Young Legal Aid Lawyers:

Submission to the Ministry of Justice consultation on the Criminal Legal Aid Review: an accelerated package of measures amending the criminal legal aid fee schemes

17 June 2020

YOUNG LEGAL AID LAWYERS

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1. Introduction

Young Legal Aid Lawyers ('YLAL') was formed in 2005 and has over 3,500 members.

We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded.

YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales.

We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

YLAL was set up and operates to pursue the following objectives:

- To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
- To increase social mobility and diversity within the legal aid sector.
- To promote the interests of new entrants and junior lawyers and provide a network for like-minded people beginning their careers in the legal aid sector.

YLAL has engaged with the Criminal Legal Aid Review throughout the consultation process. We have previously made submissions to the Ministry of Justice on matters relating to criminal legal aid, including a response to the consultation on amending the Advocates' Graduated Fee Scheme. You can find this and other consultation responses we have submitted on our website.

In this consultation response, we also refer to our Social Mobility Report, 'Social Mobility in a Time of Austerity' published in 2018. Further, we completed a brief survey of some of our members currently or previously practicing in criminal legal aid, in March 2020.

We received 35 responses and some of the data from this survey, including feedback from our members, are referenced within this submission.

2. Acronyms and explanations

YLAL intends its work to be as accessible as possible to anyone interested in access to justice issues and the criminal justice system.

We use acronyms in this response for ease of reading. However, because there are so many within the criminal legal aid sector, we also think it is important to provide a quick-reference page for these, with a brief explanation of what they are and what they mean.

Acronym	Title	What it is
AA	Accelerated Areas	Five areas of criminal legal aid being considered more quickly than the rest, as part of the Criminal Legal Aid Review.
AGFS	Advocates' Graduated Fee Scheme	The legal aid fee scheme used to calculate how an advocate (barrister or solicitor advocate) will be paid for their work in Crown Court cases. This is a staged scheme calculated with reference to a number of different variables including the type of offence, the number of Pages of Prosecution Evidence, and the length of the trial. There have been a number of different versions of the AGFS; the current scheme in force is AGFS Scheme 11.
CCRC	Criminal Cases Review Commission	An independent body set up by Parliament to investigate miscarriages of justice.
CLAR	Criminal Legal Aid Review	A review by the Ministry of Justice into how the criminal legal aid system works.
CPS	Crown Prosecution Service	The main body who bring criminal prosecutions against individuals on behalf of the State.

IDPC	Initial Details of the Prosecution Case	The initial evidence against a defendant provided by the prosecution before a first appearance in the magistrates' court.
LGFS	Litigators' Graduated Fee Scheme	The legal aid fee scheme used to calculate how a litigator (solicitor, legal executive, trainee, paralegal, etc.) will be paid for their work in Crown Court cases. As with the AGFS, this is a staged scheme calculated with reference to a number of different variables including the type of offence, the number of Pages of Prosecution Evidence, the stage at which a case concludes and/or the length of the trial.
MoJ	Ministry of Justice	The Government Department responsible for Courts and Justice.
PPE	Prosecution Pages of Evidence	The number of pages the prosecution (CPS) relies on as evidence.
PTPH	Plea and Trial Preparation Hearing	The first hearing in the Crown Court after a case is sent from the Magistrates Court in which the defendant pleads guilty or not guilty, and a timetable is set for the stages to trial.

3. The Criminal Legal Aid Review and Accelerated Areas

The Criminal Legal Aid Review ('CLAR') which was announced in December 2018, is intended to be a holistic review of the system of criminal legal aid within England and Wales.

The aims of CLAR[1] are:

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

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

[1] Ministry of Justice 'Criminal Legal Aid Review', 14 March 2019

- operates to ensure the right level of legal aid provision and to encourage a diverse workforce.

The existence of CLAR is demonstrative of the overwhelming crisis in which the criminal defence community finds itself, following decades of cuts which have slowly but surely decimated the future of the profession and access to justice.

CLAR was originally due to conclude and report back by Summer 2020.

The Accelerated Areas are five elements of the criminal legal aid scheme which are subject to 'accelerated review'. These areas have been accelerated in an attempt to plaster over the gaping holes in the current scheme, and to stem the tide of defence practitioners leaving for areas of work which are more financially viable and provide a more reasonable work-life balance.

The reality of the current system is that criminal legal aid as an area of practice is so difficult to maintain that many firms have been forced to stop working in this area, or use more profitable areas of work to subsidise their crime departments. This has resulted in practitioners being required to take on an ever-increasing number of cases to the detriment of their clients and their own quality of life.

The impact of the current system also, inherently, has a negative impact on access to justice for individuals experiencing the criminal justice system; whether as defendants, complainants or witnesses. It leads to higher risks of miscarriages of justice, because defence practitioners are so overstretched, and their workload is often so vast that no other legal professional would be expected to deal with a similar quantity of work, due to risk of negligence.

The current criminal legal aid system is so disincentivising that insufficient numbers of practitioners are entering criminal defence. Instead they are choosing to practise in areas of law which are more profitable and do not have the same levels of out of hours work, allowing for a

far better quality of life. This has led to an ageing profession[2] and the effects of the resulting succession crisis are already palpable.

CLAR and the Accelerated Areas have been plagued with delays, which YLAL accepts are, at least to an extent, out of the control of the Ministry of Justice CLAR team. The Accelerated Areas were originally due to go out for consultation in November 2019. This was delayed until February 2020 due to the general election. The Accelerated Areas consultation was due to close in March 2020. This has also been delayed, due to the COVID-19 pandemic.

We appreciate that, at this time of global crisis, there are other issues within the criminal justice system which have been prioritised over CLAR. However, YLAL believes that the COVID-19 pandemic has simply compounded the issues which had already been facing criminal legal aid firms, chambers and individual practitioners.

As the most junior members of the profession, YLAL members are often in the most vulnerable position in terms of being the lowest paid, most precarious workers, with little financial stability, and most at risk of exploitation in terms of the amount and complexity of work they should be completing.

The criminal defence profession is facing a sustainability crisis. YLAL believes that this will only be solved with a substantial injection of funding into the criminal legal aid system as, until criminal defence is a financially viable career choice, new entrants will be fewer and the sustainability and existence of this crucial part of the justice system will be at risk.

YLAL implores the Ministry of Justice ('MoJ') to protect the future of the criminal defence profession. We call on the MoJ to promote social mobility and diversity, by ensuring that rates of remuneration are such that those without third-party financial support are able to practise in this area of law.

[2] The Law Society, Parliamentary Briefing: 'Criminal Duty solicitors: A looming crisis', 17 April 2018

We welcome the comments made in oral evidence to the Justice Select Committee by Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice, in which he stated:[3]

> *"I am a very strong champion of our courts system [...] I know the challenges they face, and it is my intention to make that case, to continue making a strong case, for the court system, in the forthcoming spending review [...] but it will not diminish my determination to make the strong case for the investment that we need."*

In response to a question about the small margins within which criminal legal aid firms were working even prior to the current coronavirus crisis, the Lord Chancellor stated:

> *"The sustainability of practice in this area is a real question in many respects. [...]*
>
> *It is part of the wider review we have been doing of criminal legal aid. Very recently, I announced a set of accelerated requests for a response to that from both professions. There is more work to be done, most definitely, with regard to the solicitors' profession and to work out what will be a sustainable model for the future.*
>
> *I am far from convinced at the moment that the way in which we remunerate solicitors matches the work they do, including the important work they do, for example, in the police station and in the early preparation of a case."*

In the same evidence session, the Lord Chancellor highlighted the important work being completed by those practising within the criminal defence community. He noted with particular reference to the COVID-19 pandemic, that defence workers are "*trying to keep an important public service going*" and stated that this was taken into consideration when those required to attend court were designated key workers.

[3] Justice Select Committee, 'Oral evidence: The work of the Lord Chancellor', HC 225, Tuesday 24 March 2020, Q.10 and Q.22.

YLAL welcomes the Lord Chancellor's recognition that criminal defence practitioners are key workers, carrying out an essential public service.

YLAL urges the Lord Chancellor and the government as a whole to remember our essential public service in the future, beyond COVID-19, and to commit to protecting the future of our profession, therefore allowing social mobility and diversity to be possible, and to thrive.

YLAL asks the Lord Chancellor to commit to ensuring that the criminal legal aid system appreciates and respects the defence community by paying it fairly for the important role it plays in ensuring that our justice system functions.

4. Executive Summary

The justice system of England and Wales is often lauded as 'the best justice system in the world'. Those who are on the ground dealing with the everyday realities of the criminal justice system, in our magistrates' courts and Crown Courts, would disagree.

Decades of cuts and austerity have decimated our justice system, slashing it to its core. These cuts have created damage which is irreparable, without a clear and systematic change in the way in which criminal legal aid is viewed both within the Ministry of Justice and throughout society.

The way criminal legal aid lawyers have been cast as 'fat cats' profiting from the acts of objectionable individuals is a highly damaging narrative and one which has permeated public consciousness.

One of our members stated:

> *"I think more should be done to change the public perception of the work of criminal lawyers. The vast majority of those I know in criminal legal aid are exceptionally talented and astute lawyers who do an extremely difficult job for little thanks, and even less remuneration. The criteria on which payment is made needs to be completely overhauled. The current method in no way reflects or recognises the work that is done or that needs to be done on cases. The future of criminal legal aid is wholly unsustainable under the present system."*

This negative narrative is one reason for the chronic underfunding of the criminal legal aid system, and it must be countered. Criminal lawyers are not 'fat cats'; many of us, particularly at the junior end, are barely scraping by.

YLAL is pleased that the MoJ have recognised the impending crisis facing the criminal legal aid sector. We recognise that the Accelerated Areas are an interim measure—a sticking plaster intended to stem the bleeding of the sector—in the period until the full CLAR can be completed.

However, YLAL does not believe the current proposals for the Accelerated Areas go sufficiently far to mitigate the harm being caused to the criminal legal aid practitioners by the current fee schemes.

This is particularly so when one considers that these measures were intended to provide interim relief from early 2020 until Summer 2020.

Given that there have been six months of delays to the accelerated areas and work on the substantive aspects of CLAR have not yet commenced, whilst a new timescale for CLAR has not been announced, a reasonable estimate for CLAR's conclusion would presumably involve a delay of around 12 months.

This is a further 12 months during which legal aid firms must survive and barristers must remain in practice. In our survey of some of YLAL's members who practise in crime, 15% stated they would only remain practising in criminal law for a further 12 months, with 27% stating that they would continue for between 1-2 years.

If urgent measures are not brought in to stem the flow of those abandoning criminal legal aid practice, there may not be a profession left to save. One of our members stated:

> *"The criminal justice system will fall apart without significant investment. There will be significant miscarriages of justice as the talent continues to drain away from the profession and the older generation retire, particularly in relation to solicitors. The current remuneration is simply not sustainable."*

Many of the respondents to our survey spoke of their plans to gain experience in other areas of practise so they are able to move out of criminal practice. In respect of the sustainability of criminal legal aid, one respondent simply stated:

> *"It's doomed."*

YLAL welcomes the commitment of the MoJ and the Lord Chancellor to protect the profession and ensure the sustainability of criminal legal aid.

However, YLAL does not believe the current proposals for the Accelerated Areas go far enough. Our main concerns can be summarised as follows:

Unused Material

- YLAL's starting position is that any 'bolt on' fee for three hours' work should be paid at three hours. For too long, the defence community has been expected to complete work at derisory rates and then still not be paid for all of the work done. This is not acceptable, and no reimagining of the criminal legal aid system should be predicated upon this principle.
- We are concerned about the basis upon which the MoJ calculations have been made, specifically, that they are based upon CPS data and CPS decision making in respect of unused material has been found in various disclosure reviews to be seriously deficient.
- The definition of electronic evidence should be amended to include video evidence for both used and unused evidence. When considering unused video evidence, for the purposes of its inclusion within the three-hour limit for unused material, duration is not the only relevant consideration; "stoppage time" must be accounted for and should also be taken into consideration as a necessary part of proper analysis of unused material.
- The lack of different rates for different grades of fee earner to take account of different levels of experience and protect junior lawyers from being required to carry out work beyond their level of experience.

- In respect of the lack of increase in rates, although we appreciate rates were not within the scope of the Accelerated Areas, YLAL does not believe it is appropriate to base any proposal upon the current derisory rates. As an interim measure, a top-point rather than a mid-point of the various rates should have been used as the basis for the bolt-on payment.

Paper heavy work

- If the consideration of PPE over the threshold is to be paid as a claim for special preparation, a number of factors need to be implemented to ensure this structure is fair.
- YLAL advocates for the adoption of an alternative hourly rate to the proposed rate for special preparation. We believe that a higher rate should be applied.
- YLAL notes that, under the AGFS, cases are already assigned different levels of remuneration depending upon the type of offence and the inherent complexities. Payment could be at an hourly rate commensurate with the complexity of the case, in line with the AFGS banding system.
- YLAL is concerned by the administrative burden of claims for special preparation. We submit that clear guidance should be applied by the LAA to ease this burden as much as possible.
- Whilst YLAL does not accept that time-per-page is an appropriate proxy for the amount of time actually required to consider a document, we do appreciate that a guideline may be of assistance. We suggest that the standard time-per-page of two minutes should be adopted, rather than the lower time referenced within this proposal.
- The LAA should be empowered to exercise appropriate discretion when considering claims for special preparation and not apply a blanket policy. Where justified, time-per-page in excess of the proxy should be allowed. Discretion would allow the LAA to approve borderline cases which may otherwise be rejected and cause the undue administrative burden of appeals to the Independent Costs Assessor.

Cracked Trials

- YLAL welcomes the raising of the cracked trial fee from 85% to 100% of the trial fee.
- YLAL recommends an uplift to the brief fee, if the case cracks on the first day of trial, to take account of the loss of refresher fees.
- YLAL recommends the MoJ address the reduction in fee where a client has elected a Crown Court trial in comparison to cases where the magistrates' court has declined jurisdiction.
- YLAL is concerned with the perverse irrationality of paying the advocate 100% of the trial fee for a cracked trial but not applying the same principle to the litigators' fee.

Sending Cases to the Crown Court

- YLAL's position is that it is unreasonable to propose paying £90 for work that, in 2011, was valued at £318. The previous fee was abolished due to austerity measures, and lawyers were required to simply continue completing this work for free.
- YLAL is further concerned that the work involved has increased significantly as a result of the Better Case Management requirements.
- YLAL notes that, accounting for inflation, £318 in 2011 is worth £390 today. The fee as proposed as part of this Accelerated Areas is barely a quarter of the original fee. There is no reasonable justification within the policy proposal for this reduction.

Whilst we appreciate the commitment of the MoJ to reform the broken system of criminal legal aid, we do not think the Accelerated Areas as currently proposed will be sufficient to mitigate the damage being caused every single day by the broken legal aid system.

For too long, the profession has been stretched to breaking point in our attempts to protect our criminal justice system and maintain its functioning. We cannot continue to do this: the profession is now broken and unable to continue to operate within the current system.

YLAL calls upon the MoJ to protect the future of our profession and enable junior criminal legal aid practitioners to continue with the jobs we love. We need the Lord Chancellor and the MoJ to make a serious commitment to long-term investment in order to prevent our profession from collapse.

5. Accelerated Area 1 – Advocates' Graduated Fee Scheme & Litigators' Graduated Fee Scheme - Unused Material

Question One: Do you agree with our proposed approach to paying for work associated with unused material? Please state yes/no and give reasons.

YLAL does not agree with the proposed approach to paying for unused material.

Defence lawyers have a professional obligation to consider the unused material disclosed to them by the Crown Prosecution Service ('CPS'). The CPS apply the test of disclosure, as per the Criminal Procedure and Investigations Act 1996.[4] This requires that any material which could reasonably be considered capable of undermining the prosecution case or assisting the defence case, must be disclosed. This disclosure is referred to as 'unused material'.

The MoJ notes that "*some degree of work in relation to unused material was modelled into the Graduated Fee Schemes when they were introduced*". The MoJ accepts that since this modelling, two decades ago, the volume of unused material has increased significantly, particularly in respect of mobile phone downloads and other electronic material.

YLAL welcomes the proposed change in the current status quo, meaning that litigators or advocates will be remunerated for considering unused material. However, we have a number of concerns. Our main concerns are the proposal to pay only 1.5 hours for up to three hours of work, the stagnation in rates, the continuing increase in the volume of unused material, and the administrative burden of making claims to the Legal Aid Agency for special preparation rates. In addition, and pervasive throughout the above concerns, are the issues surrounding the application of the test of disclosure by the CPS.

[4] Criminal Procedure and Investigations Act 1996, s.3

Disclosure

The way in which the test for disclosure is applied by the police disclosure officer and the CPS has fallen under harsh criticism in recent times. Notably, there have been high-profile 'near-misses', such as the case of Liam Allan, in which the prosecution offered no evidence during the course of the trial. Afterwards it was established that material of overwhelming relevance and support for the defence case had not been disclosed.

The Criminal Cases Review Commission Report on Phase Two of the Disclosure Review[5] highlights that there was confusion regarding the way in which schedules of unused material should be compiled, with entries frequently appearing on the wrong schedule, or not being included at all. In addition, the report stated that "*[i]dentifying and obtaining potentially relevant third party material and digital communication evidence presents particular problems for police investigations*".

A report into the disclosure of unused material in Crown Court Cases, published in July 2017, following a joint inspection by Her Majesty's Crown Prosecution Inspectorate and Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services[6], contains heavy criticisms of the way in which the police and the CPS deal with schedules of unused material and the disclosure of unused material.

The "*widespread failures*" included the police routinely ignoring processes and failing to comply with guidance and requirements when recording unused material on the disclosure schedule, resulting in missing or deficient data. 22% of schedules were found to be "*wholly inadequate*". In 33% of cases, the Disclosure Officer's Report was not supplied or was wholly inadequate.

The report found evidence of poor decision making by prosecutors in the application of the test on disclosure, with only 22.2% of files being of the required standard. Prosecutors were found

[5] Criminal Cases Review Commission, 'Report on Phase Two of the Disclosure Review', July 2019
[6] Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases

to be engaged in a prevalent culture of acceptance, rather than challenging deficient or substandard schedules.

This 2017 report was followed by a January 2020 report by HM CPS Inspectorate,[7] following up on the concerns which had been highlighted regarding the '*culture of defeated acceptance*' and noting that a determined cultural change is necessary if the police and CPS '*are ever going to comply fully with what the law requires of them by way of disclosure*'.

The 2020 report notes that a number of measures have been introduced across police forces and throughout the CPS, in an attempt to tackle the issues pervasive in the handling of disclosure. The report notes that in serious cases such as homicide, terrorism or complex fraud, where the cases are dealt with by specialist police and prosecutors, disclosure issues rarely arise. However, the report states that it is '*in the day to day work in the Crown Court that disclosure issues arise*' as this work suffers from the impact of overstretched police and under-resourced CPS staff struggling to cope with the volume of work.

The report states that there are signs of improvement and highlights the additional resources provided to the police and CPS in this year's spending review. The report notes that this is heartening, although does recognise that the improvements must be considered in the context of the low baseline of performance.

The CPS casefile review was based on cases paid out between April 2018 and March 2019. With the average Crown Court trial taking six months from first appearance to completion[8], and the up-to-five-week turnaround in the Legal Aid Agency making payments[9], these cases are likely

[7] HMCPSI Disclosure and unused material in the Crown Court, 9 January 2020

[8] Ministry of Justice, 'Criminal Courts Statistics Quarterly: England and Wales, January to March 2019', Jun 2019, p.9. Note that it is clear from Figure 7 that the length of time of a case has remained stable since 2017

[9] Gov.uk website, 'Guidance: Legal Aid Agency payments to providers', March 2020. Note that with claims submitted between the last Thursday of the two months being paid on the first Friday of the following month, therefore resulting in what should be a maximum delay of five weeks between submission of a bill and payment being received.

to fall within the exact period of time covered by the July 2017 HM Inspectorate report[10] in which serious concerns were raised regarding the wholly inadequate decisions made regarding disclosure of unused material.

Proper compliance with disclosure obligations is a separate issue in terms of the way in which criminal cases are managed and the risks of miscarriages of justice. However, it demonstrates the impact of the significant underfunding of all elements of the system, and is of relevance to the basis upon which the proposed payments for unused material has been calculated.

In light of the ongoing concerns about whether or not the police and CPS are complying with the statutory duty of disclosure, we are concerned about whether the Accelerated Area proposal for unused material is based upon an accurate set of data regarding the average quantity of unused material across cases.

In November 2018, the Attorney General published a review[11] of the effectiveness of disclosure in the criminal courts. This acknowledged the vast increase in data now relevant to criminal investigations, due to the increase in technology and data creation, retention and storage in modern life.

In February 2020, the Attorney General commenced a further consultation[12] in relation to disclosure.

In the foreword of this consultation, it is explained and acknowledged that:

> *'Disclosure lies at the heart of securing fair trials for all. Disclosure is the process whereby relevant unused material, gathered during the course of an investigation, is provided to the*

[10] HMCPS Inspectorate and HMIC, 'Making It Fair: A joint inspection of the disclosure of unused material in volume Crown Court cases', July 2017.
[11] Attorney General's Office 'Review of the efficiency and effectiveness of disclosure in the criminal justice system' November 2019
[12] Attorney General's Office, 'Consultation on revisions to the Attorney General's Guidelines on Disclosure and the CPIA Code of Practice' February 2020

defence. It is a key step in the process of an investigation, and it is a priority for this Government to encourage improvements in disclosure practice, to ensure an effective and robust criminal justice system.'

YLAL, and the criminal legal aid community more generally, believes that lawyers should be paid fairly for reviewing disclosure — a task which is acknowledged to be crucial to ensure a fair trial is possible.

YLAL is concerned that the MoJ has based its calculations regarding the volume of unused material on inadequate schedules of unused and cases in which inadequate disclosure has been provided by police and the CPS, who have failed to comply with the statutory duty. This is a concern which permeates throughout the rest of the comments YLAL has in respect of this proposal.

Electronic material

The Accelerated Area proposal for payment for the consideration of unused material includes both documentary and electronic unused material.

We appreciate the MoJ acknowledging the substantial increase in the volume of unused material, since the work was purportedly included in the original calculations of fixed fees. However, the issue remains that video evidence, including CCTV, body worn video footage and video recorded statements, are currently excluded as electronic evidence for special preparation purposes. Video footage is also not claimable as page count. This means that the volume of video footage in a case has absolutely no bearing on the fee paid. Given the proliferation and importance of this type of evidence over recent years this is a major source of unfairness built into the LGFS and the AGFS. How can it be justifiable that video evidence is treated completely differently to all other types of evidence and attracts no kind of increase in fee?

We therefore feel that it is essential that the definition of electronic evidence be amended to include video evidence. It is only fair that representatives are paid for considering video footage, whether it be served as used or unused evidence.

Unused electronic material has been referenced within Annex B of the proposal. We sincerely hope that the unfairness referred to above will be rectified and that representatives will be able to claim for considering unused video evidence. It is stated that of the cases with unused electronic material 90% have less than three hours of footage.

We note that it is the duration of the material alone which has been taken into consideration within Annex B. We agree that the size of the electronic file in megabytes is not a useful tool when considering the length of time required to consider electronic material.

However, YLAL notes that, when considering electronic material such as CCTV or body-worn footage, duration alone is not a reasonable means of calculating the length of time required to consider the material. Whilst reviewing visual footage, not only does the footage need to be watched in full, but additionally, further time is spent pausing, rewinding, re-watching relevant sections, and taking notes.

Therefore, for any proposal to be made regarding the time spent watching electronic footage, this additional 'stoppage' time must be taken into account. For example, taking the duration of the footage and adding 50% would lead to a reasonable estimate of the length of time actually required to review this material.

Payment for 1.5 hours for up to three hours of work

The MoJ proposal in relation to this Accelerated Area is that an additional payment of 1.5 hours work will be added to the trial fee, effectively acting as a 'bolt on' to the existing fee. The proposal is based upon the same rates as generally permitted as 'special preparation' rates, as per the Criminal Legal Aid (Remuneration) Regulations 2013.

We note that the MoJ relies upon the premise that 90% of cases had less than 250 pages of unused material, with 50% having 40 or fewer pages. The availability of a special preparation claim appears to have been designed for the 10% of cases where the unused material is of a significant volume.

Currently, litigators work on the basis of proxies□. The Legal Aid Agency permits two minutes of reading time per page. Where there are 40 pages of material to consider, firms would therefore be permitted to charge 13 units (where one unit is six minutes).

The methodology employed by the MoJ is therefore based upon the assertion that, in 50% of cases, only 13 units of work (1 hour, 18 minutes) is required to consider the unused material. However, this does not account for the fact that in the 40% of cases where the unused material is more than 40 pages but less than 250, this proposed payment will be insufficient. By this proposal these cases are supposed to be covered within the payment for up to three hours' work. Whilst this proposed payment will be insufficient, albeit it is potentially not to the extent where it would be time-efficient for a firm to undertake the administrative burden of submitting a claim for special preparation.

Based upon the proxies permitted by the LAA, 250 pages of evidence would take approximately 8.3 hours to consider, therefore many of the cases falling within the 40% of cases with 40-250 pages of evidence could potentially fall within the special preparation category, thus undermining the MoJ's aim of providing a 'bolt-on' fee which would cover a large majority of cases and therefore avoid adding an unfeasible administrative burden onto firms.

We note that the MoJ asserts that analysis of some pages of unused□—those referred to as 'lower bound'□—are estimated to take only 40 seconds to review. We believe that this is not a reasonable assertion to make. Any implication that the already-minimal two-minute time estimate for considering a page is unreasonable is simply incorrect. Whilst it is accepted that some documents take less time to consider than others, it is unreasonable to introduce a further

(and significantly lower) time estimate and attempt to impose this upon the payment for the work completed by litigators and advocates.

The proposal that the payment for up to three hours of work is set at 1.5 hours is a disappointing indication of the MoJ's approach to reforming the current system of criminal legal aid. If a payment is being set for up to three hours of work, this should be a payment for three hours' work, not for only half of the anticipated work. An expectation that defence lawyers will continue to complete 50% of their work for free is unreasonable and would not be expected of any other professional in any other industry.

Special preparation for work in excess of three hours

YLAL welcomes the availability of claims for special preparation, where the amount of time spent considering unused material exceeds three hours. However, we would also highlight the administrative burden involved in submitting special preparation claims to the Legal Aid Agency.

Other representative organisations including the Law Society and Legal Aid Practitioners Group may be better placed to attest to the administrative burden of special preparation claims. However, we have heard anecdotal evidence from discussions amongst those in leadership positions at firms which suggests that many firms do not currently submit claims for special preparation where they are able to, due to the widely observed culture of refusal at the Legal Aid Agency.

Lack of increase in rates

As noted above, the proposal is based upon the 'special preparation' rates as per the Criminal Legal Aid (Remuneration) Regulations 2013. Specifically, under the LGFS, this allows for a senior solicitor to claim £48.36 (£50.87 in London) per hour, a solicitor or equivalent to claim at £41.06 (London: £43.12) per hour, and a trainee solicitor, paralegal or equivalent to claim at £27.15

(London: £31.03) per hour. Under the AGFS, the special preparation rates are £74.74 for Queen's Counsel, £56.56 for a leading junior, and £39.39 for a junior alone.

By comparison, the Senior Courts Costs Office Guideline Hourly rates[13], last updated in 2010, are as follows:

Pay band	Fee earner	London grade 1	London grade 2	London grade 3	National grade 1	National grade 2	National grade 3
A	Solicitors and legal executives with over 8 years' experience	£409	£317	£229–£267	£217	£201	£201
B	Solicitors and legal executives with over 4 years' experience	£296	£242	£172–£229	£192	£177	£177
C	Other solicitors or legal executives and fee earners of equivalent experience	£226	£196	£165	£161	£146	£146
D	Trainee solicitors, paralegals and other fee earners	£138	£126	£121	£118	£111	£111

These are the hourly rates that the Court system believes are fair for solicitors to charge their clients, and the other party of the case if the case is won, in civil matters. These are the rates that

[13] Gov.uk Guidance 'Solicitors: Guideline Hourly Rates', 19 April 2010

allow legal professionals to do their jobs, to pay their staff fair wages, and for sufficient work to be done on a case so that justice can be done.

It is clear that those practising within the criminal justice system are treated as second class citizens in comparison to other areas of law: the lawyers working within it, the legal aid rates for which they work, and the importance of their role in ensuring justice, are simply demeaned. This inevitably has a knock-on effect on the quality of justice delivered to everyone who uses the criminal justice system, including both victims of crime and defendants.

The criminal legal aid system is in crisis, due to a failure to increase rates since the 1990s. Whilst we appreciate that the rates are subject to consideration within the wider Criminal Legal Aid Review, rather than the Accelerated Areas, we would highlight that any proposal based upon the current rates will not be taken by the criminal legal aid community as anything less than offensive and derisory.

Concerns specific to LGFS

The Accelerated Area proposal uses a mid-point as the basis for paying 1.5 hours of work at a rate of £43.12 per hour. This is because the LGFS does not calculate the fee payable under the Graduated Fee Scheme based upon the seniority of fee earners.

Whilst we appreciate that this is an issue more relevant to the wider Criminal Legal Aid Review, YLAL is concerned that where fees are not paid based upon the seniority of a fee earner, there is encouragement that work is completed by the most junior and least well-paid members of staff in order for criminal defence providers to break even.

The stagnation of fees due to a combination of cuts to criminal legal aid rates and the failure to increase fees in line with inflation has placed an undue burden on firms practising in criminal legal aid. Firms have been forced to save costs wherever possible and this has resulted in more and more complex work being shifted down onto junior members of staff.

The 'paralegalisation' of the profession has been a long-standing concern for YLAL. The decades of cuts and underfunding which our legal aid system has suffered has decreased opportunities for qualification and career progression. It has resulted in complex work which would traditionally have been completed by a solicitor being instead carried out by paralegals, sometimes with minimal supervision.

As a result, junior members of the profession are being required to undertake work which is beyond their level of experience, with lower levels of supervision than should be provided, due to supervisors being equally stretched in other areas.

Question Two: If you do not agree with our proposed approach to paying for work associated with unused material, please suggest an alternative and provide supporting evidence.

As stated above, YLAL has serious concerns about the proposal in relation to the amount of payment for the consideration of the vast quantities of unused material required to be reviewed.

Litigators and advocates should be paid for considering the unused material. However, this payment must be at a proper rate which is commensurate with the time taken and the importance of the work being completed.

If this is to be a 'bolt-on' to the fixed fee, with a standard fee and the possibility of a special preparation claim for outlier cases, the 'bolt-on' element must be for the full three hours of work up until the point at which a special preparation claim can be made.

YLAL appreciates that the rates at which criminal legal aid work is paid under the Graduated Fee Schemes are not currently within the scope of the Accelerated Areas review. However, we are disappointed that, at the very minimum, taking a top-point rather than a mid-point of £43.12 per hour as an interim measure pending the review of rates was not considered.

6. Accelerated Area 2 – Advocates' Graduated Fee Scheme – Paper Heavy Work

Question Three: Do you agree with our proposed approach to paying for paper heavy cases? Please state yes/no and give reasons.

We do not agree with this approach. Although we appreciate it has benefits, we do not believe that special preparation rates are appropriate.

YLAL notes that, under previous iterations of the AGFS, advocates were paid based upon Pages of Prosecution Evidence ('PPE'). PPE was used as a proxy to indicate the amount of work required in preparing a case.

PPE was used as a proxy under AGFS Scheme 9, but was removed in Schemes 10 and 11, apart from certain offences (fraud and drugs cases). Under the previous versions of AGFS, the fee paid to advocates increased with each additional PPE, up to 10,000.

YLAL agrees that paper-heavy cases need to be additionally remunerated to make up for the loss of PPE payments. However, YLAL believes there are problems in the way in which the MoJ proposes to address this deficit in the current fee scheme.

The proposal for this Accelerated Area is to apply PPE thresholds at different levels, dependent upon the type of offence. Any PPE above this threshold would be paid as special preparation. For example, the PPE threshold for an offence of wounding or causing grievous bodily harm with intent (band 3) would be 700 pages. If more than 700 PPE are served, the time spent considering this can be claimed at an hourly rate, via a claim for special preparation. However, no explanation has been given for this difference in the PPE thresholds for different bands of offences, nor has there been an explanation of the way in which the thresholds have been calculated.

Special preparation rates are hourly rates determined by the seniority of the advocate. These are set at £39.39 for a junior advocate acting alone, £56.56 for a leading junior, and £74.74 for Queen's Counsel.

Although we welcome the fact that payment for the brief fee will not be delayed whilst applications for special preparation are being considered, YLAL notes that special preparation applications are time-consuming for both advocates and the Legal Aid Agency ('LAA').

Applications take many months for the LAA to consider, and frequently refused on the first occasion, requiring further applications for redetermination. This administrative burden results in significant delays to payment and therefore cash flow for junior advocates, a group the profession has already identified as problematic in terms of recruitment, retention and diversity.

Although we appreciate that the legal aid rates themselves are not open for consideration as part of the Accelerated Areas, YLAL submits that the proposed rate of pay is too low and that more appropriate rates are available and could be implemented as an alternative. We will focus in particular on the rate of £39.39 per hour for juniors alone, given our membership and YLAL's expertise. The rates are not justifiable simply because they are the same rates already paid for special preparation applications; special preparation is already paid very poorly.

The purpose of this proposal by the MoJ is to properly remunerate advocates for considering and preparing evidence in paper heavy cases. It is therefore intended to pay advocates for work which is of absolutely central importance in any case: reading and analysing the evidence. Such work should not be paid at such a low rate.

It is of note that there are other, higher hourly rates paid to juniors in other areas of criminal legal aid. For instance, £45.35 per hour paid to assigned counsel for preparation work in magistrates' courts. Alternatively, £80 per hour is paid to junior counsel providing secondary advices on appeal in complex cases under advice and assistance funding.

The current special preparation rate should not be used merely because it is the lowest current hourly rate available and therefore will cost the least. YLAL also highlights the fact that the rate for junior advocates in 2007 was £45 per hour, before it was cut to £39 per hour in 2013. It is unacceptable to reinstate a similar amount more than seven years later.

The proposed rates are significantly lower than hourly rates in almost all areas of civil legal aid. For instance, the hourly rate for junior counsel on the Attorney General's Civil Panel is £120 p/h for the A Panel (£110 outside London), £100 p/h for the B Panel (£90 outside London), and £80 for over 5 years call / £60 for under 5 years call for the C Panel (£60 outside London). Compared to these rates, the proposed special preparation rates are derisory.

The impact statement for this proposal states "*[i]t has been assumed the rate of payment in the additional claims would be equivalent to one minute per page of evidence successfully claimed.*" As stated above, the LAA usually accepts that it takes two minutes per page, but it is here proposed that advocates should be paid for just half of this time with no justification.

We are concerned with the 'one-minute' assumption, which fails to consider the varied complexity of cases. This is at the heart of the AGFS scheme which has higher brief fees and refreshers for different cases. The proposal also fails to account for cases where there are multiple, vulnerable complainants or vulnerable defendants.

Working on the basis of one minute per page, a rate of £39.39 per hour works out at around £0.66 per page. The rate per page under Scheme 9 for a junior acting alone in a trial was £0.98 per page. The proposed rates are therefore significantly lower than the equivalent payment for PPE under Scheme 9 of the AGFS, directly contradicting the intention of the new scheme, which was meant to address the underpayment of paper heavy cases under Scheme 11 when compared to Scheme 9.

Question Four: If you do not agree with our proposed approach to paying for paper heavy cases, please suggest an alternative and provide supporting evidence.

YLAL has a number of suggestions which it believes should be considered in respect of this policy proposal.

We support the adoption of an increased hourly rate rather than the special preparation rate. We submit that a higher hourly rate be adopted to ensure the reasonable remuneration of advocates.

YLAL notes that, under the AGFS, cases are already assigned different levels of remuneration depending upon the type of offence and the likely complexities arising in those types of cases. Payment for those pages considered in excess of the PPE thresholds should be paid at an hourly rate which is commensurate with the complexity of the case, in line with the AFGS banding system.

YLAL believes it would be prudent to liaise with the LAA to ensure the administrative burden of making special preparation claims is as minimal as possible and ensure that the LAA is able to exercise appropriate discretion in allowing claims to be made in borderline cases which may be rejected and cause undue administrative burden and lengthy appeals to the Independent Costs Assessor.

YLAL remains concerned about the use of page count as a proxy. It is very difficult to determine an accurate amount of time required to consider pages of evidence. We appreciate that a guideline per page may be helpful for the LAA when assessing claims. We submit that, if this is to be used, the time-per-page should be two minutes per page, in line with the usual LAA proxies, rather than a reduced time as set out within the Accelerated Area proposal.

However, we submit that, where claims for special preparation are made, the LAA should not apply a blanket policy regarding the number of pages per minute and, where justified, time spent in excess of this proxy should be permitted.

7. Accelerated Area 3 – Advocates' Graduated Fee Scheme – Cracked Trials

Question Five: Do you agree with our proposed approach to paying for cracked trials under the AGFS? Please state yes/no and give reasons.

Question Six: If you do not agree with our proposed approach to paying for cracked trials under the AGFS, please suggest an alternative and provide supporting evidence.

YLAL has addressed questions five and six together:

YLAL does not agree with the proposed change to the way in which cracked trials are paid under the AGFS as we do not believe it goes sufficiently far to address problems caused to advocates by cracked trials.

YLAL are highly concerned by the perversity of paying advocates for this work and not paying litigators. In addition, we submit that more should be done to account for the impact of cracked trials, including the impact of the loss of refresher fees upon practitioners.

Comments on proposed changes to AGFS

YLAL agrees that the cracked trial fee should be raised from 85% to 100% of the trial fee, to better meet the principle of paying for work done by advocates during preparation for cracked trials. We also welcome the scrapping of the distinction between stages leading up to trials.

We agree with the proposal that the full cracked trial fees should apply to all cases that crack after the first Crown Court hearing (usually the Plea and Trial Preparation Hearing ('PTPH')), not just those that crack in the last third of the period between plea and first day of trial. This will also reduce any avoidance of early guilty pleas and the perceived potential conflict of interest

between the best interests of the client and the financial interests of the advocate. These proposals reflect the reality that it is not possible to accurately predict which cases will result in a cracked trial.

We do not think that the proposals adequately address the problem raised by barrister participants of the difficulties of 'filling diaries' and of lost refresher fees in the circumstances of a cracked trial. Evidence given in the focus groups suggests the increased difficulty in this area is due to the reduction of the number of shorter trials in light of approaches to charging. We are conscious that there may be no 'easy fix' to this systemic issue, however, we suggest that the MoJ further consider developing creative solutions to solve this issue, for example:

YLAL recommends an uplift to the brief fee if the trial is cracked on the first day of trial, to reflect the fact that barristers are expected to be fully prepared for trial by that date, the difficulty in filling diary gaps and the loss of refreshers.

We also urge this review to address the derisory sum that is paid for cracked trials where magistrates' courts retain jurisdiction and a defendant elects a Crown Court trial. Currently, if an elected trial cracks at any point from the PTPH until the first day of trial, the total fee paid, including the fee for preparing for and advocating at the PTPH is £365 + VAT, regardless of the number of hearings involved in that process. This fee is divided up amongst all counsel who have attended hearings.

It is often junior practitioners who undertake this work, and the current fees are unsustainable. These fees are also counter-intuitive to ensuring efficiency in the criminal justice system. Whilst, of course, an advocate would never advise a client to go to trial instead of pleading guilty due to a financial benefit, it is important to ensure these perverse incentives towards inefficiency are safeguarded against.

We would request an urgent review of these fees within this accelerated review process to ensure that junior criminal barristers are properly remunerated for the work they undertake.

Litigators and cracked trials

YLAL is also concerned that the operation of the Litigators' Graduated Fee Scheme ('LGFS') in relation to cracked trials was not considered as part of this Accelerated Area. Whilst we appreciate that under the LGFS, fees for cracked trials are calculated in a different manner to the AGFS, we urge the Ministry of Justice to review the LGFS in respect of cracked trials as soon as possible.

This is particularly important due to the evidence from the focus groups which showed that the issue of financial disincentives for cracked trials is particularly relevant to solicitors. Although the proposed changes to unused material fees will also apply to cracked trials, this will only go part of the way to ensuring that litigators are properly compensated for work done in relation to cracked trials.

Where a case cracks on the day of trial, the litigator has inevitably completed all of the necessary work in preparing the trial and should be properly remunerated for this work.

It is the litigator who instructs the advocate. It is illogical to pay an advocate for the work completed in preparation for a trial which cracks, and refuse to pay a litigator for it, as, for an advocate to be trial ready, this necessarily means that the litigator has prepared the case fully for trial.

YLAL endorses the London Criminal Courts Solicitors' Association's ('LCCSA') submission that:

> "*Having recognised that payment should be made for work done, it is perverse to only reward the advocate for preparing the trial and not the litigator. The current differentiation*

runs counter to the principal of recognising and paying for work actually done, and is illogical, irrational and unreasonable."[14]

Whilst the proposed changes will ensure that advocates are paid for their work between PTPH and trial under the AGFS, we suggest that it is important to ensure that litigators are also paid properly for their inevitably front-loaded work in cracked trials during this period.

Failing to address this issue in respect of litigators would be wholly inconsistent with the aims of CLAR in respect of ensuring that the criminal legal aid scheme fairly reflects and pays for work done.

[14] LCCSA, 'LCCSA response to Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes', 2020, p.5

8. Accelerated Area 4 – Sending cases to the Crown Court

Question Seven: Do you agree with our proposed approach to paying for new work related to sending hearings? Please state yes/no and give reasons.

No. YLAL does not agree with the proposed approach in respect of sending cases to the Crown Court.

The proposed fee of £90 is insufficient to cover the amount of work that is done in relation to a sending hearing. It equates to just two hours of attendance or preparation at current rates, which are already completely inadequate as a result of previous cuts to rates combined with the lack of rises to reflect inflation meaning further real-terms cuts.

The "Better Case Management" process has significantly increased the amount of time that defence solicitors have to spend both preparing for and attending court in relation to sending hearings.

YLAL submits that the suggested two hours does not properly reflect the following work that is often done at sending hearings:

- Consideration of the evidence served, with lengthy Initial Details of the Prosecution Case (IDPC) bundles which often include multiple media links, such as Body Worn Video and CCTV, and extracts of mobile phone records which must all be considered in advance of the hearing;
- Holding meetings with defendants before the hearing, some of whom will be in prison owing to them already serving or the case overlapping with other ongoing matters, or in psychiatric hospital due to mental health issues;

- The additional time spent with defendants when they require interpreters or have mental health or learning difficulties;
- The additional pressure on the solicitor and work required as a result of having to now advise on plea for very serious offences, as a result of changes made to the sentencing guidelines relating to the loss of credit if not guilty pleas are entered in the magistrates' court;
- The additional scrutiny from the Court to identify the trial issues early which is akin to the work historically carried out by the advocate at PTPH in the Crown Court;
- The time spent preparing for and doing contested bail applications;
- The time involved in travelling to and from Court and waiting time;
- Delays at court outside of the solicitor's control including delays and non-effective hearing relating to non-production or late production of defendants in custody, a shortage or complete lack of interpreters and liaison teams.

Defence practitioners should be properly remunerated for the above work that they are professionally obliged to complete, and which simply cannot be completed within the two hours which will be paid. Failure to provide adequate remuneration also discentivises the early resolution of cases. This has the knock on effect of causing more work that needs to be done in the Crown Court where the financial cost to public expenses will be significantly higher.

Question Eight: If you do not agree with our proposed approach to paying for new work related to sending hearings, please suggest an alternative and provide supporting evidence.

YLAL understands that in 2011 the Government abolished the fixed fees for committal hearings of £318. There was no justifiable reason for removing this fee other than to simply reduce costs to the legal aid budget in an arbitrary manner. The work done at sending hearing did not cease; rather, solicitors were simply expected to carry out this work for free. In fact, the quantity of

work required at a sending hearing has actually increased over the last few years, as a result of the "Better Case Management" process.

We submit that a fee similar to the old committal fee of £318 should be introduced, but increased to reflect inflation.

9. Equality Impact Assessment

Question Nine: Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please state yes/no and give reasons. Please provide any empirical evidence relating to the proposals in this document.

Question Ten: From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views.

Question Eleven: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide evidence and reasons.

YLAL has responded to questions 9, 10 and 11 together:

YLAL welcomes additional funding for those working in criminal legal aid. We further welcome the intention that this additional funding aims to benefit junior lawyers. YLAL's members, particularly its crime members, are in precarious financial situations, with many needing to rely upon external financial support to allow them to continue in their careers. This is not acceptable. Professionals should be able to afford to survive on the money their work earns.

YLAL conducted a short survey of some of its members practising in crime, to assist in informing our response to this consultation. There were 35 responses.

In this survey, 37% of respondents stated that they rely upon financial support from sources other than their work, for example, from family or partners, with 60% of these stating they would not be able to survive in their career without this external financial support.

Our members report that they often complete significant amounts of work for little to no pay and YLAL is pleased that some steps are being taken towards payment being made for work which is currently completed for free, e.g. the consideration of unused material. However, the current proposals do not go far enough.

YLAL's view is, in summary, as follows: to the extent that the proposals would benefit litigators and advocates across criminal legal aid by ensuring that they are paid more fairly for the work they do, they may benefit women. Our survey data, and the Equality Statement accompanying this consultation, suggests that women represent a higher proportion of junior legal aid lawyers.

In addition, the proposals may have a beneficial effect on people for whom the financial challenges and stress of working as a junior legal aid lawyer are more acute: people with disabilities; people with caring responsibilities; and people from lower socio-economic backgrounds.

Women in the junior legal aid sector

In YLAL's Social Mobility Report 2018,[15] nearly four out of five respondents to our survey were female (78 per cent). In our survey in March 2020, two out of three respondents were female (66 per cent). These figures suggest that a higher proportion of those entering the legal aid sector generally are female. If this is the case, the proposals are likely to have a greater impact on women, on the basis that they represent a higher proportion of the junior legal aid sector and, as noted in the Equality Statement accompanying the paper, junior lawyers are more likely to undertake the work impacted by the proposals.

[15] YLAL Social Mobility Report, 13 March 2018

In response to our survey in March 2020, one woman described her experience in at the junior end of the legal aid profession as follows:

> *"The level of remuneration is simply not enough to make this a feasible career choice - it is not possible to earn a reasonable salary, given the extensive student fees I have paid, the seven months of unpaid work experience I had to complete before I was able to get a paralegal job, and the fact that it has taken three years of toil to get me to the point where I earn a living wage. It is so frustrating to have a job I love be decimated by cuts to the extent where firms have to adopt a 'fast and cheap' approach to criminal litigation, meaning that I exist in a constant state of guilt for not being able to do enough for my clients, due to being given a caseload which is too large for any person to reasonabl[y] cope with. This is not a system within which firms can care about the wellbeing of junior lawyers and this is an unsustainable position. In terms of future sustainability, it is incredibly frustrating that I will probably never be able to [afford] a mortgage, unless I find a partner who will be able to support me financially. As a professional woman in 2020, I should not have to rely upon a partner to subsidise my wages, nor should I have to choose between a family and a career, although having both is simply not on the remuneration I am likely to receive for at least the next 5 years, if I remain in criminal legal aid."*

The proposals may go some way to addressing such problems. However, as reflected in the rest of this response, much more is needed to ensure that junior legal aid lawyers are paid fairly for the work they do.

Challenges facing young legal aid lawyers

In its Social Mobility Report 2018,[16] YLAL found that there were three main challenges to entering and remaining in the legal aid profession. Two challenges are particularly relevant in relation to the proposals: (1) low salaries combined with high debt and (2) stress, lack of support,

[16] YLAL Social Mobility Report, 13 March 2018

and juggling legal aid work with other responsibilities. These two challenges are also the biggest: when asked to identify the biggest professional challenge facing them, 34% of YLAL members said it was being underpaid (making it the biggest challenge), while 21% said that it was stress (making it the second biggest challenge).

Regarding the second challenge—stress—some of the responses suggested that stress is due in part to low pay, exacerbated by uncertainties around whether and how much legal aid lawyers can expect to be paid for the work they do:

> *"Unfortunately, I no longer work in legal aid. The junior criminal bar became too much; the financial anxiety was overwhelming. Working ten hour days when you didn't know if you were going to be paid or not became too much."*

We found that these challenges were more acute for people in three groups: (a) people with mental health and physical disabilities; (b) people with caring responsibilities; and (c) people from lower socio-economic backgrounds. To the extent that the proposals go a small way to redress the inequalities faced by YLAL members, they may assist some people in these three groups. However, as stated previously, YLAL believes far more needs to be done to ensure the sustainability of the profession.

People with disabilities

In its Social Mobility Report 2018, YLAL found that disabled people (13% of respondents) face particularly acute stress, due to low pay combined with the challenges of dealing with their disability:

"Long hours, emotionally tiring work and low pay were combined with worries about financial problems, caring for your young children or dealing with mental health and physical disabilities."[17]

The heavy workloads and lack of remuneration for work done may exacerbate underlying mental health problems. One respondent to our CLAR survey in March 2020 said:

"I used to enjoy the role but as more leave the work life balance is decreasing to plug gaps of fewer solicitors. Clients are increasingly difficult expecting a level of service which isn't funded and there is a huge chasm between what the courts / regulators / law expect us to provide for clients and what is actually available or comes at the cost of longer hours. Much of the job is hindered or frustrated by cuts to eg mental health services etc. It is a constant battle which has had huge impacts on my mental health. There is a lack of opportunity to progress past duty qualification and not a sustainable lifestyle!"

People with caring responsibilities

Those with caring responsibilities also face particular difficulties. One respondent quoted in our Social Mobility Report 2018 described their work as:

"…a massive, pernicious balancing act, that I fear will have an adverse effect on my son."

Another said:

"I would not return to private legal aid practise, as it is too stressful and too difficult to make enough money to survive. I am about to have my first child and I would not be able to work the hours that are required to try to make a living from legal aid."

[17] YLAL Social Mobility Report, 13 March 2018 p.45

It should be noted that caring responsibilities fall disproportionately on women. For example, the Office for National Statistics in their report 'Living longer: caring in later working life' (March 2019)[18] found that almost one in four (24%) female workers care, compared with just over one in eight (13%) male workers. Therefore, to the extent that the proposals address challenges which are particularly acute for people with caring responsibilities, the proposals may be particularly beneficial for women. They may also particularly affect those who are pregnant or who need to take maternity leave.

People from lower socio-economic backgrounds

In YLAL's Social Mobility Report 2018, we found that the biggest challenge was low pay. This finding is further supported by responses to our survey in March 2020: when identifying what factors were most likely to make them leave criminal legal aid practise, all but one respondent cited "financial reasons". Our 2018 Social Mobility Report 2018 found that low pay was especially problematic for those without independent financial support. We noted that:

> *"Though there are numerous discussions within government and society in general of issues such as inclusivity for potentially disadvantaged or minority groups - including the disabled, parents, carers and those from LGBTQ community - there are greater difficulties for those who wish to become legal aid lawyers and fall into the above groups and / or do not have the requisite financial support."*[19]

When identifying what factors were most likely to make them leave criminal legal aid practise, all but one respondent to the survey of our crime members in March 2020 cited financial reasons (the one exception said they did not want to leave and would try to make it work). One respondent said:

[18] Office for National Statistics, Living longer: caring in later working life, 15 March 2019
[19] YLAL Social Mobility Report, 13 March 2018, p.11.

"I will only ever leave criminal defence if I cannot afford to live. Sadly, with salaries as low as they are, I will probably have to think of changing my career path sooner than I want."

In addition, we found that low pay presents the greatest difficulty for those without independent financial support. Respondents described having to rely on family support — support which may be unavailable to those from less advantaged backgrounds:

"Low salaries prevent those without access to independent wealth from entering the profession if they want to work in legal aid. I am only able to afford working at my current salary as I live with family and pay a very low rent. Without this support I would not be able to work in legal aid."

"I am paid £17,000 in London. I had to move for work; my family live in Nottingham. I pay out for rent, food, travel to work, my phone and Internet and there is nothing left. It's depressing. I didn't buy a 39p pack of sweets the other day because it was 'extravagant'. I cannot live on my salary; my parents have to help me out. The money side of things is really soul destroying. Firms are paying peanuts because they can."

To the extent that the proposals address these challenges, they may improve retention across the junior legal aid sector. They may in particular improve retention of people for whom the financial challenges and stress of working as a junior legal aid lawyer are more acute: people with disabilities; people with caring responsibilities; and people from lower socio-economic backgrounds.

Therefore, our view is that the fact that these proposals will offer slightly more funds to junior legal aid lawyers for the work they are currently undertaking unpaid may have some beneficial impact on those from lower socio-economic backgrounds, who may lack independent financial support. But again, YLAL believes that there is much more to be done to make criminal legal aid work a realistic, sustainable and attractive potential career choice for junior legal aid lawyers.

This is reflected right from the beginning of juniors' careers, when they are students considering their future areas of work.

As one of YLAL's student members said:

> *"[D]uring the course of my studies I have noticed the same response when I have stated my aspiration is criminal law – "that isn't good money," or "worst paying part of the law." I of course was not sway[ed] by this, but I am sure many people are. It is not a myth that criminal legal aid is sparse, and there is a high demand [to work for] free over time. This, if repeated enough times will sink into a student and prevent them following the legal path they desire."*

The lamentable state of the criminal legal aid system is well-known, and is acting as a significant deterrent to potential entrants to the profession before they even conclude their studies.

10. Conclusion

YLAL welcomes the expressed commitment of the MoJ and the Lord Chancellor to protect the profession and ensure the sustainability of criminal legal aid.

Positive words must now be supported by urgent action to repair the damage done by decades of underfunding of criminal legal aid, and YLAL does not believe the current proposals for the Accelerated Areas go far enough.

Whilst we appreciate the commitment of the MoJ to reform the broken system of criminal legal aid, we do not think the Accelerated Areas as currently proposed will be sufficient to mitigate the damage being caused every single day by the broken legal aid system.

For too long, the profession has been stretched to breaking point in our attempts to protect our criminal justice system and maintain its functioning. We cannot continue to do this: the profession is now broken and we are unable to continue to operate within the current system.

YLAL calls upon the MoJ to protect the future of our profession and enable junior criminal legal aid practitioners to continue with the jobs we love. We need the Lord Chancellor and the MoJ to make a serious commitment to long-term investment in order to rescue our profession from collapse.

11. Acknowledgements

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