**The rise and decline of criminal legal aid in England and Wales**

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**Introduction**

England and Wales was one of the first jurisdictions to introduce a comprehensive criminal legal aid system. In less than three decades, from the 1970s, criminal legal aid was developed so that all suspects arrested and held in custody by the police were entitled to non-means-tested legal aid, and most defendants appearing in criminal courts (other than in respect of minor offences) could rely on state support to cover the costs of their defence. Criminal defence came to be a specialist branch of the legal profession, with solicitors’ practices devoted to it, and a range of strategies were adopted that were designed to improve and assure quality. The criminal justice system came to rely on defendants being represented by a lawyer, adopting procedures designed to save time and costs that were reliant on legal representation. Yet, by the middle of the 1990s, even as lawyers were being encouraged to adopt specialist, legally aided practices and to assure the quality of the services that they provided, the seeds of decline were already being sown. Remuneration for legal aid work began to decline in real terms, and relationships between the Ministry of Justice (MoJ) and the legal aid authorities on the one hand, and legal aid lawyers and their professional bodies on the other - a relationship that was always likely to be tense – became increasingly fractious. Most importantly, governments increasingly failed to recognise the essential role of legal aid in ensuring a fair and just criminal justice system and, ultimately, determined that legal aid should suffer the same fate as other parts of the welfare state.

 In this chapter we argue, with regret, that the prospects for criminal legal aid in England and Wales are bleak. We begin by tracing the development of the modern system of criminal legal aid, from its inception as an essential element of the welfare state following the Second World War, to its peak in the 1990s. We then describe and analyse its decline, arguing that whilst the need for economy and efficiency, especially following the global financial crisis of 2007-08, has been used to rationalise government policy in the first decade and a half of the twenty-first century, the roots of that decline are deeper, and reflect an antipathy not only to state welfare provision but also to procedural justice and fair trial. This is followed by an examination of the likely impact of both budget cuts and changes to the arrangements for managing and delivering criminal legal aid. Whilst there are grounds for optimism at the international level, with both the United Nations (UN) and the European Union (EU) recognising the fundamental importance of legal aid in underpinning justice and fair trial, successive British governments have lacked a commitment to developing and sustaining a high quality criminal legal aid system.

**The Rise of Criminal Legal Aid**

Schemes for assisting indigent defendants appearing before the criminal courts have existed in England and Wales since at least the early part of the twentieth century.[[1]](#footnote-1) The Rushcliffe Committee, reporting in 1945 in the same month as the war in Europe ended, made relatively modest recommendations regarding criminal legal aid. Whilst these were broadly accepted by the government, it was not until the 1960s, when the relevant provisions of the *Legal Aid and Advice Act 1949* were implemented, that the expansion of the criminal legal aid scheme really began. In the 1950s, very few defendants appearing in magistrates’ courts received legal aid; in 1955, 0.3 per cent of defendants dealt with summarily in magistrates’ court and less than 10 per cent of those appearing in committal proceedings were granted legal aid (Report of the Departmental Committee on Legal Aid in Criminal Proceedings 1966). However, by 1980, there were 330,000 grants of legal aid annually in magistrates’ courts, a twofold increase compared to 1970 (McConville et al 1994: 300). By 2002-3 the number of grants of legal aid in magistrates’ courts had increased to nearly 600,000 (Legal Services Commission 2003: 50).[[2]](#footnote-2) This expansion was mirrored by an increase in criminal legal aid expenditure. In 1966-67, less than £600,000 was spent on magistrates’ court legal aid, but by 1982-83 expenditure had risen to £54 million, increasing to £169 million in 1990, while in 2002-3 the cost of magistrates’ court legal aid amounted to more than £300 million. In that year, the cost of all forms of criminal legal aid was over £1 billion, a quarter of which was accounted for by Crown Court and higher courts representation (Legal Services Commission 2003: 50).

 The significant expansion of criminal legal aid during this period was the result of a number of factors (some of which are discussed in more detail in the section below), including the increase in crime over much of this period, accompanied by an increase in the number of defendants appearing before the courts. The formal scope of criminal legal aid remained largely the same, although a non-means tested scheme for legal advice for suspects held in police custody was introduced in 1986, and whilst it was projected that this would cost £6 million annually, by the first years of the twenty-first century the scheme was costing over £170 million a year (Department for Constitutional Affairs 2005a: 9). However, a significant factor in the expansion of legal aid was that magistrates’ courts, which had primary responsibility for determining legal aid applications, became more willing to grant them. Dissatisfaction with the inconsistent approach taken by the courts in determining applications led to the establishment of the Widgery Committee in 1964.[[3]](#footnote-3) The committee’s recommendations regarding the criteria to be applied in deciding whether the merits test was satisfied, which came to be called the Widgery Criteria, were accepted and have remained more or less the same since they were introduced in the mid-1960s.[[4]](#footnote-4) However, a notable feature of the criteria is that they allow for a great deal of flexibility in interpretation, and it would seem that as legal representation became more routine courts came to interpret the criteria more generously - a process that was mutually reinforcing (Young 1996; Young and Wilcox 2007). Legal representation for defendants became the norm for all but the least serious allegations, and came to be relied upon to facilitate procedures designed to make criminal proceedings quicker and more efficient.[[5]](#footnote-5)

 Whilst the Rushcliffe Committee favoured a salaried advice scheme, it rejected proposals for a public defender service, and the model adopted for the delivery of legal aid services was that legal aid should be provided by private law firms (sometimes referred to as a ‘judicare’ model). Solicitors would provide legal advice and assistance, and representation in magistrates’ courts, and would instruct barristers on an *ad hoc* basis for cases requiring representation in the higher courts. Legal aid was an important element in the growth of the legal profession, which increased in size five-fold in the latter half of the twentieth century (Zander 2003: Ch 8).[[6]](#footnote-6) Initially, any firm of solicitors could provide legal aid services, and by 1999-2000 over 13 per cent of the gross income of solicitors’ firms was derived from civil and criminal legal aid (Law Society 2001: 40). However, from the mid-1980s onwards, law firms became more specialised, and whilst most solicitors’ firms initially carried out some magistrates’ court work, by 1991-92 the number of firms performing such work had declined to just under 7,500 (from 8,716 in 1986-87) (Bridges 1992). The introduction of legal aid contracting in 2001 led to a dramatic fall in the number of firms engaged in legal aid work, so that by 2002-3 the number of such firms with a criminal law contract was 2,900 (Legal Services Commission 2003: 46). This was a deliberate policy objective of the Legal Services Commission (LSC), which signalled its intention to reduce the number of contracts by as much as a further two-thirds - a somewhat limited ambition given the more recent developments explored later in this chapter.

 Whilst the decision over whether to grant legal aid for court representation was the responsibility of the courts, the administration of legal aid was initially in the hands of the legal profession itself in the form of the Law Society. When the *Legal Aid Act 1988* was implemented in 1989, responsibility for the administration of legal aid was transferred to a new institution, the Legal Aid Board (LAB), on which the solicitors’ profession only had two representatives, with half of the Board drawn from the business sector. Responsibility for determining legal aid remuneration, which had previously been based on a discounted market rate, was given to the Lord Chancellor, who was given a free hand in this regard. The LAB introduced a system of legal aid franchising which was, in part, an attempt to establish and assure minimum standards, but this had a relatively limited impact on criminal legal aid work. However, it laid the foundation for the introduction of legal aid contracting, which restricted legal aid work to those solicitors’ firms with a contract - contracts being awarded for specific practice areas, including criminal law. The LAB was to have a relatively short life, and it was replaced by the LSC in 2000 with an expanded remit for planning and funding legal aid services. Whilst Commissioners were appointed by the Lord Chancellor - who also had the statutory power to provide guidance to the Commission which it was required to consider - the LSC had a significant degree of autonomy, although crucially it had a capped budget (Lord Chancellor’s Department 1998).[[7]](#footnote-7) Civil and criminal legal aid were divided between a Community Legal Service and a Criminal Defence Service respectively, and the LSC was empowered to determine how legal aid services were to be delivered, and who should deliver them.

 Two early initiatives of the LSC were the introduction of legal aid contracting in 2000, and the piloting of a public defender service (PDS). Ironically, given the relative independence of the new LSC, the LAB had already piloted legal aid contracting,[[8]](#footnote-8) and the creation of a PDS had been enthusiastically backed by a government minister in the Lord Chancellor’s Department and announced in a White Paper in 1998 (Lord Chancellor’s Department 1998: 6.18 - 6.19).[[9]](#footnote-9) Under contracting, firms were paid in respect of work done, rather than in accordance with a contract price, but contracting enabled the LSC to have a significant influence, if not control, over the nature and extent of work carried out, and also to establish minimum quality requirements that could be monitored and controlled via contractual mechanisms. Research carried out following the introduction of the right of suspects held in police custody to consult a solicitor showed that the legal assistance provided was often inadequate. Solicitors were sometimes slow to respond to requests for assistance, advice was frequently given over the telephone where the circumstances warranted personal attendance, some firms made significant use of unqualified advisers, and many lawyers took a passive approach to providing advice and assistance (Brown 1997; McConville et al 1994; McConville and Hodgson 1993).[[10]](#footnote-10) This research, and the need to pre-empt criticism of the profession by the Royal Commission on Criminal Justice (Royal Commission on Criminal Justice 1993), resulted in a number of initiatives including the introduction in 1995 of an accreditation scheme for police station representatives.[[11]](#footnote-11) This was extended to cover all lawyers providing legally aided advice at police stations in 2001 and, together with a magistrates’ court duty lawyer accreditation scheme, was included as a contractual obligation in the legal aid contract. In addition, the contract incorporated a number of quality assurance requirements including minimum response times, minimum obligations regarding police station attendance, recording obligations, and regular supervision of both solicitors and representatives providing services under the contract.

 The PDS, which at its peak had eight offices, proved to be a short-lived experiment as a significant provider of criminal defence services, although it continues to operate through five offices. It was never intended that the PDS should replace the judicare model. Rather, the government believed that a mixed system would enable the costs of providing criminal legal aid services to be ‘benchmarked’, and that the PDS could fill gaps in provision (Lord Chancellor’s Department 1998). Evaluation of the PDS, conducted in the first couple of years following its establishment, showed that it was able to provide a generalist criminal defence service ‘that is of good quality, equal and in many respects better than the general standard of service provided by private practitioners’ (Bridges et. al. 2007: 261). However, overall its average cost-per-case was higher than that of private practice. The authors of the pilot evaluation argued that there were a number of reasons why this was the case, some of which resulted from the way in which the PDS had been set up, and that the PDS could have ‘an important role in the continuing development of quality standards and service innovation’ (Bridges et. al. 2007: 268). However, although the PDS was subsequently used by the government to try to break resistance by the private profession to the introduction of competitive tendering, since its creation no government has seriously suggested that it be expanded (Baksi 2015).

**The Decline of Criminal Legal Aid**

It is difficult to define a precise point in time when the rising tide of criminal legal aid turned. One point could be in 1994 - the last time there was a ‘real terms’ increase in legal aid fees (Deloitte 2014). Another could arguably be the passage of the *Access to Justice Act 1999*, which overhauled the structure of criminal legal aid provision and which engendered heated public debate between the Government and its opponents (Abel 2004). Yet another could be the peak in criminal legal aid expenditure, at approximately £1.4 billion in 2003-4, which was followed by a steady decrease of 12 per cent in real terms over the subsequent five years (National Audit Office 2009). Whichever event is identified, there was a critical decade between the mid-1990s and mid-2000s during which a decline in financial investment and returns to the legal profession - and an increasingly negative view of criminal legal aid by successive governments - emerged and became mutually reinforcing. During this period, a now well-established narrative developed, espoused by government ministers and significant sections of the media, that the criminal legal aid system in England and Wales was one of the most expensive in Europe, and that spending had ‘spiralled out of control’ in a manner that is ‘unsustainable’ (Ministry of Justice 2013). Both of these assertions are misleading.

With regard to the first element of this narrative, any comparison with other jurisdictions is complicated by the different procedural traditions in European jurisdictions. Most countries in continental Europe have an inquisitorial criminal procedure tradition, in contrast to the adversarial tradition of England and Wales. Compared to adversarial jurisdictions, judges and prosecutors in inquisitorial jurisdictions have a much more substantial role in criminal proceedings – including both supervising criminal investigations and proceedings, and protecting the rights of suspects and defendants[[12]](#footnote-12) – whilst defence lawyers have had, at least until recently, a less significant role. As a result, inquisitorial jurisdictions spend a much greater proportion of their criminal justice budgets on the prosecution and courts, and much less on legal aid, rendering a direct comparison of legal aid expenditure unjustified. Bowles and Perry (2009: 36), relying on the evidence of the European Commission’s CEPEJ report (European Commission for the Efficiency of Justice 2006), point out that comparing legal aid costs in isolation ‘risked missing important structural differences between justice systems’.

 The second element of the dominant narrative, that expenditure on legal aid is out of control, also needs to be contextualised. Between 1997-8 and 2005, the criminal legal aid budget rose by 37 per cent (Department for Constitutional Affairs 2005b: 13), part of which can be attributed to inflation, but other factors were also instrumental. One such factor is the generally accepted notion of increased criminalisation. In 2010 it was estimated that around 70 Acts of Parliament relating to criminal justice had been passed since the late 1990s (Faulkner 2010), and between 1997 and 2010 approximately 3,000 new criminal offences were created by primary and secondary legislation (Chalmers 2014). Whilst questions can be raised about the absolute accuracy and reliability of such figures ‘the huge increase in the number of incidents criminalised is indisputable’ (Silvestri 2010). The implication is that this generated work for the criminal justice system, driving up costs. Indeed, after a slight drop in workload (including committals for trial/sentence and appeals) between 1997 and 2000, the Crown Court saw an eight per cent rise in the number of cases disposed of between 2000 and 2004 (Department for Constitutional Affairs 2005a: 85). Over the same period, there was a six per cent increase in the number of defendants proceeded against in magistrates’ courts (Ministry of Justice 2007: 134). There was also substantial growth in the prison population (an increase of 15 per cent between 2001 and 2005), suggesting that a greater number of cases in respect of which the legal aid merits test was satisfied were dealt with by the courts (Home Office 2001, 2006).

The rise in the criminal legal aid budget should also be compared with the increase in the budgets of other criminal justice institutions. There was an increase in expenditure on policing of around 30 per cent between 1998-9 and 2004-5 (Mills et al 2010: 68). Between 2001-2 and 2005-6, the Crown Prosecution Service (CPS) request for resources increased by 50 per cent (Crown Prosecution Service 2002, 2006), and between 1997 and 2005 Serious Fraud Office expenditure increased by 110 per cent.[[13]](#footnote-13) It has, therefore, been argued that ‘the upward pressures [on criminal legal aid] are due to external cost drivers’ (Constitutional Affairs Committee 2007: 224). Cape and Moorhead also identified a number of external factors driving legal aid costs, including an increase in arrests (and thus in volumes of police station work), an increase in the uptake of police station advice, an increase in the number of complex investigations and more serious cases, and the high cost of a small number of Crown Court cases (Cape and Moorhead 2005).

By contrast, governments have favoured the ‘supplier-induced demand’ theory: that the providers of legal aid services were driving demand for their work and thus increasing costs (Bevan 1996). This may be seen as based on an ideological objection to criminal legal aid, a general desire to curb state spending and, ultimately, hostility to welfare spending. Despite evidence to the contrary, successive governments and significant sections of the media have, at various times, caricatured legal aid lawyers as ‘fat cats’ who exploit taxpayers in order to grow wealthy.[[14]](#footnote-14) Yet, this is contradicted by the stagnancy of the market at the time. Between 2001 and 2005, fees for criminal legal aid providers remained virtually static (Grindley 2006). Over the same period, the number of providers contracted to supply criminal legal aid reduced by 14 per cent, and by a further 23 per cent by 2010 (Legal Services Commission 2001 and 2010; Carter 2006). Yet despite the fact that spending began to decline in the mid-2000s the argument that expenditure on criminal legal aid is ‘unsustainable’ has persisted.[[15]](#footnote-15) As Cape and Moorhead argued, the supplier-induced demand theory provides ‘a convenient political justification’ for reducing the criminal legal aid budget (Cape and Moorhead 2005).

The decline of criminal legal aid accelerated following the election of the Coalition government in 2010, and still further after the election in 2015 in which a Conservative government came to power. The decline can be partially explained by reference to the economic context of the last decade. Throughout the late 1990s and early 2000s, the United Kingdom (UK) experienced unprecedented economic growth accompanied by substantial investment in public services. Following the global financial crisis of 2007-08, ‘austerity’ and the desire to reduce the ‘footprint’ of the state have been central to both economic and social policy. The result has been swingeing cuts across the public sector, from which the criminal justice system has not been exempt.[[16]](#footnote-16) Following the 2010 election, the Home Office sought to cut the police budget substantially, with the number of police officers reduced to pre-2003 levels in only three years.[[17]](#footnote-17) The MoJ was required to find nearly £2 billion of savings from its £9 billion budget over five years (HM Treasury 2010). The net expenditure of the CPS reduced by nearly a quarter between 2010 and 2015 (Crown Prosecution Service 2015), and 146 courts were closed over the same period (Caird 2015). Legal aid, both civil and criminal, was considered by the government to represent a prime source of savings, with significant cuts and cost-saving reforms implemented or proposed.[[18]](#footnote-18) The Coalition government planned to cut approximately £220 million per year from the criminal legal aid budget by 2018-19 (Ministry of Justice 2013: 5), justified on the basis of similar arguments to those posited by previous governments despite the markedly different economic climate they faced. After the election of the Conservative government in 2015, the austerity agenda continued unabated, with the MoJ proposing to meet Treasury demands for a further £1 billion of savings in 2015-16 through the closure of another 91 courts (Ministry of Justice 2015) – amounting to a reduction of nearly 40 per cent of the court estate in five years[[19]](#footnote-19) – and the continued implementation of market reforms and fee reductions for criminal legal aid. Clearly, the austerity context has been highly influential in accelerating the decline of criminal legal aid, yet the perceived problem of disproportionate spending on criminal legal aid had existed for some years prior to the 2007-08 global financial crisis. We can, therefore, conclude that the austerity context is only one, relatively recent, factor influencing the decline of criminal legal aid.

Before the global financial crisis, the New Labour government had offered a number of responses to the assertion that criminal legal aid expenditure was out of control. In 2006, following the Carter Review, it proposed to ‘marketise’ criminal legal aid (Carter 2006). This was to be achieved by introducing fixed fees for police station work, revising the fixed fee and graduated fee schemes for litigation and advocacy, and introducing competitive tendering for legal aid work. In most circumstances, lawyers would not be paid an hourly rate for criminal legal aid work, meaning that the more time a lawyer spent on a case, the less profitable it would become. The policy was rationalised on the basis that lawyers would be encouraged to focus on cost-effective and efficient work practices and would be deterred from time-wasting (for which, incidentally, no evidence was produced). Additionally, it was argued that lawyers would benefit from ‘swings and roundabouts’ – they might lose money on some cases, but would profit from others. In the same year in which the Carter Review was published, the government re-introduced means-testing for criminal legal aid (initially for magistrates’ court cases, and subsequently for Crown Court cases). The means test for criminal legal aid had been abolished in 2001 on the grounds that it was costly and bureaucratic, and raised little by way of contributions: ‘The value of contributions collected scarcely paid for the direct costs of the system. Less than 1% of applications were refused legal aid on grounds of means and only 5% of defendants were ordered to make any contribution towards the cost of their legal aid’ (Department for Constitutional Affairs 2004: [7]). However, by 2004 the government was explicitly proposing its re-introduction as a way of limiting demand, and these proposals were implemented in the *Criminal Defence Services Act 2006*.[[20]](#footnote-20)

Successive governments have also sought to reduce expenditure on criminal legal aid by reforming the ‘market’ of providers. As noted earlier, criminal legal aid is primarily delivered by a variety of private entities – either firms of solicitors or self-employed barristers – using public funds, supplemented by as small number of PDS offices (Cape 2004: 401). Since the *Access to Justice Act 1999* came into force, solicitors’ firms have only been able to provide criminal legal aid services if they have a contract (initially with the Legal Services Commission, and subsequently with the Legal Aid Agency). Both the previous Labour government and the Coalition government sought to reduce the size of the market, and therefore the cost to the state, through competitive tendering – in essence, by conducting an auction in which each provider would ‘bid’ for a contract. In 2009, the Labour government proposed a scheme entitled ‘Best Value Tendering’ (BVT), which required providers to submit bids for work that would ensure a ‘sustainable profit margin’ (Legal Services Commission 2009: 11). However, this scheme was widely criticised, on the basis of fears that providers desperate to secure work would be encouraged to enter unsustainable ‘suicide’ bids, and that quality of service would be compromised.[[21]](#footnote-21) After substantial opposition from the legal profession, BVT was abandoned. In 2013, the Coalition government resurrected the idea, re-named ‘Price-Competitive Tendering’ (PCT) – a similar scheme, but one requiring that bids be at least 17.5 per cent lower than the then current levels and capping the number of contracts to be awarded (Ministry of Justice 2013). The legal profession (and many other organisations) strongly opposed this, and again it was abandoned (Smith 2013: 906).

A third attempt to introduce a competitive tendering scheme was initiated in September 2014 with the publication of a consultation on a ‘two tier’ system of contracting for criminal legal aid.[[22]](#footnote-22) The first tier would allow an unlimited number of law firms to offer ‘own client’ services: that is, providing legal representation to ‘an individual who selects you, at the point of request’.[[23]](#footnote-23) The second tier would allow a maximum of 527 law firms to offer ‘duty solicitor’ services at police stations.

The fear of many, and no doubt the intention of the government, was that the number of firms providing criminal legal aid services would be drastically reduced.[[24]](#footnote-24) Duty solicitor cases form a substantial proportion of legally-aided criminal defence work. The Carter Review estimated that half of police station representation was delivered under the duty solicitor scheme (Carter 2006: 24), and research by Otterburn in 2013 suggested a figure of 43 per cent (Otterburn 2014: 14). Duty solicitor work is also an important method by which solicitors’ firms attract new clients, described as ‘critical to future revenue streams’ and ‘integral to medium term viability’ (Otterburn 2014: 59). Generally, if a firm represents a suspect as a duty solicitor, it will continue to act for them if they are charged with a criminal offence throughout the criminal justice process. Moreover, this can lead to ‘duty conversions’ – in short, a ‘duty’ client becomes familiar with the firm and becomes an ‘own’ client in the longer term (Otterburn 2014: 59). Since there are approximately 1,600 solicitors’ firms with a criminal legal aid contract, the limitation on the number of firms with a duty solicitor contract would lead to a large forced contraction in the size of the supplier base, resulting in several potential problems for providers and legal aid recipients alike. By limiting the number of ‘duty’ contracts, a major source of new clients for providers would be restricted, reducing the possibility for firms without a contract to remain viable businesses, and ultimately reducing the level of choice for suspects and defendants generally. This would be a particular problem for legal aid recipients in areas with small numbers of existing providers (such as rural locations) or for communities with specific needs (for example, black and minority ethnic groups). Additionally, the two-tier model would have an indirect impact on barristers, who would not be contracted under it, since solicitor firms would be likely to make greater use of in-house advocates.

The impact of the introduction of the ‘two-tier’ contracting model would have been exacerbated by the parallel introduction of reduced legal aid fees. In April 2013, the then Lord Chancellor, Chris Grayling, announced cuts of at least 17.5 per cent to criminal legal aid fees for solicitors and barristers, to be implemented in two tranches (Ministry of Justice 2013).[[25]](#footnote-25) The Government subsequently postponed the reduction of fees for barristers, leaving only solicitors subjected to the reduction (Ministry of Justice 2014b). The first cut of 8.75 per cent took effect in March 2014, and the second was implemented in July 2015, prompting widespread direct action by solicitors and barristers. The introduction of reduced fees meant that many solicitors’ firms, including those that would have secured a duty contract under the two-tier system, would be on the cusp of profitability, with some becoming unprofitable. Legal aid firms were generally not highly profitable before the reduction in fees; in 2013, such firms were achieving an average five per cent net profit margin for criminal legal aid work (Otterburn 2014: 5). Coupled with the consistent decline in fee levels in real terms over the previous 20 years, the fee reductions presented a serious threat to the long-term survival of many firms (Deloitte 2013: 23). Since criminal legal aid providers tend to be specialised rather than generalist law firms (a long-term trend encouraged by successive governments and legal aid authorities), they cannot easily offset losses in legal aid work with alternative work (Deloitte 2013; Otterburn 2014). Yet, the LAA did not appear to have undertaken any analysis of the impact of the two-tier scheme on either providers or legal aid recipients, beyond predicting an 11 per cent drop in the number of providers between April 2012 and April 2015 (Legal Aid Agency 2015).

After the conclusion of the two-tier contract bidding process in Summer 2015, the government planned to implement the scheme in January 2016. However, a large number of firms launched legal challenges, largely on the basis of the arbitrary way in which the contracts appeared to have been awarded.[[26]](#footnote-26) As a result, in January 2016, the LAA announced that introduction of the scheme was to be delayed until Spring 2016,[[27]](#footnote-27) and in February 2016 the government announced that it would not go ahead with the two tier scheme, and would also suspend the fee cut that had been introduced in July 2015.[[28]](#footnote-28) On the face of it, this appears to have been a victory for lawyers and others who opposed the introduction of the scheme. However, in making the announcement, the Lord Chancellor made clear that the primary reason for the decision not to implement the scheme was pragmatic; the large number of legal challenges meant that implementation would be problematic. Furthermore, the suspension of the reduction in fees was temporary - for a period of 12 months - and the Lord Chancellor indicated that he would return to the issue of ‘the second fee reduction and market consolidation before April 2017’. It is highly likely, therefore, that the long term contraction of the supplier base, and real-terms reduction in legal aid fees, will continue.

**An Uncertain Future for Criminal Legal Aid**

Whilst the latest attempt to reduce the number of criminal legal aid suppliers, and fee levels, has been temporarily halted, criminal legal aid in England and Wales has an uncertain future, in terms of both scope of provision and delivery of service to clients, and this has implications for the criminal justice system as a whole. Government policy has become increasingly focused on reducing expenditure, and the austerity agenda has de-prioritised criminal legal aid – and many other public services – in favour of deficit reduction and public debt management. Government rhetoric continues to emphasise the importance of access to justice in principle, but in practice it is a secondary consideration. The assertion that criminal legal aid expenditure is out of control and unsustainable persists as a rationalisation for government policy even though this is an increasingly untenable justification given the consistent decline in expenditure since 2003-04. The introduction of comprehensive criminal legal aid was a product of post-war welfarism, founded on the concept that all citizens should be able to equitably access public services.[[29]](#footnote-29) Whilst criminal legal aid remains theoretically available to a significant proportion of the population, it now bears little resemblance to the model developed as part of the foundations of the welfare state.

This new culture – what might be termed ‘minimalism’ – is ideologically driven, reflecting the approach of the government to the responsibilities of the state in general, and to the criminal justice system in particular (see, Laster and Kornhauser, Chapter 8, this volume, for a discussion of this in the Australian context). The cuts to the budgets of other criminal justice agencies have been accompanied by a series of measures designed to maximise throughput at minimum cost. The Criminal Procedure Rules, which were introduced at the turn of the century and emphasise ‘efficient and expeditious’ criminal proceedings (Rule 1.1(2)(e), the ‘Overriding Objective’), exemplify this culture (Smith 2013). Suspects and defendants are co-opted into assisting with the achievement of this objective of efficiency and cost-cutting via a mixture of ‘carrot and stick’, with an emphasis on the ‘stick’. The primary ‘carrot’ is the sentence discount scheme for an early guilty plea, designed to encourage swift resolution, save time and reduce costs.[[30]](#footnote-30)

There are many ‘sticks’. In addition to the sanctions set out in the Criminal Procedure Rules (which may apply to both defendants and their lawyers), defendants who do not co-operate with the police following their arrest by telling them the basis of their defence face ‘adverse inferences’ at trial.[[31]](#footnote-31) Limitations have been placed on the recovery of defendants’ costs in criminal proceedings, encouraging a limited approach to defence preparation.[[32]](#footnote-32) Most recently, the government introduced the Criminal Court Charge,[[33]](#footnote-33) requiring courts to impose a charge on all defendants irrespective of financial means. The charge was increased in the event of a conviction following a not guilty plea and further increased if the defendant chose to be tried in the Crown Court.[[34]](#footnote-34) Following a vigorous campaign by, amongst others, the Howard League for Penal Reform and the Magistrates’ Association, who argued that the charge encouraged inappropriate guilty pleas,[[35]](#footnote-35) the government scrapped the charge in December 2015.[[36]](#footnote-36) However, whilst the criminal court charge was, in the event, short-lived it was just one example of a longer term trend encouraging, cajoling and inducing defendants (and their lawyers) to co-operate in the speedy and efficient processing of their cases through the criminal justice system.[[37]](#footnote-37)

The policy choices made will have a long-term impact not only on the legal profession, but also on legal aid recipients and other aspects of the criminal justice system. With the number of solicitors’ firms that are able to offer legal aid services having been reduced, and likely to be reduced still further, client choice will inevitably be limited. Outside major conurbations and particularly in less populous areas, suspects and defendants will be unlikely to have any real choice since there may be only a small number of firms with a contract covering such locations (Otterburn 2014: 46). Defendants who do not perceive that they have a choice will likely be less trusting of their lawyer (Smith 2013) which, in turn, will be likely to diminish their trust in the criminal justice system more generally (Tyler 2007, 2009; Hough et al 2010).

The quality of criminal defence services is also likely to be a casualty. Quality is the product of an interaction between professional ethics, competition, and financial and other incentives, mediated by any applicable quality assurance measures. A smaller market of providers will reduce competition. Indeed, in some locations that have few providers there will be no effective competitive market. With reduced remuneration, and business models focused on economies of scale rather than quality of service, surviving providers will need to improve efficiencies in both the range and level of service that they offer. The consultation paper which inaugurated the recent reform process explicitly encouraged the ‘economies of scale’ approach and the achievement of ‘efficiencies’ (Ministry of Justice 2013: [5.6.4]). Law firms that do not focus on reducing costs and providing services in greater volume will be unlikely to survive. The nature of criminal defence services is such that lawyers have a great deal of discretion in determining the level of service that they provide. As Tata has argued, faced with a number of choices each of which ‘may’ benefit the client, lawyers will tend to advise clients to adopt the option that benefits the lawyer (Tata 2007). Kemp found that the fixed-fee regime for police station advice resulted in some police station lawyers spending the minimum amount of time on advising suspects in person, or providing advice by telephone rather than in person (Kemp 2010). Faced with a contract that is on the borderline of profitability, lawyers will be likely to spend less time on client consultations and case preparation, considering disclosure, and investigating evidence. If an early guilty plea is likely to be the most profitable option from the lawyer’s perspective, it may be difficult for the lawyer to resist the temptation to emphasise to their client the systemic incentives of sentence discount and reduced costs, particularly when combined with the system incentives for defendants to plead guilty that were referred to earlier. McConville and Marsh argue that defence lawyers have been co-opted into inducing clients to plead guilty, and that the Criminal Procedure Rules are ‘a tool for bringing the defence bar into line’ (McConville and Marsh 2014: 167). Such nuanced practices, carried out by lawyers working for larger, less personalised, firms will be almost impossible to register or capture in any conceivable quality assurance scheme.

The potential long-term impact on the future of the criminal legal profession is also troubling, with increasing costs of qualification, reduced remuneration, lack of job security, and limited career progression offering ‘little incentive for debt-saddled graduates to opt for a career in legal aid work’ (HC Committee of Public Accounts 2010: 19). Indeed, a report released in December 2015 suggested that fees for junior barristers have decreased by eight per cent since 2012,[[38]](#footnote-38) with the chair of the Bar Council arguing that ‘the payment structure provides little scope for career progression for criminal barristers’ (Smith 2015). This raises questions about who will deliver criminal legal aid services in the future. In 2009, the National Audit Office conducted a survey of criminal legal aid solicitors, finding that the profile of the profession was ageing and that 15 per cent of respondents would be unlikely to be conducting legal aid work in five years’ time due to impending retirement (National Audit Office 2009). The issue is not simply whether suitable lawyers can be recruited to the criminal defence profession, but whether it will be possible for new law firms dedicated to criminal legal aid to emerge. Criminal defence work is largely carried out under legal aid; there is relatively little privately paid criminal defence work, and such work as currently exists is largely concentrated in firms that do little, if any, legal aid work, and have little appetite for moving into the legal aid market. Since there is only a small privately paying client-base, there will likely be no firms that rely largely on private clients that would wish to extend their client-base to those funded by legal aid, and start-up practices will not have the capacity to move into a market dominated by relatively large firms. This will have a greater impact on firms that wish to specialise in working for particular communities or socio-demographic groups, or in providing specialist services such as those for young or vulnerable people. Thus the criminal defence supplier-base will not be entrepreneurial, dynamic, or inventive in developing new ways of providing criminal defence services. Rather, it will be static, rigid and ossified.

The reduction in the number of suppliers, and their increasingly commercialised business ethic, will also have adverse consequences for other areas of the criminal justice system. The police will likely have to wait longer for the arrival of a lawyer who has a larger case-load of police station cases, and who may be based some distance from the station. At court, defence lawyers will have to balance higher case-loads, and the number of unrepresented suspects and defendants will likely increase, which will limit court efficiency and increase the time spent on cases in court. No systematic research has been conducted on litigants-in-person in criminal cases, but surveys undertaken in February and November 2014 suggest that legal aid reforms have already increased their number.[[39]](#footnote-39) There is also concern regarding the future of the criminal judiciary, which is primarily drawn from the ranks of criminal practitioners (particularly the Bar). As Sir Bill Jeffrey commented in his review of independent criminal advocacy:

‘[A]s the present generation of experienced criminal barristers moves towards retirement, concerns about the future "talent pipeline" for criminal QCs and judges are not, in my view, fanciful.’ (Jeffrey 2014: 62)

A decline in the number of providers, the likely departure of experienced lawyers from criminal practice, and a lack of new entrants will combine to reduce the pool of lawyers with expertise in criminal law from which new judges can be drawn. Less choice may result in a reduction of the overall numbers of criminal law judges, and risks lowering their quality, seriously affecting the administration of criminal justice.

It is not too strong to conclude that criminal legal aid and the criminal defence profession are in crisis. It is difficult to see, at this juncture, how (if at all) that crisis will be resolved. Yet the fast-moving context – the rise of crime associated with social media, other technological developments, and the ease of cross-border criminal activity – demands enterprise and innovation, in approaches to the investigation and prosecution of crime, and also in the delivery of criminal legal aid services. Where is such enterprise and innovation to come from? The significance of the abolition of the LSC, and its replacement by the LAA located within the MoJ, has not been sufficiently appreciated. The LAB and the LSC, both with a measure of independence from government, piloted and introduced franchising, contracting, accreditation, and new forms of legal aid delivery, and also conducted research on the demand for and supply of legal aid. The LAA, whilst functionally independent in respect of individual decisions whether to grant legal aid, is fully part of the MoJ in all other respects, and has no independent members on its Board. The Director of Legal Aid Casework must comply with directions given by the Lord Chancellor,[[40]](#footnote-40) and one of the primary objectives of the LAA is to ‘support the strategic aims of Ministers and the Department’.[[41]](#footnote-41) The LAA carries out almost no research, and therefore has limited knowledge of the impact of its policies. Indeed, the agency has been the subject of strident criticism. Its lack of independence from the MoJ has led to suggestions that both its specific funding decisions and general strategy for delivering legal aid are influenced by the Government’s austerity agenda. For example, in July 2015, the High Court ruled that the LAA’s exceptional funding scheme for civil legal aid was unlawful, with a ‘very low’ number of successful applications.[[42]](#footnote-42) In another case, involving family law, the agency was described by the High Court as ‘wasteful and inefficient’,[[43]](#footnote-43) and it has been accused of being in ‘institutional denial’ over problems with its Client and Cost Management System (Association of Costs Lawyers 2015). In his assessment of the LAA approach to analysis in its most recent Annual Report, Martin Partington - a former Law Commissioner - suggested that it was ‘very narrowly focussed on corporate concerns’ rather than examining ‘the robustness of the scheme for delivering legal aid services’.[[44]](#footnote-44) He concluded:

‘The report is thus about administrative and operational outcomes, rather than giving a view of how citizens are (or are not) being assisted by legal aid.’ [[45]](#footnote-45)

As a mechanism for managing and delivering legal aid in a dynamic and innovative manner, the LAA has patently failed. However, since the LAA was the product of a bi-partisan policy, the prospects for re-establishing an independent legal aid agency are minimal.

The professional associations of lawyers, principally the Law Society and the Bar Council,[[46]](#footnote-46) have been vigorous in their opposition to fee-reductions and dual contracting.[[47]](#footnote-47) However, as representatives of their respective professions, they have a vested interest in protecting their members or, rather, the majority of their members who are in private practice.[[48]](#footnote-48) The professional bodies appear to be implacably opposed to a public defender service, yet they have not sought to develop ideas about alternative ways of delivering legal aid services in the context of a radically reduced legal aid budget.

The PDS itself, as part of the LAA, is not in a position to independently develop a concept of a national service. Whilst, as noted earlier, the evaluation of the PDS pilot suggested that it could play a role in developing quality standards and covering localities in need of criminal legal aid services, opponents have latched on to the tentative conclusion that the PDS was more expensive than private practice.[[49]](#footnote-49) Opposition was, unfortunately, strengthened when the government implicitly threatened the private profession with an expansion of the service if it did not desist in its opposition to fee cuts.[[50]](#footnote-50) The PDS could provide a basis for developing alternative methods of delivering legal aid services if legal aid contracting results in gaps in supply, geographically, or in terms of the needs of particular client groups, or if (which remains a distinct possibility) a radically reduced supplier base leads to upward pressure on legal aid fees in future. However, it is doubtful whether any party that is likely to form a government in the foreseeable future would adopt such a policy.

**Conclusions**

The approach of successive governments over the past two decades suggests a very distinct direction of travel for criminal legal aid policy in England and Wales. The consistent downward trend in real-terms levels of funding, repeated attempts to reduce and limit the size and cost of the criminal legal aid market, encouragement of economy and speed over quality of delivery and just results, and repeated failures to engage in meaningful consultation with the legal profession and other stakeholders on reform, all suggest a disinclination to strengthen the provision of criminal legal aid. By contrast, the European Union has been pursuing an agenda of positive reform through its ‘procedural rights roadmap’ and consequent legislation, developing clearly defined procedural rights for suspects and defendants, underpinned by legal aid.[[51]](#footnote-51) With two exceptions, the UK Government has opted-out of this programme of reform, including a proposed Directive on criminal legal aid,[[52]](#footnote-52) describing the proposed legislation as ‘unnecessary and unwelcome’.[[53]](#footnote-53) In 2012 the United Nations (UN) unanimously adopted Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, but the UK Government has completely ignored them. In adopting the Principles and Guidelines, the UN General Assembly declared that ‘legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law’ which is a ‘foundation’ for the right to fair trial.[[54]](#footnote-54) Since the turn of the century, successive UK governments have not only failed to provide a lead in the development of criminal legal aid globally, but have also set about weakening and undermining a system that, whilst imperfect, provided good-quality legal services to the majority of suspects and defendants who cannot pay for a lawyer from their own resources.

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1. See, for example, the *Poor Prisoners’ Defence Act 1930*. For an account of the history of criminal legal aid in England and Wales, see Goriely 1996, and Hynes 2012, ch 2. [↑](#footnote-ref-1)
2. The numbers are not directly comparable since the LSC figures include only orders in respect of which a claim for payment was made, and a further 100,000 defendants were represented under other forms of legal aid, such as the duty solicitor scheme and the advocacy assistance scheme. [↑](#footnote-ref-2)
3. See Report of the Departmental Committee on Legal Aid in Criminal Proceedings 1966. [↑](#footnote-ref-3)
4. See now the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO), s17(2). The criteria are: likely loss of liberty or serious damage to reputation; the case may involve the consideration of a substantial question of law; the defendant may be unable to understand the proceedings or to state his or her own case; the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses; and whether it is in the interests of another person that the defendant be represented. [↑](#footnote-ref-4)
5. For example, ‘paper’ committals under the *Magistrates’ Courts Act 1980* (MCA), s6(2), required a defendant to be legally represented, and complex procedures such as ‘plea before venue’ under the MCA 1980, s17A, would make little sense to defendants without explanation by a lawyer. [↑](#footnote-ref-5)
6. The number of barristers increased from about 2,000 to in excess of 10,000, and the number of solicitors rose from under 20,000 to nearly 90,000. [↑](#footnote-ref-6)
7. See the *Access to Justice Act 1999*. [↑](#footnote-ref-7)
8. For an account of the contracting pilot, see Bridges et al 2000. [↑](#footnote-ref-8)
9. For an account of the policy context see Bridges et al 2007, ch 1. [↑](#footnote-ref-9)
10. For example, many lawyers were found to be reluctant to intervene during police interviews of their clients. [↑](#footnote-ref-10)
11. Research demonstrated that this resulted in an improvement in quality of the work of police station representatives and the solicitors who supervised them. See Bridges and Choongh 1998. [↑](#footnote-ref-11)
12. This is true in a formal sense, although in practice the level of supervision and engagement is often less significant. See, generally, Cape et al 2010, and Hodgson 2005. [↑](#footnote-ref-12)
13. Serious Fraud Office *Annual Report 2001-2002*, available at <https://data.gov.uk/dataset/annual-reports-sfo/resource/af0e48ba-6d81-4964-bcc9-b47a44a46986> (accessed 16 February 2016); and Serious Fraud Office *Annual Report 2005-2006*, available at <https://data.gov.uk/dataset/annual-reports-sfo> (accessed 16 February 2016). [↑](#footnote-ref-13)
14. For example, see <http://www.dailymail.co.uk/news/article-2306630/Legal-aid-payouts-fat-cat-lawyers-slashed-says-Justice-Secretary.html> (accessed 16 February 2016) and <http://www.lawgazette.co.uk/practice/ministry-ticked-off-over-barrister-earnings-claim/5040420.fullarticle> (accessed 16 February 2016). It should be noted that Government Ministers have always been careful to avoid explicitly using terms such as ‘fat cats’, whilst characterising criminal legal aid lawyers in this manner. [↑](#footnote-ref-14)
15. Chris Grayling, ‘Letters: Britain’s legal aid costs are unsustainable’ (The Guardian, 7 October 2013). [↑](#footnote-ref-15)
16. See the Chancellor of the Exchequer’s Emergency Budget speech of June 2010:

<http://www.telegraph.co.uk/finance/budget/7846849/Budget-2010-Full-text-of-George-Osbornes-statement.html> (accessed 16 February 2016). [↑](#footnote-ref-16)
17. Home Office, ‘Police Workforce, England and Wales: 31 March 2015: Data Tables’, available at <https://www.gov.uk/government/statistics/police-workforce-england-and-wales-31-march-2015-data-tables> (accessed 16 February 2016). [↑](#footnote-ref-17)
18. See the changes implemented by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. [↑](#footnote-ref-18)
19. Public and Commercial Services Union, ‘New court closures will further restrict access to justice’ (Press release, 16 July 2015, available at <http://www.pcs.org.uk/en/ministry_of_justice/moj-news.cfm/new-courts-closures-will-further-restrict-access-to-justice>) (accessed 16 February 2016). [↑](#footnote-ref-19)
20. The Act was repealed by the *Legal Aid, Sentencing and Punishment of Offences Act 2012*, but the means test provisions remained the same. [↑](#footnote-ref-20)
21. Criminal Bar Association, ‘Criminal Bar Association Response to Ministry of Justice Consultation Paper Dated August 2009 “Legal Aid: Funding Reforms”’, available via <https://www.criminalbar.com/resources/cba-responses/?page=8&> (accessed 16 February 2016). [↑](#footnote-ref-21)
22. Available at <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-crime-duty-contracts> (accessed 16 February 2016). [↑](#footnote-ref-22)
23. Legal Aid Agency, ‘Own Client Contract 2015 Standard Terms’ , available via <https://www.gov.uk/government/publications/own-client-crime-contract-2015> (accessed 16 February 2016). [↑](#footnote-ref-23)
24. The MoJ stated that the ‘principal objective’ of the reform process was ‘to deliver a sustainable service through encouraging consolidation of the provider base’, which they justified on the basis that ‘current providers are chasing too little work’ in a market that was ‘extremely fragmented’ (Ministry of Justice 2014a: 7, 10). Representative groups, including the Law Society, the LCSSA and the CLSA, argued that this artificial reduction in the size of the supplier base would seriously damage the delivery of criminal legal aid, challenging the proposals in court (see <http://www.solicitorsjournal.com/news/crime/funding-legal-aid/grayling-back-court-over-duty-contract-process> (accessed 19 February 2016)). [↑](#footnote-ref-24)
25. The fee cuts would also apply to solicitor advocates. [↑](#footnote-ref-25)
26. According to Michael Gove, who replaced Chris Grayling as Lord Chancellor, the MoJ faced 99 separate legal challenges to the tender for contracts and a judicial review (see <http://www.theguardian.com/politics/2016/jan/28/michael-gove-in-u-turn-over-legal-aid-fund> (accessed 19 February 2016)). In a letter before claim to the LAA, those firms challenging the tender process argued that it had been ‘vitiated by serious structural flaws giving rise to an unacceptable risk of unlawful decision-making’ (<http://www.lawgazette.co.uk/law/laa-faces-two-pronged-attack-over-legal-aid-contracts/5051972.article> (accessed 19 February 2016)) [↑](#footnote-ref-26)
27. See <https://www.gov.uk/government/news/crime-news-provision-of-criminal-legal-aid-services-from-11-january-2016> (accessed 16 February 2016). [↑](#footnote-ref-27)
28. See <https://www.gov.uk/government/speeches/changes-to-criminal-legal-aid-contracting> (accessed 16 February 2016). [↑](#footnote-ref-28)
29. Although there is some debate about this. See Wilmot-Smith 2014. [↑](#footnote-ref-29)
30. Sentencing Guidelines Council, ‘Reduction in sentence for a guilty plea: Definitive Guideline’ [12], available via <http://www.sentencingcouncil.org.uk/publications/item/reduction-in-sentence-for-a-guilty-plea-definitive-guideline/> (accessed 16 February 2016). The Council has issued a consultation on revising the Guidelines so that the maximum reduction in sentence would only apply if a defendant pleads guilty no later than the first hearing, with the level of the sentence reduction falling more rapidly for a guilty plea entered thereafter. See *Reduction in Sentence for a Guilty Plea Guideline: Consultation*, 11 February 2016, available at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.pdf> (accessed 16 February 2016). [↑](#footnote-ref-30)
31. See *Criminal Justice and Public Order Act 1994*, ss. 34-38. [↑](#footnote-ref-31)
32. See *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Sch 7. [↑](#footnote-ref-32)
33. Introduced in April 2015 by the *Prosecution of Offences Act 1985 (Criminal Court Charge) Regulations 2015* SI No 796, the charge was the last act of Chris Grayling, the Justice Secretary, prior to the General Election. [↑](#footnote-ref-33)
34. In fact the enhanced charge applied irrespective of whether the defendant elected or the court directed trial in the Crown Court, but arguably it would affect defendants’ decisions where they did have a choice. The charge ranged from £150 for a guilty plea to a summary offence in a magistrates’ court to £1,200 following conviction for an indictable offence in the Crown Court. The charge was in addition to an order that the defendant pay the prosecution costs, compensation, the victims’ surcharge, and any legal aid contribution, as well as any financial penalty imposed as, or as part of, the sentence.. [↑](#footnote-ref-34)
35. Howard League for Penal Reform, ‘Media Release: Howard League launches campaign for urgent Criminal Courts Charge review’ (5 August 2015), available at <http://www.howardleague.org/criminal-courts-charge/> (accessed 16 February 2016); Magistrates Association, ‘MA Chairman voices concern on criminal courts charge’, available at https://magistrates-association.org.uk/news/ma-chairman-voices-concern-criminal-courts-charges-–-27-march-2015-0 (accessed 16 February 2016). [↑](#footnote-ref-35)
36. HC Deb 3 December 2015, c26WS. [↑](#footnote-ref-36)
37. For an extensive analysis of how the ‘process of State-induced guilty pleas is *intended to replace* in whole or part the promise of adversary justice’ (original emphasis), see McConville and Marsh 2014. [↑](#footnote-ref-37)
38. Ministry of Justice, ‘The Composition and Remuneration of junior barristers under the Advocates’ Graduated Fee Scheme in criminal legal aid’, available at [www.justice.gov.uk/publications/research-and-analysis/moj](http://www.justice.gov.uk/publications/research-and-analysis/moj) (accessed 16 February 2016). [↑](#footnote-ref-38)
39. Bureau of Investigative Journalism, ‘Magistrates in new legal aid warning to Grayling as survey shows growing fears over justice system’ 15 January 2015, available at <https://www.thebureauinvestigates.com/2015/01/18/magistrates-warn-chris-grayling-legal-aid-new-survey/> (accessed 16 February 2016). [↑](#footnote-ref-39)
40. Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 4(3). [↑](#footnote-ref-40)
41. Legal Aid Agency, *Framework Document*, (undated), para. 1(2) available via <https://www.gov.uk/government/organisations/legal-aid-agency/about/our-governance> (accessed 16 February 2016). [↑](#footnote-ref-41)
42. *IS v Director of Legal Aid Casework* [2015] EWHC 1965 (Admin). [↑](#footnote-ref-42)
43. *Re R* [2014] EWHC 643 (Fam) [95]. [↑](#footnote-ref-43)
44. ‘Who is doing legal aid? The statistical evidence’, blog by Martin Partington, June 2015, available at <http://martinpartington.com/2015/08/04/who-is-doing-legal-aid-the-statistical-evidence/> (accessed 16 February 2016). [↑](#footnote-ref-44)
45. ‘What is happening to Legal Aid? Reports from the Legal Aid Agency’, blog by Martin Partington, June 2015, available at <http://martinpartington.com/2015/06/15/what-is-happening-to-legal-aid-reports-from-the-legal-aid-agency-june-2015/> (accessed 16 February 2016). [↑](#footnote-ref-45)
46. Even more active have been the Criminal Law Solicitors Association (CLSA), the London Criminal Courts Solicitors Association (LCCSA) and the Criminal Bar Association (CBA). [↑](#footnote-ref-46)
47. The Law Society and Bar Council have lobbied the Government directly and through consultations. In reaction to the Government decision to proceed with its proposed reforms in February 2014, the Bar Council stated that ‘our worst fears have been confirmed’ and that barristers would be ‘dismayed and demoralised’ (<http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2014/february/bar-chairman-unsustainable-and-unnecessary-legal-aid-cuts-confirm-our-worst-fears>) (accessed 16 February 2016). In June 2015, Law Society President Andrew Caplen wrote to the Lord Chancellor to express ‘disappoint and concern’ about the decision to implement cuts and two-tier contracting (<http://www.lawsociety.org.uk/news/documents/Letter-to-secretary-of-state-on-duty-contract-tender-process/>) (accessed 16 February 2016). The CLSA, LCSSA and CBA have led more proactive resistance, balloting members on various forms of direct action tantamount to ‘strikes’ (for example, the refusal of barristers to undertake very high cost cases (VHCC) and ‘returns’ work, and the refusal of solicitors to represent clients in criminal proceedings in Summer 2015). [↑](#footnote-ref-47)
48. Lawyers who work for the PDS are regulated by their respective professions, but their particular interests have not been represented by the professional associations. [↑](#footnote-ref-48)
49. For example, the use of highly paid PDS QCs in junior level crime trials during the legal aid ‘strikes': <http://www.lawgazette.co.uk/practice/action-day-51-pds-silks-cover-junior-level-trials/5050625.fullarticle> (accessed 16 February 2016). [↑](#footnote-ref-49)
50. In December 2013, the MoJ imposed 30% cuts to fees for VHCC. As a result, barristers refused to accept such cases. A high profile victim of this action was a serious fraud case (*R v Crawley and others* [2014] EWCA Crim 1028), in which insufficient advocates were available to represent the defendants. After a number of adjournments, the Court of Appeal overturned the stay on proceedings in May 2014. Sir Brian Leveson (who delivered the judgment) commented that during the dispute between the MoJ and the Bar, ‘the Public Defender Service… began actively to recruit a pool of employed advocates to take on work that might otherwise have been done by independent advocates’, suggesting that this was ‘a response to the impasse which had arisen between the Bar and the Lord Chancellor’. A number of commentators interpreted this expansion of the PDS as a veiled threat that the PDS could replace the private Bar should it refuse to accept cuts: <http://www.legalvoice.org.uk/2014/01/22/moj-recruits-lawyers-for-public-defender-service/> (accessed 16 February 2016). [↑](#footnote-ref-50)
51. *Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings*. 1 July 2009, 11457/09 DROIPEN 53 COPEN 120. [↑](#footnote-ref-51)
52. *Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects and accused persons deprived of liberty and legal aid in European arrest warrant proceedings*, 27 November 2013 COM(2013) 824 final 2013/0409 (COD). [↑](#footnote-ref-52)
53. The government opted in to the EU Directive on the right to interpretation and translation (2010/64/EU), and to the Directive on the right to information (2012/13/EU). For the government’s response to other proposed directives, see [http://europeanmemoranda.cabinetoffice.gov.uk/files/2014/09/17633-13\_Min\_Cor\_29\_July\_2014\_Grayling-Cash\_(2).pdf](http://europeanmemoranda.cabinetoffice.gov.uk/files/2014/09/17633-13_Min_Cor_29_July_2014_Grayling-Cash_%282%29.pdf) (accessed 16 February 2016). [↑](#footnote-ref-53)
54. UN General Assembly Resolution 67/187, 20 December 2012. [↑](#footnote-ref-54)