 Shelter ([LEG0065](#))

- 65 Smith, Professor Roger ([LEG0008](#))
- 66 Society of Clinical Injury Lawyers (SCIL) ([LEG0027](#))
- 67 Somek & Associates ([LEG0071](#))
- 68 Surviving Economic Abuse ([LEG0082](#))
- 69 The Bar Council ([LEG0073](#))
- 70 The Chartered Institute of Legal Executives ([LEG0037](#))
- 71 The Divorce Surgery ([LEG0017](#))
- 72 The Expert Witness Institute ([LEG0078](#))
- 73 The Family Law Company ([LEG0029](#))
- 74 The Law Society of England and Wales ([LEG0070](#))
- 75 The Legal Education Foundation ([LEG0086](#))
- 76 Themis - The Intersectional Women Barristers' Alliance ([LEG0079](#))
- 77 Thornton, Dr James (Lecturer in Law, Nottingham Trent University) ([LEG0034](#))
- 78 Transform Justice ([LEG0013](#))
- 79 Tuckers Solicitors LLP ([LEG0101](#))
- 80 Watson, Miss Angela ([LEG0061](#))
- 81 Welsh, Dr Lucy (Senior Lecturer in Law, University of Sussex) ([LEG0011](#))
- 82 Wilding, Dr Jo (ESRC Postdoctoral Research Fellow, University of Brighton) ([LEG0009](#))
- 83 Young Legal Aid Lawyers ([LEG0095](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2021–22

Number	Title	Reference
1st	The Coroner Service	HC 68
2nd	Rainsbrook Secure Training Centre	HC 247
1st Special	The future of the Probation Service: Government Response to the Committee's 18th Report of 2019–21	HC 475
2nd Special	Rainsbrook Secure Training Centre: Government Response to the Committee's Second Report of 2021–22	HC 565

Session 2019–21

Number	Title	Reference
1st	Appointment of Chair of the Office for Legal Complaints	HC 224
2nd	Sentencing Council consultation on changes to magistrates' court sentencing guidelines	HC 460
3rd	Coronavirus (Covid-19): The impact on probation services	HC 461
4th	Coronavirus (Covid-19): The impact on prisons	HC 299
5th	Ageing prison population	HC 304
6th	Coronavirus (Covid-19): The impact on courts	HC 519
7th	Coronavirus (Covid-19): the impact on the legal professions in England and Wales	HC 520
8th	Appointment of HM Chief Inspector of Prisons	HC 750
9th	Private prosecutions: safeguards	HC 497
10th	Sentencing Council consultation on sentencing guidelines for firearms offences	HC 827
11th	Sentencing Council consultation on the assault offences guideline	HC 921
12th	Children and Young People in Custody (Part 1): Entry into the youth justice system	HC 306
13th	Sentencing Council: Changes to the drugs offences definitive guideline	HC 751
14th	Appointment of the Chair of the Independent Monitoring Authority	HC 954
15th	Appointment of the Chief Inspector of the Crown Prosecution Service	HC 955
16th	Children and young people in custody	HC 922

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17th	Rainsbrook Secure Training Centre	HC 1266
18th	The future of the Probation Service	HC 285