



**SUBMISSION OF EVIDENCE TO  
HM Treasury**

**This is a submission of evidence by the Criminal Bar Association.**

**INTRODUCTION**

1. The CBA is the largest specialist Bar association representing the barristers who work in the field of criminal law at the Bar. Most are self-employed in private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment, and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial, and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of criminal law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. Although many of our junior members work in the magistrates' court, the majority work primarily in the Crown Court, dealing with the complete calendar of criminal offending.
4. The criminal bar is currently facing a crisis of recruitment and retention. We no longer have enough of our highly trained, specialist criminal barristers to meet the case flows and deal with the existing and growing, record Crown Court case backlog. This impacts both the ability of both the magistrates' and Crown Courts to function effectively, whilst at the same time adding to the existing and rising delays, and putting at risk the ongoing ability for the delivery of fair trials. With these metrics in mind, the crisis across the criminal justice system has worsened consistently and considerably in every consecutive Spending Review and Budget since 2019.
5. Our members both prosecute on behalf of the Crown Prosecution Service ("CPS") and represent those accused of crime. Whilst our submission relates to the funding for the specialist Criminal Bar, it must be born in mind that without a vibrant, independent, fully functioning human resource of criminal barristers, those who ultimately pay the greatest price for a failure to reinvest immediately, substantially and with provisions for ongoing sustainable regular annual reinvestment, will be the ordinary people waiting for their trials to start let alone be resolved – both the defendants and victims of crime.

### **Summary of our Position on fees**

6. We have had the advantage of reading the detailed submissions prepared by the Bar Council (“BC”) which has the benefit of much detailed statistical research.
7. The BC’s submissions relate to the whole of Legal Aid. We support all of their submissions made in respect of the Criminal Bar.
8. In addition, we rely upon the following matters in addition to the submissions made by the BC:
  - a. The conclusions reached by the Bellamy Review (“BR”) on 29<sup>th</sup> November 2021<sup>1</sup> also known as “CLAR”, the Government-commissioned independent review of criminal legal aid. This was first announced by Government in December 2018 for publication by the summer of 2020. It was subsequently delayed to summer 2021, and finally published on 29 November 2021, but was only shared by Government on 15 December 2021 [[Criminal legal aid review - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/criminal-legal-aid-review), [Independent Review of Criminal Legal Aid - Report \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014447/Independent_Review_of_Criminal_Legal_Aid_-_Report.pdf)];
  - b. The terms of the settlement (“the deal”) struck between criminal barristers and the MoJ in October 2022 to resolve the industrial action taken by defence barristers (“IA”).
  - c. This deal has not been fully implemented, and this has caused dissatisfaction amongst criminal practitioners, whether they prosecute or defend.
  - d. Any increase received from the deal has been extinguished by inflation<sup>2</sup>; and
  - e. Despite significant efforts to cover the backlog by Criminal Barristers there remains a very large number of unresolved cases - over 67,573 by the end of December 2023, according to the Ministry of Justice. This figure is conservatively estimated to have risen to around 74,000 based on provisional HMCTS data for the first four months of 2024 (see below). The statistics demonstrate that last year the number of trials cancelled on the hearing day, rose to 1436, which is 5% of trials, because not all criminal advocates required were available. The criminal bar has reduced in numbers by 7.2% between 2018/19-2023/24<sup>3</sup>. This is because of increase in work, and administration which barristers must undertake, the fewer numbers available, completely overwhelming family life and well being, which is set against the inadequate remuneration compared to other areas of the profession, and unacceptable work life balance that the work now involves, given the dwindling number of practitioners against an ever-increasing workload.
  - f. In addition, there remain substantial and illogical differences between some fees paid to prosecution and defence counsel that need urgent adjustment – for example, the rate for prosecuting a standard rape case is £1,944, whilst defending is £2390.
9. Accordingly, the CBA seeks:
  - a. A 15% increase across all fees and hourly rates within the existing AGFS<sup>4</sup>.
  - b. At least parity between Defence AGFS fees and CPS fees.

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<sup>1</sup> See paras. 1.37-1.39 – Note the BR had been commissioned three years earlier.

<sup>2</sup> A £100 in 2021 is £119.97 as at July 2024 using the Bank of England Inflation Calculator (“BoEIC”) i.e. an increase of 19.97%

<sup>3</sup> Those self-employed barristers specialising in Crime have reduced from 2568 to 2384 between 2018/9-2023/24 – a drop of 184.

<sup>4</sup> (Advocates’ Graduated Fee Scheme for criminal legal aid payable to defence counsel);

- c. Substantial increases to Rape and Serious Sexual Offence [RASSO] brief fees for the ten most serious offences. It is of great concern that the attrition rate amongst criminal barristers conducting these serious cases is high, and increasing. In our recent survey advocates explained that they were deserting this work because of the low remuneration relative to the work involved, the significant pressures of the workload, and the emotional burnout that is associated with such cases, together with the additional pressures that are being brought to bear on the limited pool that remain as a result of the ever-depleting workforce.
- d. Substantial increases to murder and serious violence brief fees. In contrast to all other cases, bar serious drugs and fraud where the page count is inevitably much higher, murders are graded according to the *type* of murder and require there to be 10,000 pages of evidence before a special preparation fee can be triggered. The consequence is that these high profile and traumatic trials, which involve high stakes, engagement with families of the deceased, extensive preparation and presentation, are underpaid. The reality is, that because the numbers of such cases are comparatively low, the adjustment requested would not have great impact on the overall budget, but would be likely to improve and increase the pool of barristers available to conduct them.
- e. Full implementation of special/wasted preparation and complexity markers as originally agreed pursuant to the deal.
- f. Proper remuneration for written work and for work on audio / video recordings served as evidence as was originally provided for in the deal (which placed a limit on the overall spend). This will assist in retention of criminal barristers, and is likely to help address the backlog<sup>5</sup>.
- g. Targeted amendments to remove anomalies in the system as discussed with the CLAAB<sup>6</sup> (requiring minimal sums but with significant beneficial impact to those carrying out this work).
- h. Travel should be paid for all hearings. Currently, it is only paid for the main hearing (trial or guilty plea) when the rules allow. This places a significant and illogical financial burden on the advocate who has to carry out an average of up to 7 other hearings in a case. For example, a defence advocate is paid at £105 for a mention hearing. Often this will not cover the cost of the train fare. This disincentivises case ownership and decreases efficiency. If face to face in person hearings are not required, plainly hearings can be dealt with by CVP.
- i. The lack of a mechanism to increase fees annually is another reason for high attrition rates at the criminal bar. CLAAB should be provided with power to recommend an annual increase in the fee levels like a pay review body, or a pay review body should be established. Alternatively, once the fees are at an appropriate level, the increases could be linked to the judicial pay review on the basis that judges dealing with criminal work are carrying out similar work to criminal barristers.

**Summary of the state of the criminal justice system and its relationship to criminal barrister numbers, funding and investment**

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<sup>5</sup> Payment for listening to *unused* audio/video material is available under the existing provisions, however while the prosecution receives payment for this work on an hourly rate, the defence do not.

<sup>6</sup> Criminal Legal Aid Advisory Board - CLAAB was set up as part of the settlement agreed with criminal barristers in October 2022.

10. There are only around 2,400 specialist criminal barristers left working full-time on publicly funded criminal cases, either prosecuting, defending or both.
11. The crisis of retention has a direct impact on the efficiency of the criminal justice system, and the increasing case backlog.

### **Case backlogs and delays**

12. The case backlog is defined as “outstanding cases” by the Ministry of Justice (“MOJ”) in their, detailed quarterly figures, published quarterly in arrears (latest available are from March 2024 relating to 31 December 2023). Data includes trial backlogs, timeliness of cases and full breakdowns of ineffective, vacated, cracked and effective trials among other metrics. The Crown Court case backlog was 67,533 at the end of December 2023, 105% higher than the end of 2018, when it was at an historic low of 32,936.
13. Latest HMCT data in its monthly management “open caseload” update for the first four months of 2024, January to April 2024, published 13 June 2024 [[HMCTS management information \(accessible version\) - April 2023 to April 2024 - GOV.UK \(publishing.service.gov.uk\)](#)], taken together with the last MOJ quarterly criminal courts full data set to December 2023, published in March 2024, indicates that while overall annual case receipts in 2023 were only back to 2018 levels, they have been rising consistently in 2024 leaving on average a deficit each month of around 840 fewer Crown Court cases disposed than new receipts. If that trend has continued into September 2024<sup>7</sup>, then conservatively the Crown Court outstanding case load – backlog – will be in the region of 74,000 as at the date of this submission.
14. From August to date the Crown Court has seen between 20% and 30% of its court rooms not sitting, around twice the rate of court room disuse experienced during the first six months of 2024. With a recent decision to reduce the budget for Court room sitting days from September 2024 for the remainder of this financial year 2024/5, the backlog will grow further and faster than our conservative current estimates. Investment into the criminal barristers relied on to prosecute and defend cases, to reduce or at the least curb the backlog, is urgent.
15. The MoJ has failed to publish any data in relation to the status of backlogs, ineffective trials, or the reasons for ineffective trials throughout 2024. This is despite resident judges and listing officers submitting weekly details to HMCTS. throughout 2024 as to effective and ineffective trials. The MOJ June deadline for publishing data for the first quarter from January to March 2024 is now more than two months overdue.
16. In the absence of data, our members tell us of what appears to be a high number of trials adjourned in 2024, due to a lack of prosecution, or defence advocates. It is plain from our membership that defendants on bail are having their cases listed in late 2026 and the first quarter of 2027, with no guarantee that the cases will be reached on that date. The delay between offence and trial can now be 6 to 7 years.
17. In 2014, the average time from alleged offence to completion of a case was 441 days. In 2023, that has increased to 686 days.
18. At the end of March 2022 the backlog was 59,785. It is accepted that the action by criminal defence barristers resulted in a 6% increase over a 6 month period to 62,963 at the start of

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<sup>7</sup> and there are no indications of any marked reduction in new cases coming to court given separate Home Office data showing a gradual rise in charging rate of all police reported crime over the past two years to March 2024,

October 2022. The refusal of the government to communicate with us at all created the requirement to take action, and once the matter was settled, the criminal bar worked tirelessly to reduce the backlog. Despite us working solidly thereafter, the backlog has continued to grow.

19. There is a misconception that the bar stopped working during the action. Many barristers both prosecute and defend, and never stopped working on their prosecution cases during the action. Further, all counsel were required to consider each case individually, and for cases where the defendant or complainant were particularly vulnerable, continued to conduct the trial. It is not to be assumed that any further action would necessarily be limited in the same terms. Industrial action ended when defence barristers resumed work in full from 11 October 2022 onwards, but the outstanding caseload reduced only marginally over the next six months by a net 756 cases to 62,207, a fall of just 1% between October 2022 and March 2023.
20. Chronic underinvestment, poor working conditions, and the lack of support for the bar during COVID, has led to the criminal bar suffering a high attrition rate. From the summer of 2021 onwards, we were concerned that there would be insufficient barristers available to prosecute cases. The lack of available counsel is a new and alarming development within the criminal justice system, which has since been validated by a series of HMCTS and MOJ data, albeit the MOJ data was received late. It is not clear why. The CBA is concerned with the delays in the production of publicly available statistics from the MOJ.
21. By March 2023, six months after the end of the action, the public became aware of the chronic shortage of criminal barristers, because the MOJ statistics were published.
22. Between 31 March and 31 December 2023 the outstanding caseload increased by over 5,000, a rise of nearly 9%, to a 23 year record high of 67,573, of which 55,116 were trials. This was caused (i) because more cases were being sent to the Crown Court; and (ii) by an increase in ineffective trials.

#### **Ineffective trials – no counsel**

23. A recent independent report from the National Audit Office dated 24 May 2023 [[Reducing the backlog in the Crown Court \(nao.org.uk\)](https://www.nao.org.uk/publications/2023/reducing-the-backlog-in-the-crown-court/)] “NAO Report” gives detail of the reasons for ineffective trials. In 2023, there were 1,436 trials of all offences in the Crown Court ineffective due to the absence of either a prosecution or defence advocate, or both. For comparison, in 2019 the figure was 71 trials. Shortages of counsel has been one of the fastest rising causes of ineffective trials.
24. For information, the detail of the 1,436 “cancelled” trials is as follows:
  - i. 756 were due to no prosecution barrister being available;
  - ii. 252 of the 1436 were trials of sexual offences;
  - iii. 139 of those sexual offence trials had no prosecution barrister.
  - iv. 32 of those were an adult rape trial.
  - v. In the period between 2016 and 2019, only 1 adult rape trial per year was adjourned due to the absence of a prosecution barrister.
  - vi. Of the 139 sexual offence trials adjourned on day one in 2023 due to a shortage of a prosecution barrister, 32 involved adult rape trials.
25. The rate of ineffective trials in 2023 was 27%, a total of 7,966 Crown Court trials. An additional 16,218 trials were adjourned by being removed from lists in advance of the trial date. It is perhaps no wonder that witness attrition rates are increasing.

### **Witness Attrition rates**

26. Successive governments have indicated their determination to ensure that victims of rape are supported through the criminal justice process, and that their cases should be a priority. Analysis of CPS data<sup>8</sup> shows that 257 complainants withdrew from the court process in the 12 months ending in March 2024. 144 of those occurred in the last 6 months of that period, which suggests an upward trajectory.

### **Criminal barrister numbers**

27. The Bar Council submissions based on Authorisation to Practise Certificates with a 1 April start date are adopted.
28. Attempts made by the criminal bar to increase its numbers by recruiting more criminal pupils are reflected by the slight increase in 2024. But, we are aware that the number of those who will leave criminal practice within two years of qualifying is disproportionately high. The Bellamy Report states “...for the junior bar, it appears that between 2015/16 and 2019/20 there were reductions in the number of practitioners in the 8-12 years of practice band (from 530 to 280, - 47%), in the 13-17 years band (580 to 480, -17%), and in the 18 to 22 years band (from 500 to 450, - 10%)”.
29. Over the same 4 year period the Bellamy Report notes that the number of KC’s (then QC’s) in criminal practice demonstrates “a decline between 2015/16 and 2019/20 from 520 to 400, some -24%, with a particularly large reduction in QCs in the 18-22 years of practice range (140 to 40, a 67% decline)”. A large number of criminal KC’s have diversified by leaving criminal work in part or whole for better remunerated, and less traumatic cases in different areas of law.

### **RASSO Cases, trials and specialist criminal barristers**

30. At the end of 2018, 1 in 11 of the backlog of cases was a sexual offence case. It is now 1 in 7. By the end of December 2023, the RASSO backlog is 10,141. Of these, 2786 are adult rape cases. In 2023, 1805 rape cases were dealt with, and 2566 new cases were received. The disparity between case receipts and case disposals means there is an increase in the rape case backlog, and the rape case backlog has grown at more than double the rate of the overall case backlog.
31. Regrettably, the numbers of criminal barristers able or willing to continue to prosecute or defend RASSO cases is dwindling. Similarly, the number of barristers willing to apply to join the CPS panel<sup>9</sup> or to remain upon it, is much lower.
32. In February 2024 the CBA conducted a survey of its members<sup>10</sup>. 780 criminal barristers completed the RASSO survey. A total of 543 of the responses came from specialist RASSO barristers with 18 or more years of experience, including silks. with 49% stating that they conducted both prosecution and defence RASSO work.
  - a. 64% of Prosecutors said at renewal they will not be reapplying to be on the RASSO List.

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<sup>8</sup> according to their measure of “Volumes of non-convictions due to victim attrition”

<sup>9</sup> a pre-requisite to prosecuting these cases

<sup>10</sup> [[CBA RASSO Survey Results - 12.02.24 - Criminal Bar Association](#)]

- b. Only 246 RASSO Prosecutors confirmed they would conduct RASSO cases in the future.
- c. 34% of Defence RASSO Counsel said they no longer want to conduct these cases.
- d. 53% of those who conduct Section 28 cross-examination do not want to carry on, with over half of those saying this was down to a lack of remuneration for the work involved.
- e. Overall 6 out of 10 of those surveyed cited poor fees as the reason for refusing to conduct RASSO cases.
- f. Half of all those surveyed pointed to the adverse effects on their well-being as the cause for refusing RASSO work.
- g. 67% of all respondents said they will not currently consider accepting more RASSO cases
- h. 78% of respondents under 5 years Call said they will not consider building a RASSO practice

### **The Conclusions of the Bellamy Report**

34. The BR concluded that:

*“1.37 My central recommendation is that the funding for criminal legal aid should be increased overall for solicitors and barristers alike as soon as possible to an annual level, in steady state, of at least 15% above present levels, which would in broad terms represent additional annual funding of some £135 million per annum. How that sum should be distributed, and how the concomitant efficiency improvements to the various schemes should be implemented, are discussed in Chapters 7 – 14.*

*1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as “an opening bid” but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives.*

*1.39 It is also three years since CLAR was announced, and attention had been drawn to the underlying problems for many years before that. There is in my view no scope for further delay.”*

33. It is of note that this was designed to provide an immediate and vital injection of funds but that it was a start and would need to be reviewed.

34. At paragraphs 13.65-13.78 the Report provided detailed reasons for recommending a “substantial increase in funding for AGFS<sup>11</sup>”.

35. The CBA draws particular attention to paragraphs 13.71 to 13.73, which address the public interest in an increase in funding:

*“Sustainability in the public interest*

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<sup>11</sup> Para 13.78

13.71 *The issue from a public interest perspective is whether fee incomes of this order are likely to be able to sustain the legally aided criminal Bar going forward if no increase in funding is forthcoming. In that connection, the question is not simply whether there are “enough” barristers to go round. The need is to attract and retain barristers of the quality needed to do difficult and demanding work, carrying a very heavy responsibility for the life chances of an individual and a possible loss of liberty. Given the central role of the justice system in society as a whole, as I see it there is a high public interest in criminal legal aid being able to attract the brightest and the best.*

13.72 *As pointed out in Chapter 1, in my view it is a mistake to think of criminal legal aid in narrow terms as simply “funding the defence”. As far as advocates are concerned, criminal legal aid lawyers both prosecute and defend; the CPS relies to a significant extent on recruiting experienced criminal lawyers from defence solicitors and advocates; the same is true of many other public authorities; practising lawyers with a background in criminal law are the main pool for the recruitment of district judges, recorders, and Crown Court judges, many if not most of whom will have gained their experience doing criminal legal aid work.*

13.73 *The CJS in turn depends on the existence, and constant replenishment, of a cadre of skilled and experienced advocates to handle the more complex cases. Such cases necessarily include the serious offences involving loss of life, rape, serious violence, fraud, drugs and so on. Moreover difficult issues, for example as to admissibility of evidence, basis of plea, sentencing, dealing with young or vulnerable defendants, and many other matters, are by no means limited to cases of exceptional gravity. This means that the system needs a sustainable pool of advocates of all levels of experience capable of dealing with all kinds of cases, gradually progressing in due course to heavier and more timeconsuming cases that require great attention to detail and much preparation.”*

36. In particular, we would draw attention to the fact that it was said that *“the CJS depends...on the existence, and constant replenishment, of a cadre of skilled advocates to handle the more complex cases.”*

37. The reality is that even after the 15% increase in 2022, the profession is at further risk of falling away and is still 7.2% less than it was in 2018/19 when the Bellamy Report was first commissioned.

#### **October 2022 - the agreement between the CBA and the Ministry of Justice (MoJ) to end the action taken by defence Counsel.**

38. The “deal” between the MoJ and the CBA consisted of the following agreements:

- (i) 15% increase in fees on all defence cases (including the majority of those in the existing court backlog);
- (ii) Provision of a fee for each s28 hearing<sup>12</sup>;
- (iii) An increase to both special and wasted preparation, including payment for written work and listening/viewing audio visual material.

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<sup>12</sup>A budgetary allocation of £4m was to be used for the additional funding of s28 fees and an additional allocation of £3.3m for special/wasted preparation.



(iv) A Criminal Legal Aid Advisory Board (CLAAB) to be established<sup>13</sup>

39. Brandon Lewis, Lord Chancellor and Justice Secretary at the time in October 2022 said of the “deal”:

*“I greatly value the criminal bar and solicitors and the work they do every day in our Crown and Magistrates Courts. They are crucial to reducing the backlog. My priority in these discussions has been to ensure that victims aren’t forced to wait longer to see justice done. These are generous proposals, and I would strongly urge all members of the Criminal Bar Association to consider carefully, end their strike and work with me to deliver better outcomes for victims of crime. The Ministry of Justice will make up to £3 million of funding available for case preparation like written work and special preparation<sup>14</sup> A further 4 million will be allocated to defence barristers involved in pre-recorded cross-examinations, which are used to reduce the trauma of a trial for vulnerable victims and witnesses. The Ministry of Justice is also proposing a £5 million uplift per year for fees in the youth court, from the 2024/25 financial year, expected to benefit both solicitors and some junior barristers. This Advisory Board on Criminal Legal Aid reform will hold its first meeting in October, to discuss future proposals to improve the system for legal professionals and victims in a constructive way.”*

40. This “deal” was proposed to the CBA membership in October 2022 by ballot. The action was suspended when 57% accepted the offer. Plainly, 43% rejected it.

#### **The 15% increase on defence cases.**

41. The 15% increase on defence fees has been processed.

42. The failure to implement the remaining recommendations of the Bellamy Report has increased the attrition rate and is likely to continue to do so.

43. Criminal barristers describe being burnt out and exhausted. Without a body of practitioners between 5 and 12 years call, our profession is aging and members are retiring. To sustain our profession remuneration must bear comparison with the other more lucrative publicly and privately funded work to which our members are currently turning.

44. The 15% increase requested to all fees and hourly rates must be considered in light of the rates of inflation. For example: in order to earn the equivalent of £100 in 2021 when the Bellamy Review reported, one would now need to earn £119.97.<sup>15</sup>

#### **Section 28 fees and RASSO fees<sup>16</sup>:**

45. Item (ii) of “the deal” has not yet been met in full.

46. In 2023, 2500 RASSO cases were committed to the Crown Court. In the previous year there were 894. Plainly more specialist RASSO counsel are required. In March 2024 we submitted a

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<sup>13</sup>The CLAAB was firstly to consider the hourly rate for unused, special and wasted preparation for Counsel.

<sup>14</sup> Increased to £3.3 million to recognize that the 15% increase did not cover older cases in the backlog.

<sup>15</sup> applying the Bank of England Inflation Calculator

<sup>16</sup> See also CBA Response to The Justice Committee Inquiry into the use of pre-recorded cross-examination, under Section 28 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999, 6<sup>th</sup> December 2023

paper to the CLAAB illustrating a mechanism by which this could be achieved.

47. The preparation required for a section 28 hearing is the same as that required for the first day of a trial. The £670 set fee for s.28 hearings was inadequate, and caused barristers to prefer to undertake more lucrative work. The increase, following negotiation, to £1000, has neither encouraged more counsel to undertake these cases, nor discouraged people from leaving. Those who have persevered despite the pressures, have done so because they wish the vulnerable to have a voice. But we do not know how much longer they will be able or willing to continue.
48. We have suggested, following our survey in March 2024, that the surplus funds from the £4 million which had been allocated to S28 cases should be diverted to increase the brief fees for the ten most serious RASSO offences. We have also offered to provide a national training program, free to criminal barristers, which would include an introduction to RASSO, a course for Grade 3, and a course for Grade 4 providing qualification and training to enable people to have the skill set to apply to join panels at Grade 3 and 4.
49. We have repeatedly requested the MoJ to provide information as to the amount from the money set aside which has been spent on s.28 cases, and to calculate what will be spent prior to March 2025. We await a full response.

#### **Special and Wasted Preparation fees:**

50. In respect of item (iii) a bolt on fee of £62 plus VAT, regardless of the level of advocate instructed or work done, was provided on cases with a Legal Aid Order granted after 17<sup>th</sup> April 2023. This was said to equate to the £3.3m set aside in the “deal.” This provision did not meet the recommendations in CLAR for payment for work done. In particular it makes no provision for written work and viewing/listening to video and audio material which has expanded hugely with Body worn footage, CCTV etc.. In the case of payment for written work, this is essential to encouraging early case preparation and which also saves court time both in court (thus helping to reduce the backlog) and in avoiding unnecessary appeals. The agreement was that there was to be a similar system copying the provisions already in place in the Funding order for unused material i.e. it required no further drafting just implementation. It also was meant to cover wasted preparation as so many cases were being prepared but not reached and needing to be returned. In the latter case this is vital to promote case ownership and proper advance preparation.
51. The MoJ estimated that the spend would be £3.2 million by March 2025. We have repeatedly requested the MoJ to provide the figures for monies spent and projections for money to be spent for this bolt on fee by March 2025 which is to reflect special and wasted preparation fee. We await detailed analysis from the MoJ.
52. We submitted to the CLAAB that this fee should be increased to at least £100.
53. We reiterate our request that special/wasted preparation and unused material preparation fees are widened in scope and that there is an increase in the hourly rate.

#### **The CLAAB:**

54. The provision of the CLAAB and the promise of planned investment in the future of the criminal

justice system was a significant factor which persuaded many of our members to accept the “deal”. Barristers considered that this independent body would provide a much-needed buffer between themselves and the MoJ and Legal Aid agencies.

55. We are grateful to the Chair, HHJ Deborah Taylor, for her Chairmanship of the Board. We were pleased that the CLAAB was established, but there was a significant and unfortunate delay before her selection. We recognize that the CLAAB must consider both AGFS and LGFS legal aid reform. We accept such work is complicated and there are competing interests. The CBA supports our Criminal Solicitors and recognizes their frustration in trying to reform LGFS whilst supporting the reduced number of criminal firms providing access to justice. We would propose that the CLAAB meets more frequently and would ask that it be enabled to address urgent issues within the sector as they develop including, as suggested above being able to recommend increases in funding.

#### **Youth Court Fees:**

56. The £5 million promised to increase Youth Court fees does not seem to have filtered down to the Junior Bar as the MoJ promised. We remain concerned as to whether it will. We support the Bar Council’s request for a separate system of payment so that the Junior Bar are not punished by late or non-payment for fees for their advocacy in the Youth Court. We support the idea that there should be a relaxation in the grant of certificates for counsel making them available in any case that would have been sent to the Crown Court but for the fact that the case involved a youth. We look forward to working alongside our Solicitor colleagues to ensure many young and vulnerable defendants can access to the highest quality advocacy in the Youth Court.

#### **The Future**

57. It should be remembered that the government only agreed to increase our funding in October 2022 because of 6 months of escalating action by CBA members. Barristers did not undertake this unprecedented action lightly, and had there been any form of open dialogue, this could have been avoided.
58. The increase in funding, set against the backdrop of the independent Bellamy Report was clearly a first step towards proper remuneration. The number of barristers at the Criminal Bar conducting publicly funded work must be increased if at all possible and cannot shrink further. The stated desire of reduction in the backlog of cases requires barristers to be available to conduct these trials. The government and its agencies recognize that the Criminal Justice System requires suitably qualified, highly skilled advocates at all levels to prosecute and defend criminal cases.
59. The future of the system depends upon criminal barristers being recruited and retained. They are the KC’s and Judges of the future.
60. If none of the suggestions in relation to an independent pay review body are accepted, negotiations from now on must start from the premise that the 15% that we have requested is not an end to the process, but an emergency measure to prevent the destruction of the criminal bar. What we are seeking is a collaborative working relationship towards the setting of fees at a rate that will ensure that we can continue to retain, and to recruit.

## CONCLUSION

61. The evidence we present confirms warnings given to Parliament by the former Lord Chief Justice and current Lady Chief Justice to successive House of Commons justice select committees and House of Lords Constitutional Committees from 2021 to 2024.
62. On 16 November 2021 (long before the action taken by criminal defence barristers), the then Lord Chief Justice Lord Maldon in oral evidence to the Justice Select Committee<sup>17</sup> said:
- “ ... the shortage of lawyers that I was referring to was very much a crown court phenomenon, so ... There is a problem in the criminal legal profession and the likely reason is the relentless reduction in real rates of remuneration over the last 15 years.”*
63. On 8 November 2022 the then Lord Chief Justice, Lord Maldon, stated in oral evidence to the House of Commons Select Justice Committee<sup>18</sup>:
- “...for all the reasons you are very familiar with, the financial reward for doing crime was also, in real terms, reducing—and reducing quite fast. So the defence legal community, as it is sometimes called, is depleted. Therefore, there is not resilience within that defence legal community—it is the prosecution community as well—to do all the extra work that we are listing. So we have encountered a phenomenon of cases having to be stood out at the last minute, or adjourned on the day of the trial, because one or other side simply does not have a lawyer to prosecute or defend. The problem, as it seems to me, with a legal community that has been subject to attrition over many years, is that it is not possible simply to flick a switch and magic up hundreds or thousands of criminal lawyers. That is a problem that I fear may be with us for some time.”*
64. By 16 January 2024 the Lady Chief Justice, Baroness Carr in oral evidence to Commons Justice Select Committee<sup>19</sup> said:
- “...I am talking about the fact that, as you may have read, when Max Hill KC retired, he was saying he could not find barristers to prosecute his cases. A lack of advocates is, at the moment, a real problem in efficiency.”*
65. The Government’s recently repeated desire for “swift justice” can only be achieved if the crisis of retention and recruitment for the Criminal Bar is addressed in parallel and with the same degree of urgency. At present the volume of work is beginning to exceed the capacity of the profession. Addressing the crisis requires an immediate increase in remuneration, an improvement in working conditions and a long-term strategy to secure the viability of criminal legal aid work, relative to other areas of legal practice.
66. At present, the quality of justice delivered by the criminal courts is being impeded, as are efforts to reduce the backlog. Both impediments will continue unless there is investment in the human capacity of the criminal courts: the women and men criminal barristers who work within them.
67. Criminal justice is inseparable from, and fundamental to, a safe and functioning democratic state. That is its’ fundamental purpose: to uphold the rule of law and ensure that the state can deliver on its’ core duty: the safety and security of its’ citizens. That objective must not be

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<sup>17</sup> evidence session transcript 2021 (judiciary.uk)

<sup>18</sup> committees.parliament.uk/oralevidence/11497/pdf/

<sup>19</sup> [committees.parliament.uk/oralevidence/14108/pdf/](https://committees.parliament.uk/oralevidence/14108/pdf/)

diluted. Overburdening and under resourcing the women and men whose daily job it is to deliver justice risks not only the functioning of the system but the maintenance of law and order.

68. The recently published NAO report confirms that which criminal practitioners have known and spoken of for years - that the criminal justice system remains in crisis without a plan for sustained investment, despite the repeated warnings of prosecutors and defence advocates who are tasked with delivering justice daily in our publicly funded courts.
69. We recognize that the crisis, including the overcrowding of prisons, places an inevitable burden on the tax payer. However, for the system to work, every defendant charged and brought to trial in the Crown Court requires, under one roof at the same time, properly qualified and available counsel both to prosecute and defend a case, a judge, a jury and a working courtroom. Disregard of planning and funding for any of these interlinked cogs in the wheels of our criminal justice system, of which the criminal bar is a crucial part, has significantly contributed to the record case backlogs. If this disregard continues, it will only cause further delay.
70. In order to reduce the backlog of trials in the Crown Court we have worked tirelessly and collaboratively because those cases matter to us. They are vitally important for witnesses waiting to give evidence and accused persons waiting for their trial.
71. Further delays in the time between offence and the date of trial cause misery and hardship for every participant. We are the ones who regularly have to look people in the eye and explain to them that they will have to wait another year or so for their case to be heard. We see the devastation and anguish that news causes and try to persuade people not to give up and walk away from the trial process.
72. We are saddened that some cases have not started because so many barristers have left our profession. We have warned of that danger for years. We were ignored. The warning given by Lord Bellamy and many of the recommendations he made were ignored. Delaying the throughput of trials means that fewer prison spaces are immediately required.
73. We take issue with the long-term lack of engagement with our profession and the lack of respect for it which are two things that we have tried to foster by working with all court users.
74. An effective independent justice system is the cornerstone of a healthy democracy. It must be rectified with immediate, substantive and ongoing long term investment back into the Criminal Bar as set out in this submission.
75. We stand ready to collaborate with Government and all those who work to improve the Criminal Justice System but that can only work if there is respect and remuneration commensurate for all our professional work done.

**CRIMINAL BAR ASSOCIATION**

**10 September, 2024**