Clarke, Amy and Welsh, Lucy (2022) “F**k this game…I’m off”: financial and emotional factors in declining legal representation in miscarriage of justice cases. Journal of Law and Society. pp. 1-24. ISSN 0263-323X

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‘F**k this game … I’m off’: financial and emotional factors in declining legal representation in miscarriage of justice cases

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Funding information
ESRC, Grant/Award Number: ES/R008515/1

Abstract
In this article, we use data from interviews with 45 criminal defence lawyers to examine the reasons behind a decline in publicly funded representation in applications to the Criminal Cases Review Commission (CCRC). In doing so, we pay particular attention to the relative significance of financial and emotional factors. Our analysis finds that financial factors related to changes to legal aid are significant drivers of a decline in publicly funded representation, but that the financial unviability of CCRC work is also compounded by emotional factors. These include a sense of insecurity, low levels of satisfaction, and a perceived lack of recognition and appreciation, symbolized by low levels of remuneration and exacerbated by poor relationships with external parties. Emotional factors thus combine with financial factors to reduce the supply of publicly funded advice and deter junior lawyers from specializing in this niche area of practice.

1  |  INTRODUCTION

The Criminal Cases Review Commission (CCRC) is an institution of crucial importance to the English and Welsh (and Northern Irish) criminal process. It was established in 1997 on the
recommendation of the Royal Commission on Criminal Justice\(^1\) to independently scrutinize cases following concerns over wrongful convictions during the 1970s and 1980s. Between April 1997 and June 2022, the CCRC examined 28,861 applications, of which 796 were referred to the Court of Appeal.\(^2\)

Given the societal damage caused by miscarriages of justice,\(^3\) convicts should be able to appeal their conviction if/when new evidence casting doubt on its safety comes to light, or where there were serious failures in procedure that (potentially) affected the outcome of the trial. The Criminal Appeal Act 1995 (CAA) set the ground for appeal as safety rather than innocence, and the CCRC’s apparent function is to uncover when safety might be an issue. The Royal Commission on Criminal Justice stressed the importance of legal advice in CCRC cases, and the need for ‘adequate arrangements for granting legal aid to convicted persons who have lost their appeals’.\(^4\) As Arkinstall explains, ‘[i]t is not enough that courts of appeal and commissions exist – the state should ensure that appeal rights are of practical use’.\(^5\) To us, this means that the ability to understand and access appellate courts and the CCRC are what brings the rhetoric of the system to life. However, according to Hoyle and Sato, austerity and resulting changes to legal aid have not only made it more difficult for people to secure post-conviction advice, but also increased the likelihood of wrongful convictions in the first place.\(^6\)

In the United Kingdom, legal aid changes resulting from the Legal Aid, Sentencing, and Punishment of Offenders Act 2012 (LASPO), the reduction to expert fees under the Criminal Legal Aid (Remuneration) Regulations 2013, and an 8.75 per cent fee cut in 2014 (on rates that had failed to keep up with inflation) have threatened all criminal defence services. Research has highlighted the impact of structural changes, including funding cuts, on defence lawyers’ working practices, morale, and sense of purpose,\(^7\) as well as the incompatibility of business and client needs when remuneration rates are low.\(^8\) Building on extant work, we use data from interviews with 45 criminal defence lawyers to explore the reasons behind a decline in one area of practice – publicly funded representation in CCRC applications – paying particular attention to the relative significance of financial and emotional factors, noting the differences in payment regimes. We recognize the effects of structural changes on professional morale, the distinctive emotional content of miscarriage of justice work, and the relationship between financial and emotional factors. By focusing on one area of practice, we illustrate the broader malaises within criminal legal aid practice and demonstrate the variation between practice areas resulting from differences in both funding regimes and the nature of work performed.

\(^1\) Royal Commission on Criminal Justice, \textit{Report} (1993) at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf>.

\(^2\) CCRC, ‘Facts and Figures’ CCRC, at <https://ccrc.gov.uk/facts-figures>.

\(^3\) For a personal account of a miscarriage of justice, see for example P. Armstrong and M. E. Tynan, \textit{Life after Life: A Guildford Four Memoir} (2017). See also S. Poyser et al., \textit{Miscarriages of Justice: Causes, Consequences and Remedies} (2018).

\(^4\) Royal Commission on Criminal Justice, op. cit., n. 1, p. 187.

\(^5\) J. Arkinstall, ‘Unappealing Work: The Practical Difficulties Facing Solicitors Engaged in Criminal Appeal Cases’ (2004) \textit{1 JUSTICE J.} 95, at 102.

\(^6\) C. Hoyle and M. Sato, \textit{Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission} (2019).

\(^7\) D. Newman and L. Welsh, ‘The Practices of Modern Criminal Defence Lawyers: Alienation and Its Implications for Access to Justice’ (2019) \textit{48 Common Law World Rev}. 64; R. Dehaghani and D. Newman, ‘The Crisis in Legally Aided Criminal Defence in Wales: Bringing Wales into Discussions of England and Wales’ (2021) \textit{41 Legal Studies} 234.

\(^8\) L. Welsh, ‘The Effects of Changes to Legal Aid on Lawyers’ Professional Identity and Behaviour in Summary Criminal Cases: A Case Study’ (2017) \textit{44 J. of Law and Society} 559.
Though definitions vary, psychologists ‘generally agree that cognition and emotion are intertwined’.9 In law, emotions have been thought to interfere with rational judgment, resulting in emotional matters being ‘stifled, overlooked or rejected’.10 Yet, recent years have seen growing interest in the emotional work of lawyers in criminal courts. Flower, Gunby and Carline, and Roach Anleu and Mack, for example, have demonstrated the important role that emotions play in lawyers’ work, including the labour involved in managing emotionally charged relationships,11 highlighting an erroneous dichotomy between emotions and professional rationality.12 While research examining emotions in criminal practice has tended to focus on the courtroom,13 there is also a burgeoning body of work on the emotional effects of financial constraints, including Dehaghani and Newman’s work on lawyers’ resilience,14 Thornton’s study on morale,15 Tata’s analysis of defence lawyers’ frustrations,16 and Newman and Welsh’s research on alienation.17 It is increasingly understood that emotion is inherent in all human behaviour and that recognizing the role of emotions in legal practice could enhance perceptions of fairness in the criminal process, contra the traditional conception of law as valuing rationality above emotionality.18 By explicitly connecting structural factors to emotions, this article builds on the literature on emotions in legal practice, shedding further light on the indirect effects of financial constraints and underlining the importance of positive relationships for sustaining morale. Our central argument is that both financial and emotional factors are significant drivers in declining legal aid lawyer involvement in CCRC casework and that these factors interact, amplifying the problem.

We begin by briefly explaining how the CCRC operates, before outlining the research from which the data are drawn and reviewing literature on lawyers and legal aid in England and Wales. Data from interviews with lawyers is then presented in two parts. The first examines financial factors behind the decline in legal representation; the second examines emotional factors. The article closes by discussing the relative significance of financial and emotional factors and overlaps between the two. It concludes that while financial factors related to legal aid are significant drivers of declining legal representation, they combine with emotional factors to further reduce the supply of legal advice, exacerbating problems of sustainability in this specialized area of practice.

9 S. Roach Anleu and K. Mack, Judging and Emotion: A Socio-Legal Analysis (2021) 5.
10 L. Flower, Interactional Justice: The Role of Emotions in the Performance of Loyalty (2020) 3.
11 Id; C. Gunby and A. Carline, ‘The Emotional Particulars of Working on Rape Cases: Doing Dirty Work, Managing Emotional Dirt and Conceptualising “Tempered Indifference”’ (2020) 60 Brit. J. of Criminology 343; Roach Anleu and Mack, op. cit., n. 9.
12 C. Gunby, ‘Interactional Justice: The Role of Emotions in the Performance of Loyalty. By Lisa Flower (Routledge, 2020, 220pp., £36.99 pb)’ (2021) 61 Brit. J. of Criminology 1689.
13 Flower, op. cit., n. 10; Gunby and Carline, op. cit., n. 11; Roach Anleu and Mack, op. cit., n. 12.
14 R. Dehaghani and D. Newman, ‘Criminal Legal Aid and Access to Justice: An Empirical Account of a Reduction in Resilience’ (2022) 29 International J. of the Legal Profession 33.
15 I. Thornton, ‘Is Publicly Funded Criminal Defence Sustainable? Legal Aid Cuts, Morale, Retention and Recruitment in the English Criminal Law Professions’ (2020) 40 Legal Studies 230.
16 C. Tata, ‘“Ritual Individualization”: Creative Genius at Sentencing, Mitigation, and Conviction’ (2019) 46 J. of Law and Society 112.
17 Newman and Welsh, op. cit., n. 7.
18 S. Roach Anleu et al., ‘The Emotional Dimension of Judging: Issues, Evidence, and Insights’ (2016) 52 Court Rev. 60. See also C. Tata and F. Jamieson, ‘Just Emotions? The Need for Emotionally-Intelligent Justice Policy’ (2017) 5 Scottish Justice Matters 32.
The article thus adds weight to existing arguments about the impact of legal aid cuts on criminal defence lawyers and access to justice. Additionally, it demonstrates that, while all criminal defence services have suffered negative consequences resulting from funding cuts, different specialisms have suffered in different ways. In (post-)appeal casework, financial constraints have left firms particularly vulnerable to market contraction because it is one of the least profitable areas of defence practice. Meanwhile, low success rates (in terms of having a conviction overturned), managing clients who have reached the final stage of the criminal justice process, and feelings that criminal defence lawyers are not trusted or respected compound the emotional stresses caused by financial difficulties.

2 | THE CCRC

The CCRC is an inquisitorial body with broad powers to investigate cases where a miscarriage of justice has potentially occurred. It responds predominantly to requests to review cases from convicts and/or their lawyers, made either using the CCRC’s Easy Read application form or by letter. The application form may be completed by a self-represented applicant or by someone else on behalf of an applicant (a lawyer, friend, or campaign group, for example). Once a form has been received, the CCRC determines whether the issues raised require investigation, and the extent of investigation needed to determine whether there is a ‘real possibility’ that the Court of Appeal would not uphold the decision. The CCRC notifies applicants and/or their representatives about its avenues of investigation, and considers representations, but – as an independent body – does not represent either side in the adversarial process. If it determines that there is such a real possibility, the CCRC refers the case to the Court of Appeal, which must hear it. Few applications result in a referral to the Court of Appeal, but those that do have a good chance of the original decision being overturned.

The CCRC’s remit is to ensure the safety of convictions, rather than guaranteeing that offenders are found guilty and the innocent acquitted. In this sense, it operates primarily as a ‘quality control mechanism’ concerned with ‘fairness of process’ more than ‘fairness of outcome’. By independently examining potential miscarriages of justice, the CCRC plays a critical role in safeguarding the integrity of state action in criminal justice. However, according to Naughton, its approach fails to recognize that ‘procedural rules may cause miscarriages of justice’ or that the factually innocent ‘can be wrongly convicted even in the absence of any violations of due process’.

For Naughton, the CCRC’s operational remit is incompatible with ‘the public belief that...”

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19 R. Vogler et al., *The Criminal Cases Review Commission: Legal Aid and Legal Representatives. Final Report* (2021), at <https://sro.sussex.ac.uk/id/eprint/99153/1/210420_CCRC_FinalReport%20%281%29.pdf>.

20 See CAA, ss. 17–19.

21 Occasionally, the Court of Appeal asks the CCRC to investigate a case under Section 15 of the CAA.

22 CAA, s. 13. See *R v. Criminal Cases Review Commission ex parte Pearson* [1999] EWHC Admin 452.

23 S. Roberts, ‘Post-Conviction Review in England and Wales: Perpetuating and Rectifying Miscarriages of Justice’ in *Counter-Terrorism, Constitutionalism and Miscarriages of Justice*, eds G. Lennon et al. (2018) 249.

24 M. Naughton, ‘The Criminal Cases Review Commission: Innocence versus Safety and the Integrity of the Criminal Justice System’ (2012) 58 *Criminal Law Q.* 207, at 222.

25 M. Naughton, ‘Introduction’ in *The Criminal Cases Review Commission: Hope for the Innocent?*, ed. M. Naughton (2012) 1, at 3.

26 Naughton, op. cit., n. 24, p. 223.
it exists to help potentially innocent victims to overturn their wrongful convictions. The CCRC refers cases where either previously unargued procedural issues or new evidence point to a real possibility of a wrongful conviction.

Applications to the CCRC have increased from around 1,000 per year between 2006 and 2011 to around 1,500 per year between 2012 and 2019. Over the same period, the CCRC noted an increase in the proportion of unrepresented applicants. Figures from 2019/2020 suggest that almost 93 per cent of applications were made without the help of a lawyer, up from a historic level of around 70 per cent. Given that legally represented applications are more likely to proceed to full review and be referred to the Court of Appeal, this decline in representation is concerning. While the CCRC welcomes unrepresented applicants (and has arguably encouraged them through outreach programmes and the introduction of the Easy Read application form), it has also raised concerns about the increasing proportion of applicants without legal representation. Both lawyers and CCRC staff have suggested that lawyers tend to prepare applications that are more focused and better structured, and CCRC staff appear to value the 'sifting' work that lawyers perform in filtering out unmeritorious cases. Thus, not only are applicants more likely to have their case accepted for review with a lawyer's assistance, the CCRC also benefits from the efficiency that legal representatives bring to the process. As such, the withdrawal of (good) lawyers from this area of practice has the potential to further stretch the CCRC's resources, potentially making miscarriages of justice harder to identify and rectify.

Worryingly, as the number of unrepresented applications has increased, the CCRC has suggested that the quality of legally represented applicants has fallen. This perceived deterioration was based on the view that legal representation has become less comprehensive in recent years and that lawyers are less likely to commission expert evidence than in the past (increasing burdens

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27 Naughton, op. cit., n. 25, p. 3.
28 Vogler et al., op. cit., n. 19; CCRC, Annual Report and Accounts 2018/19 (2019), at <https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxoidnrmkgl4/uploads/sites/5/2021/05/CCRC-Annual-Report-and-Accounts-2018-19_WEB-Accessible.pdf>.
29 CCRC, Annual Report and Accounts 2019/20 (2020), at <https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxoidnrmkgl4/uploads/sites/5/2021/04/CCRC-2329571-v1-CCRC_Annual_Report_and_Accounts_2019-20_Final_for_web.pdf>.
30 All applications undergo initial screening for eligibility and issues raised. Cases that proceed to the second stage undergo full investigation/review for potential referral to the Court of Appeal. At both stages, case review managers and Commissioners can be involved, depending on the nature of the case.
31 Hodgson and Horne, op. cit., n. 29; Hoyle and Sato, op. cit., n. 6.
32 See Ministry of Justice, Tailored Review of the Criminal Cases Review Commission (2019), at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777176/tailored-review-of-the-criminal-cases-review-commission.pdf>.
33 CCRC, op. cit., n. 29.
34 Vogler et al., op. cit., n. 19.
35 Id. Many applications to the CCRC are made by self-representing people who have not yet exhausted traditional avenues of appeal and are, in the absence of exceptional circumstances, therefore prima facie ineligible for review: J. Hodgson et al., The Criminal Cases Review Commission: Last Resort or First Appeal? (2018), at <https://warwick.ac.uk/fac/soc/law/research/centres/cjc/news/65867_law_a4_report_1.pdf>. Nonetheless, CCRC time spent checking such applications places demand on its resources.
on the CCRC’s resources). However, opinions about the quality of legal casework were not universally held. Though lawyers also expressed concerns about declining quality in the face of funding cuts (see below), data across the whole study were inconclusive on the issue of quality. It is possible that, by encouraging people to apply regardless of representation, the overall quality of applications received has declined. Indeed, it appeared that applicants without legal representation were much more likely to be deemed ineligible for review than those with legal representation. This could be because lawyers prepare better applications, or because lawyers ‘cherry pick’ the strongest cases. In fact, the parameters set by the Legal Aid Agency (LAA) effectively require lawyers to pursue only strong cases (see below). Even if the greater success rate for legally represented applicants were explained by cherry picking alone, this sifting work was valued by CCRC staff and – perhaps – helped to focus the CCRC’s resources on the most egregious cases.

3 | LAWYERS AND LEGAL AID TRENDS

Reductions in the availability of publicly funded representation have been sustained since the 1990s and accelerated in the twenty-first century in the context of austerity narratives. Driven by efficiency and cost saving, fixed fees for legally aided defence work were reintroduced in the 1990s, which Young and Wall claimed would lead to hurried, routinized practices. Tata and Stephen demonstrated the realities of this shift, finding that lawyers felt pressure to deal with cases in routine ways, spent less face-to-face time with clients, and placed greater responsibility on unqualified staff. According to Sommerlad, the structures imposed by fixed fees created ‘an irresistible pressure towards routinized justice’. More recently, Welsh’s work showed that standardized fees incentivized lawyers to work less on cases, noting that ‘the payment system can place lawyers in a position where they feel it necessary to compromise their duties towards clients’. Thornton, and Dehaghani and Newman, found similar patterns in studies across England and Wales.

Alongside franchising – established via the development of government contracts to provide legally aided services in the 1990s – the shift to fixed fees reflected state prioritization of ‘economy

36 Vogler et al., op. cit., n. 19. CCRC staff were divided about who should obtain/fund expert reports. In 2021, the CCRC implemented a new policy on this issue: CCRC, ‘Casework Policies’ CCRC, at <https://ccrc.gov.uk/casework-policies>.
37 Vogler et al., id.
38 Id.
39 There is currently no data on the number of people who sought, but were refused, legal advice in relation to a potential (possibly unmeritorious) CCRC application but nonetheless proceeded with the application.
40 R. Young and D. Wall, ‘Criminal Justice, Legal Aid and the Defence of Liberty’ in Access to Criminal Justice: Legal Aid, Lawyers, and the Defence of Liberty, eds R. Young and D. Wall (1996) 1, at 12.
41 C. Tata and F. Stephen, ‘“Swings and Roundabouts”: Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Case Outcomes?’ (2006) 2006 Criminal Law Rev. 722. See also A. Gray et al., ‘Controlling Lawyers’ Costs through Standard Fees: An Economic Analysis’ in Young and Wall (eds), id., p. 192; F. Stephen et al., ‘Incentives, Criminal Defence Lawyers and Plea Bargaining’ (2008) 28 International Rev. of Law and Economics 212.
42 H. Sommerlad, ‘Reflections on the Reconfiguration of Access to Justice’ (2008) 15 International J. of the Legal Profession 179, at 183.
43 Welsh, op. cit., n. 8, p. 574.
44 Thornton, op. cit., n. 15; Dehaghani and Newman, op. cit., n. 7.
and efficiency over adversarial criminal justice principles.\(^{45}\) Since the 2008 financial crisis, legal aid has been subject to government austerity agendas and, over the past decade, policy changes have dramatically altered the context for undertaking criminal legal aid work. The enactment of LASPO created the LAA and introduced cuts to legal aid that meant that fewer people could access legal advice.\(^{46}\) Shortly thereafter, fees payable to expert witnesses were capped at lower rates, and fees for conducting criminal defence work were cut by 8.75 per cent. Even before these changes, many firms had withdrawn from publicly funded CCRC casework and, of those that continued, very few were able to do significant amounts of work in this area following recent changes to legal aid.\(^{47}\)

While the image of the legal profession had already changed from ‘service-led’ to ‘self-serving’,\(^{48}\) funding changes further challenged lawyers’ professional identity by reducing their ability to make autonomous decisions\(^{49}\) and transforming the ‘structure, culture and ethos of the profession’.\(^{50}\) As Welsh concluded, ‘changes to legal aid have challenged the professional paradigm of legally aided work’\(^{51}\) as ‘the gap between ideals of symbolic, liberal approaches to justice and the reality of assembly-line approaches … become apparent’.\(^{52}\) Given the traditionally strong justice motivations of legal aid lawyers,\(^{53}\) the emergence of this gap, alongside the decline in pay and tarnished professional image, may have implications for legal aid lawyers’ morale.

Morale is widely recognized as an issue across criminal defence and as a contributing factor to the ageing duty solicitor population.\(^{54}\) Drawing on interviews with defence lawyers, Thornton concluded that ‘a combination of cuts to legal aid, the resulting working patterns and low morale has led to a position where the criminal defence profession … is unsustainable’.\(^{55}\) In doing so, he distinguished between the direct and indirect effects of cuts on morale, explaining that together they produce an environment that is ‘progressively more unpleasant to work within’.\(^{56}\) Graffin similarly found that cuts to legal aid indirectly contributed to low morale among asylum lawyers, via heavier caseloads and capacity issues. His participants described, for example,

\(^{45}\) Welsh, op. cit., n. 8, p. 564.
\(^{46}\) The operation of the LAA is discussed later. LASPO reduced the availability of legal aid in civil cases: see J. Organ and J. Sigafoos, The Impact of LASPO on Routes to Justice (2018), at <https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>; T. McGuinness, Legal Aid: The Review of LASPO Part 1 (2020), at <https://researchbriefings.files.parliament.uk/documents/CBP-8910/CBP-8910.pdf>.
\(^{47}\) S. Bird, ‘The Inadequacy of Legal Aid’ in Naughton (ed.), op. cit., n. 25, p. 134.
\(^{48}\) D. Newman, ‘Are Lawyers Alienated Workers?’ (2016) 22 European J. of Current Legal Issues 134.
\(^{49}\) Sommerlad, op. cit., n. 42; Newman and Welsh, op. cit., n. 7.
\(^{50}\) Sommerlad, id., p. 182. See also J. Thornton, ‘The Way in which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study’ (2019) 46 J. of Law and Society 559.
\(^{51}\) Welsh, op. cit., n. 8, p. 560.
\(^{52}\) Id., p. 574.
\(^{53}\) H. Sommerlad, “I’ve Lost the Plot”: An Everyday Story of Legal Aid Lawyers’ (2001) 28 J. of Law and Society 335; E. Cooke, ‘The Working Culture of Legal Aid Lawyers: Developing a “Shared Orientation Model”’ (2022) 31 Social & Legal Studies 704.
\(^{54}\) On the ageing population, see M. Fouzder, ‘Criminal Defence Solicitors Facing Extinction’ Law Society Gazette, 17 April 2018, at <https://www.lawgazette.co.uk/practice/criminal-defence-solicitors-facing-extinction/5065695.article>.
\(^{55}\) Thornton, op. cit., n. 15, p. 230.
\(^{56}\) Id., p. 231.
‘feeling hopeless, not being able to do anything useful, and being overwhelmed’. Such negative feelings often related to a funding environment that was ‘stretching [lawyers] much further than before’ and challenging the professional identities of those driven by a desire to ‘do something’. While funding was one factor considered by Graffin, in this article we place funding cuts front and centre, exploring their impacts on lawyers and, crucially, the effect of these impacts on the availability of public representation in potential miscarriage of justice cases. By examining the links between, and relative significance of, financial and emotional factors, we also build on Thornton’s argument that finance is a direct and indirect driver of morale, recruitment, and retention problems, while raising intersecting issues of relationships and trust. The article thus responds to Newman and Welsh’s call for more scholarship examining how funding cuts have influenced different aspects of defence work.

4 | RESEARCHING THE DECLINE OF LEGAL AID WITH LAWYERS

This article is based on data from interviews with 45 lawyers conducted between November 2019 and July 2020 as part of a larger mixed methods project on the impact of legal aid cuts in applications to the CCRC. Among the lawyers interviewed were five paralegals/caseworkers, four trainee/recently qualified solicitors, 11 solicitors/legal executives, 16 partners/firm directors, and nine barristers/Queen’s Counsel (QCs). All bar two had some experience of CCRC casework, though they spent differing proportions of their time on CCRC cases. Some worked in departments dedicated to appellate work; others did CCRC work alongside other areas of practice, including general crime, public law, and prison law.

We initially made use of existing contacts and snowball sampling, gradually becoming more purposive as we sought to build a diverse sample in terms of experience, funding, and work practices in order to include different perspectives and nuance. The majority who responded to our invitation agreed to be interviewed, though in some cases it was impossible to arrange an interview because of competing time demands (reflecting some of the challenges in conducting research with time-poor publicly funded defence lawyers). While our invitation email explained that we wanted to speak to people with experience of publicly funded CCRC casework, encouraging self-selection within firms, it was not always possible to know the extent of a participant’s experience, or how their work was funded, ahead of interview. Our participants therefore had a wide variety

57 N. Graffin, ‘The Emotional Impacts of Working as an Asylum Lawyer’ (2019) 38 Refugee Survey Q. 30, at 50. See also J. Wilding, The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation (2021).
58 Graffin, id., p. 51.
59 Thornton, op. cit., n. 15.
60 Newman and Welsh, op. cit., n. 7.
61 Vogler et al., op. cit., n. 19.
62 We included the two inexperienced participants to explore whether their viewpoints aligned with those of others. Even those who had little/no experience of CCRC casework viewed it as particularly specialized, lending credence to other interviewees’ perspectives. However, none of the material quoted in this article derives from the two participants without experience of CCRC casework. These lawyers did not indicate why they had not pursued a specialization in appellate work.
63 The CCRC provided a list of firms that had sent applications, but this did not differentiate between firms operating on a publicly or privately funded basis. Most firms’ websites were unclear about whether they accepted potential CCRC cases via legal aid.
64 Sommerlad, op. cit., n. 53.
of experience of CCRC casework; some had withdrawn from such work, or only did it on a private or pro bono basis, in addition to the two people who had no personal experience at all.

Interviews were semi-structured and most lasted between 25 and 70 minutes. Predictably, the shortest interviews were with participants who had not worked on CCRC cases. The interviews were framed around experiences of conducting CCRC casework, interviewees’ opinions about legal aid policy, the effects of funding policy in practice, and suggestions for change (both in relation to CCRC practices and funding). We focused on appellate-stage work, so did not seek to distinguish between experiences of Crown and magistrates’ court casework with interviewees, but the examples of casework given by interviewees all related to Crown court matters. Prior to March 2020, most interviews were conducted in person at the participant’s workplace or a café of their choosing. However, from March 2020, all data collection took place online or by phone due to the COVID-19 lockdown. The switch to remote interviewing presented both challenges and opportunities. In some cases, it was easier to schedule interviews with participants working from home. However, in other cases, the pandemic increased workloads so that people who wanted to participate were unable to do so. While we did not find rapport or the content of the data to be significantly affected by the move to remote interviewing, it may have been impacted by a general loss of context and/or visual cues, which in some cases may have led to nuances being misinterpreted.

Recognizing that CCRC work is a relatively niche area of practice and that participants may therefore be more recognizable, we took a cautious approach to anonymization. All participants were sent a copy of their anonymized transcripts and were given the opportunity to edit/redact the data. Anonymized transcripts were then coded thematically in NVivo. An initial set of codes was created based on existing literature and our research questions, but was expanded iteratively to reflect the interviews’ content. In the analysis that follows, we present the outcomes of that analysis in two parts, the first focusing on financial factors affecting lawyers involved in CCRC work and the second on emotional factors. First, to assist with context, we explain the nature of legal aid in CCRC casework.

5 | LEGAL AID IN CCRC CASEWORK

All aspects of publicly funded legal advice are managed by the LAA, which contracts firms to provide legal services, subject to audit requirements relating to practice areas. Unlike other areas of defence practice where work is paid via standardized fees, CCRC (and so-called second-opinion appeal) casework is paid at hourly rates. Initial advice on possible grounds for appeal is funded through a legal aid Representation Order, which pays standard fees per case to litigators (usually solicitors) in magistrates’ courts, and graduated fees to litigators and advocates (usually barristers and solicitor-advocates) in Crown court cases. If no grounds of appeal are identified at the conclusion of a case, or an appeal is unsuccessful, the Representation Order falls away. If the convicted person seeks a second opinion in relation to an appeal, or to pursue a case to the CCRC, they must seek representation through an alternative funding scheme, known as Advice and

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65 See Welsh, op. cit., n. 8. In magistrates’ court casework, lawyers are paid at hourly rates if the case requires so much work that an ‘escape fee’ threshold is reached.

66 Under graduated fees, case fees are calculated according to the seriousness of the offence and the amount of evidence involved: see LAA, Crown Court Fee Guidance (2020), at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1059673/CCFG_-_Version_1.13_-_March_22.pdf>.
Assistance. Under that scheme, a solicitor can claim up to £456.25 for each potential application – around ten hours of work – after which, unlike other areas of criminal practice, they must apply for an extension, requesting and justifying all additional hours to the LAA. At 2021 rates, solicitors working on CCRC cases receive £45.35 per hour in London and £42.80 per hour outside the capital (plus £24.00 per hour for travel/waiting, £3.38 per letter, and £3.52 per phone call). These rates are 8.75 per cent lower than they were before 2014, when the rates were already prohibitively low\(^6\) and already acted as a disincentive for lawyers.\(^6\) Meanwhile, barristers can either be paid at a junior rate of £80 per hour or at a silk rate of £120 per hour.

Appeal and CCRC work are also distinct from other areas of criminal defence in the way in which payments are made to firms. While firms are able to make interim claims for disbursements in Crown (and some magistrates’) court cases,\(^6\) including for expert witness costs, in second-opinion appeal and CCRC cases the solicitor can only claim once a case concludes. Consequently, firms may not receive payment for several years, forcing them to leave large sums of money tied up in appeal cases.\(^7\) Further enhanced rates cannot be claimed for particularly complex cases, unlike in other accredited areas of defence practice.\(^7\)

Under the current system, contracted firms must assess cases according to merits and means before accepting them via public funding. To provide publicly funded Advice and Assistance, solicitors initially conduct a merits test to determine whether there is justification for conducting casework.\(^7\) This delegated assessment of eligibility for funding differs from other areas of criminal defence practice. In the police station, lawyers are not required to perform a merits or means assessment, while eligibility testing in court cases is assessed by the LAA on the basis of an application often completed by a lawyer. The merits (or ‘sufficient benefit’) test assesses whether the benefits of legal advice and assistance justify the resources invested. As Bird explains, ‘no work should be done under the scheme, beyond taking initial instructions and advising the client of his or her options, unless, on the evidence available at the time, the client’s case involves a legal issue worthy of investigation’.\(^7\) To be eligible for publicly funded advice, an applicant also needs to pass the means test by having a ‘disposable’ income not exceeding £99 per week (deducting for dependants but including partner income)\(^7\) and capital/savings not exceeding £1,000 (more for those with dependants).

Though contracted firms have devolved power to decide if Advice and Assistance can be granted, they are subject to financial audits, quality audits, and peer review by the LAA, which carry significant risks for firms.\(^7\) While all criminal practice is regularly audited, CCRC casework appears to be especially vulnerable because if LAA auditors are not satisfied that there is

\(^{6}\) Bird, op. cit., n. 47.
\(^{6}\) Arkinstall, op. cit., n. 5, p. 98.
\(^{6}\) The Criminal Legal Aid (Remuneration) Regulations 2013.
\(^{7}\) Bird, op. cit., n. 47; Arkinstall, op. cit., n. 5.
\(^{7}\) See LAA, ‘VHCCs: Very High Cost (Criminal) Cases’ Gov.uk, 1 June 2014, at <https://www.gov.uk/guidance/high-cost-cases-crime>.
\(^{7}\) See LAA, ‘Standard Crime Contract 2017’, Gov.uk, 21 July 2016, at <https://www.gov.uk/government/publications/standard-crime-contract-2017>.
\(^{7}\) Bird, op. cit., n. 47, p. 136. Solicitors should reject cases where there is ‘no reasonable prospect’ of meeting CCRC criteria.
\(^{7}\) The £99-a-week income ignores the costs of rent and bills and is, therefore, not ‘disposable’.
\(^{7}\) M. Newby, ‘Can’t Find an Appeal Lawyer? Blame the MoJ’ The Justice Gap, 16 July 2015, at <https://www.thejusticgap.com/cant-find-an-appeal-lawyer-blame-the-moj/>. 

sufficient benefit in the first place, ‘the entire claim could be disallowed’,\textsuperscript{76} creating uncertainty for firms. Additionally, while LAA auditors appear ‘uncomfortable with auditing appeal files, as they come across them very rarely’ and ‘do not always appear to understand the nature of cases’,\textsuperscript{77} they nonetheless have the power to claim money back from solicitors by retrospectively disallowing time spent on particular activities, rescinding extensions of the upper fee limit, or making post-hoc revisions to an agreed number of hours for work. That legally aided criminal practice is made precarious by financial uncertainty is common across different areas of practice. However, the fact that in CCRC cases most decisions on eligibility for, and the extent of, necessary funding are delegated to lawyers appeared to intensify the pressures associated with funding decision making for practitioners with whom we spoke. As one participant (who now only accepted cases on a privately funded basis) explained: ‘It was [the fact that], even when you’ve made the decision and you felt that the tests had been met, that they were then coming in saying, “You were wrong to make that judgment”’ (R32).

6 | FINANCIAL FACTORS

Of the 43 participants who had experience of CCRC casework, 13 no longer accepted potential CCRC cases and five said that they would only take on cases on a privately funded basis\textsuperscript{78} (though some explained that they would make exceptions for cases that had straightforward grounds for appeal, particularly interesting cases, or cases related to an area of specialism). Exceptions were also made where the firm had previously dealt with the case, either at trial or appeal. Nonetheless, it was striking that 18 participants (42 per cent) were no longer willing and/or able to accept potential CCRC cases funded through legal aid.

Key reasons for reducing the number of CCRC cases taken on or withdrawing from legally aided CCRC work were all either directly or indirectly related to funding. Lawyers described CCRC work as unprofitable, financially unviable, and loss making. While they emphasized different issues – and some noted that appeal and CCRC work had never been profitable – participants were unanimous that legal aid payment for CCRC work was too low. Some explained that payment rates had become a virtually insurmountable barrier to practice:

\begin{quote}
You can’t do this sort of work effectively on the rates of pay that you get for legal aid, which haven’t increased for 20 years or so. In fact, they’ve declined. (R28)

I mean, it’s ridiculous. You can’t … That wouldn’t even cover the cost of a paralegal. Having a paralegal in London costs more than £45 an hour. (R16)

Generally, we are looking at some very complicated cases, and yet we’re supposed to do it for a ridiculous rate of pay. It’s just … It’s impossible, to be honest. (R7)
\end{quote}

As above, the rate of remuneration was not only considered low in and of itself, but also in relation to the complexity of CCRC casework. Most participants believed that CCRC work – which they

\textsuperscript{76} Bird, op. cit., n. 47, p. 144.

\textsuperscript{77} Id., p. 143.

\textsuperscript{78} All five of these participants had previously accepted publicly funded CCRC cases but were no longer willing and/or able to do so.
viewed as complex and high stakes – should be done by skilled and experienced lawyers. Yet, they also indicated that, in most cases, the rates were insufficient to ensure this:

If it’s 1,100 billable hours a year, that’s £44,000 a year that you’re going to bill as a CCRC legal aid lawyer. Now £44,000 a year is not obviously going into your pocket – that is what you’re generating as a lawyer. Even on the most conservative estimate … your lawyers need to generate at least twice what you pay them to break even … That means that the maximum I could pay somebody on the current legal aid rates is £22,000 a year. That’s just a joke. (R8)

£45 doesn’t really cover your costs when you’re doing the case with a senior solicitor. You might be paying them £40,000 to £45,000 or whatever, and when people have been qualified for 20 years, that’s not a big salary either. (R10)

My boss, who is god knows how many years qualified and a specialist criminal appeal lawyer, gets the same £45.35 an hour as I get as a paralegal … It’s absolutely crazy because it does encourage the paralegalization of the legal profession. (R24)

Representatives of some firms explained that they could only afford to pay people at paralegal/trainee rates, or employ them as consultants, preventing lawyers with the appropriate skills and experience from working on CCRC cases. This deskilling and paralegalization was similar to that documented in other areas, but was something that participants found especially troubling given the high stakes of CCRC work. One participant, who had withdrawn from legally aided CCRC casework over a decade ago, explained that it had become ‘uneconomic’ to work to the necessary quality. Asked about the rates, they said:

They’re having a joke. It’s just not possible. I don’t think criminal practice in general is possible. I mean, I pulled out when they were proposing the first of many series of cuts, and they’ve cut and cut and cut, seven or eight times since then. And even when they started that, the rates hadn’t gone up for about … I can’t remember how many years. ’94, I think, was the last time they went up properly – ’94. And I pulled out 14 years after that … 14 years of making it more efficient, creating greater economies, and trying to hang on to any semblance of quality. (R16)

Lawyers who were still providing a legally aided service also commented that they would not be able to afford to do so indefinitely, and some suggested that if things did not improve, they too would stop. Even firms where CCRC work was done by paralegals struggled to make it financially viable. As one partner put it, ‘If rates don’t improve, there’s going to be some point in the next 12 to 18 months where we’ll stop taking on publicly funded cases’ (R8).

While, historically, low-paid CCRC work could be subsidized by other areas of practice, participants explained that cuts across criminal defence had reduced possibilities for firms to take a

79 D. Newman and T. Smith, ‘Alienated Advocates: Applying Marx’s Labour Theories to Criminal Legal Aid’ (2017) 75 Socialist Lawyer 26; Newman and Welsh, op. cit., n. 7.
80 Two senior partners identified challenges in recruiting and retaining staff on low wages, limiting their firm’s capacity for CCRC work. Similar problems were reported in the junior bar, where the rates were insufficient to attract and retain good junior lawyers who could build specialism in the area.
'swings-and-roundabouts’ approach.81 In this sense, the 8.75 per cent cut to solicitors’ fees affected CCRC work directly (by reducing the hourly rate) and indirectly (by reducing opportunities to subsidize the work). Though it was difficult to separate the effects of the 8.75 per cent cut from other factors, and lawyers themselves were sometimes unclear when changes had occurred, the interviews presented clear illustrations of how financial difficulties surrounding CCRC casework worsened around 2014, including redundancies, firm closures, and decisions to withdraw from publicly funded CCRC work.

The financial unviability of CCRC casework was further exacerbated by the fact that large portions of the labour went unpaid.82 Though this complaint is raised across criminal defence practice, in CCRC casework the concerns were exacerbated by the particulars of LAA funding arrangements, including the unpaid labour involved in making funding applications and applying for extensions, the inability to claim interim payments, and bureaucratic difficulties associated with extending initial funding limits. Lawyers also noted particular difficulty with funding the preliminary filtering work needed to determine whether to accept instructions in a case because the LAA’s merits test necessitated a demonstration that there was sufficient benefit in taking on a case before having read it.83 One experienced solicitor explained:

It’s almost like a chicken-and-egg situation, because you’ve got to be able to say you’re satisfied that they’ve got reasonable prospects of an appeal before you take it on, but then how can you be satisfied there are reasonable prospects without spending, in some cases, quite a bit of time on considering a case before you even get to the stage of saying ‘Yes, I can tick the box to say yes, this justifies spending public funds on preparing either an appeal or CCRC case’? (R29)

In CCRC work, this problem was intensified by the high proportion of requests that failed to pass the merits test, for which there was ultimately no funding. While some participants had begrudgingly accepted unpaid filtering work as ‘a necessary evil’ (R40), others cited the inability to fund initial filtering work as a reason for withdrawing from publicly funded CCRC casework.

Lawyers reported working unpaid because of the LAA’s unwillingness to grant the number of hours required and difficulties extending funding above the £456.25 limit.84 They explained that the LAA often restricted how many hours were paid, creating a situation where diligent lawyers ended up working for free. In relation to LAA administration, participants explained:

If you put a request into the [LAA], you know you’re not going to get the level of funding you require to do the piece of work. They may grant you two hours, but you

81 A ‘swings-and-roundabouts’ logic had been relied on to justify the imposition of standardized fees in areas of criminal practice, but this logic is no longer valid in relation to publicly funded defence services (if it ever was): see Tata and Stephen, op. cit., n. 41.
82 A minority of respondents (three of 43) had done CCRC work on a purely pro bono basis; however, many more reported doing large amounts of work unpaid.
83 Barristers recognized the difficulties facing solicitors, and some chambers had reportedly attempted to support solicitor firms with filtering work (which also proved financially unviable).
84 Some participants also noted a reluctance to pay QC rates, something that they found concerning given the complexity of CCRC work. One barrister withdrew from publicly funded appeal and CCRC work when they took silk because it became uneconomic. Another had restricted their caseload since taking silk for the same reason.
know it’s going to take you five. So, you find the time to do it, whether that’s weekends, evenings. (R17)

I probably get between eight and ten hours extra on a case where I say it’s got merits, to review it and write an advice, but it might take me 15 to 20 hours to get to that point. But there’s no way [the LAA]’s going to pay that unless it’s a very substantial case. So, I am always doing more work on a case than I’m going to get in terms of the hours. (R7)

It was also notable that many of the hours that lawyers worked unpaid were dedicated to client care. Lawyers may continue to do client care work despite lack of payment because they are aware of the importance of rapport in criminal defence practice. That this work is often unpaid does, however, undermine both the financial viability of the work and lawyers’ morale.

For some, the administrative burden of applying to the LAA outweighed the benefit of getting funding. Regardless of success, there was work involved in making these applications, and more work where lawyers had to challenge LAA decisions. It was therefore significant that this was also time for which lawyers were not paid, and time that, in long-running cases, could amount to many hours. Unpaid administrative tasks thus made the work less profitable and increased the financial pressure on firms. While all criminal defence lawyers conduct unpaid administrative work when they are uncertain about funding, standardized fee systems in other practice areas might mitigate that issue (as long as legal aid is granted eventually). One solicitor described the challenges as follows:

[M]y view is that the amount of time it takes just to do the extensions is probably … I mean, once you get the money through, it probably pays for the time that you spent getting the extension itself, not doing the actual work that you’ve got the extension to do. (R45)

Another participant described the process of obtaining legal aid as ‘so burdensome in itself that it defeats the whole object of asking for further time’ (R31). This idea was reflected in other interviews in which participants suggested that it was sometimes better to get on with the work in the knowledge that it would remain unpaid rather than negotiating with the LAA over hours.

For many, unpaid work was also conducted after submitting an application to the CCRC because of the inability to claim interim payments. This meant that firms were unable to recoup costs before closing the file and had to carry the costs themselves for long periods of time. One senior solicitor explained the problems that this caused when it came to transcript fees:

You’ve got to, as a firm, have the capability or capacity to actually incur that cost, and be prepared to carry it for a period of 18 months or so before you can then bill it and get that money back … That is a real problem because … if I say we’ve got 200 cases, say 60 of those involve transcripts [costs] in excess of £1,000, then, obviously doing the sums, it’s a lot of money you’re carrying for a long period of time … We’re quite

85 This resonates with Tata and Stephen’s finding that client care often suffered when public funding was reduced: Tata and Stephen, op. cit., n. 41.
86 Dehaghani and Newman, op. cit., n. 14.
87 Welsh, op. cit., n. 8.
lucky because … we’re able to carry it to an extent, but there may come a time when we can’t. (R35)

As this example shows, the problem of interim payments was exacerbated when firms carried a large caseload, as well as by long waiting times at the CCRC. In this case, the solicitor estimated that the firm was owed between £50,000 and £60,000 in transcription costs, explaining that ‘[i]t’s really the upfront costs that is one of the biggest obstacles’ (R35). The same problem occurred in cases involving experts, where fees could be many thousands of pounds. Several participants pointed out that in cases involving experts, those fees constituted a large proportion of the bill, making the absence of interim payment particularly relevant:

The fee generally has to be paid within 30 days … I mean, [in] one particular case I’m thinking [of], … we spent … roughly about £8,000 and our bill was less than £1,000. And if you think you’ve got nine or ten different cases like that … that’s why a lot of firms have stopped. (R17)

Again, the problem was exacerbated where firms had large CCRC caseloads and, as the quote above suggests, this had forced some firms to reduce the number of CCRC cases that they accepted, or to withdraw from CCRC work altogether.

7 | EMOTIONAL FACTORS

Alongside the direct effects of the public funding system, the financial circumstances of undertaking legally aided CCRC work fed indirectly into lawyers’ decisions to withdraw by altering their working environments and emotional experiences of the work. In interviews, participants spoke with varying levels of candour about the emotions involved in CCRC work, but three key themes emerged: the emotional toll of the work itself, and in relation to funding; a perceived lack of trust and/or appreciation by different institutions and by the public; and frustrations with the restrictive nature of the appellate system and the way in which the CCRC operates, and resulting low success rates (in terms of referral for appeal). In this section, we explore these emotional components and consider how much they fed into decisions about withdrawing from CCRC work. While we attempt to highlight each factor separately below, it is often difficult to completely disentangle them.

While other areas of defence work have their own challenges, the lawyers with whom we spoke felt that CCRC work was especially demanding because of the difficulties associated with revisiting decisions that had already been made and identifying potential ‘red flags’ that might render a conviction unsafe, as well as the potentially serious consequences associated with miscarriage of justice cases. These attributes made the work very complex, leading our interviewees to understand CCRC work as highly demanding. One key factor that appeared to have an emotional impact on participants was thus the perceived discrepancy between remuneration and the high-stakes,

88 The CCRC disputes that long waiting times are normal, reporting that their 2021 figures indicated ‘less than 6% of cases over 2 years, over 80% of cases completed within 12 months, average review time less than 36 weeks’: CCRC Research Committee, CCRC Written Response to The Criminal Cases Review Commission: Legal Aid and Legal Representatives (2021) 4, at <https://legalaidandrepresentatives.files.wordpress.com/2021/06/response-to-sussex-university-june-2021-07-06-2021-1.pdf>.
complex work involved in CCRC cases. The feeling that CCRC work was not fairly remunerated was exacerbated by funding cuts, which one participant described as ‘a further indignity’ (R36). Another solicitor explained:

> It’s almost the principle of the fact that they feel they can cut you from £49.70 to £45.35 and still expect you to do the work. We still do the work because it’s not about the money. That’s not something the government really understand, I don’t think. (R10)

This quote exemplifies the feeling, expressed by several participants, that while financial issues were important, money was just one factor impacting their work. Indeed, the Justice Committee cite both poor levels of funding and mentally and emotionally draining work as contributors to the current recruitment and retention crisis in criminal legal aid work generally. 89

As mentioned above, 42 per cent of lawyers interviewed were no longer willing to accept publicly funded CCRC cases. It was also striking that, of the seven trainees and paralegals with whom we spoke, one had withdrawn from CCRC work for a training contract and two planned to move into other areas of law. 90 Another participant had withdrawn from CCRC casework after finishing their training contract, explaining that they had had concerns about targets and job security. While they did not explicitly explain what caused them to withdraw from CCRC work, it was clear that those concerns had been a factor:

> It was a concern to me, going forward, as far as actually continuing as a fee earner … Being salaried and justifying them paying me that salary when on paper I wouldn’t be justifying that salary – that would have been extremely stressful … because, at the end of the day, it’s far easier to cut a salary than to try and work out how to make a criminal department more profitable. (R23)

Several other participants reported having to diversify their caseload beyond appeal and CCRC work to meet billing targets. For junior practitioners looking to future careers, the large amounts of unpaid work and the unprofitability of appeal and CCRC work were evidently a concern:

> It would be a problem if someone more senior was doing [unpaid work] all the time … Because I’m [in] a paralegal role, I can do that without charging for it. But once I take that step up and come to taking my own cases, I won’t be able to do that sort of stuff. (R21)

Three of the eight junior practitioners interviewed referred to (present or future) billing pressures. Such concerns were substantiated by reported redundancies among staff specializing in CCRC work, as well as by comments from senior solicitors about the difficulties of running unprofitable departments. In the context of a succession crisis among publicly funded criminal defence

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89 Justice Committee, The Future of Legal Aid (2021) para. 27, at <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/70/7002.htm>.

90 Of the other four, one did not mention their intentions either way, one planned to stay in general crime, one intended to stay in CCRC work but had left in the past, and one intended to stay in CCRC work for now but expressed demoralization.
solicitors, the worries expressed by these junior practitioners were concerning. Barristers also noted the impact of low rates on perceptions of the financial security of appeal and CCRC work, which some suggested was deterring junior barristers from specializing in the area:

The really good juniors are not coming up, and really good junior solicitors, because they can’t deal with it. You know, they want to bring up a family, they want a solid career where they can see some salary structure or some wage structure. They say ‘F**k this game for a … I can’t see it. I want a family, I want to have a steady income and I want to be able to do it and I’m not going to be able to bring up a family doing this with any sort of guarantees. So, sorry, I’m off.’ (R22)

People have to earn a living. Particularly for juniors, there is just no financial incentive whatsoever. So, if you do this work, and you do it well, you’re going to do a lot of work on each case and you’re going to be woefully underpaid for it. (R13)

Among more senior practitioners, several described appeal and CCRC work as challenging and intellectually satisfying, reflecting previous research. That the work was important and intellectually stimulating helped to counteract its emotional toll. However, it was clear that participants were also demoralized by what they experienced as a lack of trust, respect, and appreciation. Thus, any benefit gained from the rewarding aspects of the work was counteracted not only by its demanding nature, but also by the lack of recognition that practitioners felt, reflected both in the way in which lawyers reported being treated by the public and other institutions, and by the financial constraints imposed by the LAA. As with participants in other studies, for some, the low remuneration rates on offer were symbolic of a general lack of appreciation and contributed to feelings of disappointment and dejection. Some junior practitioners also drew attention to the emotional strain of working for low rates given the long hours and high cost of training, highlighting the importance of connecting structural and emotional factors:

I’m not looking for sympathy, but sometimes I walk home from the train station at 9 pm at night, and I’ve got more work to do, and I’ve got a social life as well. All this sort of stuff … and I’m getting paid so little. (R21)

Why have I just paid 70 grand to then go and work at those legal aid rates? … So, quite frankly, CCRC stuff doesn’t appeal to me from a financial perspective because it’s a lot of work, a lot of investigative work … for fees that don’t reflect the work done. (R9)

Several participants emphasized their social justice motivations for doing appeal and CCRC work, stressing that it was not done for profit. Arguably, this represented another form of emotional labour for lawyers who – like participants in studies by Gunby and Carline and by

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91 Fouzder, op. cit., n. 54.
92 Arkinstall, op. cit., n. 5.
93 See for example Newman and Welsh, op. cit., n. 7.
94 Gunby and Carline, op. cit., n. 11, p. 345.
Cooke\textsuperscript{95} – sought to manage negative perceptions about the profession. Positive identities are routinely fostered among professionals conducting difficult work, via the cultivation of shared occupational ideologies that reframe stigmatized work, enabling negative associations to be downplayed and positive associations asserted.\textsuperscript{96} Lawyers conducting poorly paid appellate work may be similarly reliant on ideological reframing to make that labour emotionally sustainable. This may go some way towards mitigating the effects of both funding issues and other emotional challenges, but the overall sense among our participants was one of malaise.

The social justice motivation for doing appellate work was not something that lawyers felt that the LAA understood, given their hesitancy to agree funding. Lawyers had to manage not only the demands of the work on their well-being, but also their perceptions about how other institutions and the public viewed their work. Several participants suggested – more or less explicitly – that the LAA did not trust lawyers, noting problems in relation to extension requests and what were seen to be aggressive auditing practices. This stood out as a particular issue in CCRC casework due to the extent of delegated powers that lawyers possess in relation to funding. Lawyers appeared particularly indignant where they perceived that LAA staff had not respected their professional decisions:

\begin{quote}
You get someone at the [LAA] saying ‘I don’t think you need to do this’ or ‘I don’t think you need to do that’. And you’re, you know, ‘With all due respect, you’re not a lawyer, you don’t know anything about …’ (R10)

Say I need to pursue a line of enquiry, which will take me X number of hours, and someone comes back and says ‘No, it won’t’, then that’s highly objectionable because they’re telling me that they know better than me, and that’s just wrong. (R39)\textsuperscript{97}
\end{quote}

The LAA’s reluctance to grant funding not only had severe financial consequences, but also in practice impacted emotionally on lawyers, fostering a sense that they were not trusted or respected by the LAA. These emotional impacts also seemed to feed into a recruitment and retention crisis that appeared to be particularly acute in relation to CCRC casework.

Some participants also felt disrespected by the CCRC, usually as a result of limited communication, with more than one participant comparing the CCRC to a ‘black hole’.\textsuperscript{98} Lawyers found the perceived lack of communication frustrating, and in some cases thought that the CCRC was obstructive. While all publicly funded criminal defence lawyers engage with the LAA, lawyers conducting this casework must also engage with the CCRC, which operates entirely differently to the traditionally adversarial criminal justice process. Where lawyers had received communications from CCRC staff, some were disappointed by the quality of communication and, as the

\textsuperscript{95} Cooke, op. cit., n. 53.
\textsuperscript{96} Gunby and Carline, op. cit., n. 11, p. 345.
\textsuperscript{97} Expert witnesses reported similar concerns and frustrations around LAA procedures: see L. Welsh and A. Clarke, Legal Aid, Legal Representatives and Expert Witnesses: The Impact of Legal Aid Cuts on Expert Witness Instructions & Reports (2021), at <https://sro.sussex.ac.uk/id/eprint/99154/1/Report%202012%20May.pdf>.
\textsuperscript{98} At least ten participants complained about the lack of communication. Several others felt that the CCRC could improve in this area. The CCRC recently updated its communications policy, and publicly indicated its commitment to improvements in this area: see CCRC, op. cit., n. 36; CCRC, ‘CCRC Releases Official Response to the Westminster Commission Report’ CCRC, 2 June 2021, at <https://ccrc.gov.uk/news/ccrc-releases-official-response-to-the-westminster-commission-report/>. 
quotes below show, this had sometimes left them feeling that CCRC staff did not understand or respect lawyers’ role:

They said ‘If you keep sending further documents, it’s going to take longer’. And it’s like, ‘Yes, but you’re doing an investigatory process into a wrongful conviction … I’ve been instructed by a client. I’m not doing this stuff off my own back. This isn’t personal.’ I mean, maybe sometimes you have got your personal elements, but I’m not just doing this to waste public money. I think that’s sometimes what they think you’re doing. (R21)

You don’t want to put your application in, which is incredibly well thought through and a lot of work has been done by a team of people, and then you hear nothing and a year later you get a statement of reasons which is a load of nonsense, which doesn’t take into account any of the points that you’ve made. That really makes you angry then because you think ‘Are they really doing their job properly?’ (R26)

The feeling of not being understood or respected by other bodies in the system – notably, the LAA and the CCRC – was exacerbated by negative media representations of legal aid lawyers and lawyers’ perception that neither government nor the wider public appreciated the significance of criminal defence work, let alone appeal and CCRC work, as illustrated below:

Lawyers are just cast as that they’re fat cats, and most of the general public just think lawyers make loads of money, too much money. And people … don’t feel much sympathy. (R36)

Taxpayers always say ‘Well, hold on a moment, we fork out enough for criminal defence – why should we be spending any more money on it?’ So, it’s difficult … Funding for criminal defence falls at the very, very bottom of priorities, and unfortunately appeals work falls below that even further as well. (R31)

According to Flower, societal perceptions about ‘one’s profession can be a source of stress’,99 and lawyers in our study seemed keenly aware of how their work was perceived, including by the government that ultimately funds their work.100

While feelings of being misunderstood or disrespected are expressed across criminal defence services,101 other aspects of CCRC work made it especially dispiriting. Alongside the demanding nature of the work and their understanding that it was not widely respected, our participants also appeared to be frustrated with the intricacies of appellate criminal procedure itself. Notably, the nature of CCRC work, whereby cases have already been to trial and most have already been rejected on appeal, meant that, for the vast majority, there was little or no chance of overturning

99 Flower, op. cit., n. 10, p. 6.
100 See A. Forrest, ‘Boris Johnson Accused of Damaging Rule of Law after Renewed Attack on “Left-Wing Lawyers”’ Independent, 29 July 2021, at <https://www.independent.co.uk/news/uk/politics/boris-johnson-left-wing-lawyers-b1893121.html>.
101 See for example Dehaghani and Newman, op. cit., n. 7; Thornton, op. cit., n. 15.
a conviction, especially given the high bar applied by the Court of Appeal\textsuperscript{102} and, relatedly, the CCRC.\textsuperscript{103} Consequently, lawyers were aware that – in CCRC casework, in particular – the odds of success were stacked against them. As one participant explained:

The reason that you don’t have that many successful appeals is because most trials are actually conducted fairly, so one should bear that in mind. But, equally, the hurdles to get over either to get into the Court of Appeal generally, or the CCRC, are fairly high. You know, trying to show that a conviction is unsafe is quite rare … because, by and large, judges tend to get it right. (R42)

While participants recognized that this was the nature of post-conviction work, the low chances of a CCRC referral or Court of Appeal decision to quash a conviction – which many thought had reduced over the years – led many participants to feel dispirited and demoralized as they came to view their efforts as futile.\textsuperscript{104} For some, this fed into a general sense of purposelessness that appears to pervade criminal defence services\textsuperscript{105} and challenges the resilience of defence lawyers.\textsuperscript{106} However, a sense of futility in relation to case outcomes seemed especially pronounced with respect to appellate work – perhaps uniquely so, having not been identified as a core issue in studies of legal aid and criminal defence practice more broadly. It was also suggested that low chances of success led lawyers to avoid post-conviction work. As one solicitor explained:

Nobody goes into criminal law just to do appeals because they very rarely succeed. You know, as a criminal lawyer, you win a case, you get a good feeling. If you’re just doing appeals, you’re not going to get that feeling very often. (R45)

Supporting this suggestion, another participant raised the low chance of success and the lack of reward as reasons for wanting to move away from CCRC work:

I don’t envisage myself ever becoming solely focused on CCRC applications or appeals or anything. I would want as little appeals as possible probably, if I’m honest … I don’t always feel like CCRC appeal work is rewarding at all. I mean, it’s great if a client says to you ‘Thank you’, but ‘Thank you for your help’, not ‘Thank you for achieving the decision’, because the decision is going to be negative most likely. (R21)

For this participant, the sense of futility was exacerbated by a perceived lack of understanding about appellate work, generally but also among clients – the latter adding emotional pressure when the chances of success were already low and much was out of the lawyer’s hands. Another

\textsuperscript{102} See S. Roberts, ‘Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal’ (2017) 81 J. of Criminal Law 303. Alternatively, see P. Dargue, ‘The Safety of Convictions in the Court of Appeal: Fresh Evidence in the Criminal Division through an Empirical Lens’ (2019) 83 J. of Criminal Law 433.

\textsuperscript{103} This is related because of the predictive nature of the ‘real possibility’ test that the CCRC must apply to determine whether grounds exist to refer a case for appeal: see Hoyle and Sato, op. cit., n. 6; Roberts, op. cit., n. 23.

\textsuperscript{104} Graffin, op. cit., n. 57.

\textsuperscript{105} Newman and Welsh, op. cit., n. 7.

\textsuperscript{106} Dehaghani and Newman, op. cit., n. 14.
participant, who had already withdrawn from CCRC work, described similar feelings of failing in the client’s eyes, noting that a lack of support from other agencies worsened the experience:

Unlike every other area of law, the majority of the time you are failing because you’re representing them and they’re getting convicted. You’re representing them and their appeal isn’t going through. You’ve done your job properly and in any other area of law if you do your job properly, you are succeeding in the eyes of the client. In criminal law, the system is such that you’re going to be failing in the eyes of the client. And it’s very dispiriting when you don’t have the support of the various government agencies, be it the Legal Aid [LAA] or the Court of Appeal or the CCRC. (R23)

Similar to the asylum lawyers in Graffin’s study, 107 CCRC lawyers, as a subset of the wider criminal defence community, were therefore not only impacted by the gravity of the work for clients – who one paralegal described as being in the ‘last-chance saloon’ (R6) – and by how society viewed their work, but also demoralized by the futility of their efforts. It was noted, furthermore, that even when cases were ‘successful’, there was little to celebrate because the client had already suffered, often having spent many years wrongly imprisoned:

It’s too late by then – they’ve already done their time. I mean, this guy’s done 20 years. (R28)

If my client spent 14 years in prison for a murder that he was later acquitted of, does that counteract it? Probably not, does it? (R5)

Feelings of futility were again amplified by the funding system, which left participants feeling overwhelmed and disempowered. Solicitors still working in the area explained that demand had also remained strong, making capacity a real concern, and some described having to turn people away but not being able to signpost or refer them elsewhere. According to Thornton, tensions between ‘what one values and wants to do’ and ‘how one actually has to do criminal defence’ can cause lawyers to feel frustrated and to suffer from low morale. 108 This effect was reflected in some of our interviews, and was neatly articulated by one of the solicitors who had withdrawn from CCRC work:

I massively fell out of my enjoyment of working on CCRC cases, criminal appeals, because you do find that then the emphasis becomes more on billing a file quickly than actually getting cases to the CCRC or the Court of Appeal. And nine times out of ten, the way to bill a file quickly is to advise them negatively. (R23)

The contrast between those working on public and on private funding also made the impact of finances clear, with one participant who had stopped accepting legal aid cases describing the ‘lift’ that it brought them to offer services ‘to the standard that you probably imagined would be ordinary’ (R26). However, even where lawyers were privately paid, the money often ran out, leaving

107 Graffin, op. cit., n. 57.
108 Thornton, op. cit., n. 15, p. 250.
them working pro bono out of commitment to the client and to justice. One experienced barrister explained that lack of payment had forced them to limit their CCRC work, despite their expertise and enjoyment of it:

I do it because I love it and I’ve done it for years, and I get emotional, intellectual satisfaction from it … The fact that I spent a largish chunk of last year perfecting submissions which, as I say, had started off with a limited private fee but then went on to 150 to 200 hours of pro bono work was because I wanted to put in a good submission. But it would be nice to be recognized financially … I think that that’s really the only thing that’s stopping me taking on more of that sort of work. Because I think a lot of us feel that we’ve built up an expertise in an area, we want to use it, but at the same time we don’t want to be exploited. (R33)

All of this indicates that poor remuneration can lead lawyers to feel exploited, and that those feelings become more acute in a complex and specialist field of practice that practitioners would otherwise find intellectually and emotionally rewarding. Additionally, in practice, the emotional challenges that CCRC lawyers faced were exacerbated by the low chance of cases being referred or successfully appealed, and by feelings that the work was mentally and emotionally demanding, yet not respected. These issues combine with the financial unviability of CCRC casework to create real problems of recruitment and retention of lawyers in this niche area of practice.

8 | CONCLUSION

This article has examined the reasons behind a decline in publicly funded representation in applications to the CCRC with particular attention to the relative significance of financial and emotional factors. Our analysis has demonstrated that there are significant financial challenges in CCRC work related to rates and mechanisms of pay and the inevitability of conducting some (and, in many cases, lots of) pro bono work. In some cases, the financial challenges have become insurmountable barriers to practice, particularly for experienced practitioners who cannot afford to dedicate time to such non-remunerative work. For some, it was not only an issue of payment rates, but a combined concern over rates and quality of work done that caused them to reduce the number of cases accepted, or to withdraw from CCRC work completely.

Though there are generalizable points to be made about the financial unviability of legally aided criminal defence work, our study also revealed that the specific nature of CCRC casework leaves it particularly vulnerable to being dropped from a firm’s area of practice. Many of the issues raised by lawyers whom we interviewed reflect similar concerns raised across criminal defence more generally, especially in relation to funding rates, difficulties engaging with the LAA, demanding work, and misunderstanding and a lack of appreciation on the part of the public and other institutions. However, there seem to be additional factors associated with CCRC casework that make it a particularly vulnerable area of criminal practice. These factors include the extent of delegated powers granted to lawyers in relation to legal aid decision making and the associated perception that costs will be disallowed, which is an additional risk factor, alongside the especially legally and procedurally restrictive nature of appellate casework and its extremely low chances of success (in the adversarial sense of winning a case). All of this has implications for the sustainability of appeal and post-appeal work and is concerning given the impact of this work in uncovering miscarriages
of justice. Thus, while our focus on CCRC casework exemplifies some of the broader malaises within publicly funded criminal defence practice, it also demonstrates variation between areas of practice, giving insight into where problems are acute.

While financial factors appear to be the most significant drivers of a decline in legally aided representation, it is clear that the financial unviability of CCRC work is compounded by emotional factors. In some cases, these compounding emotional factors – including insecurity around billing targets – result indirectly from low legal aid rates, and for some practitioners, those rates were symbolic of a wider lack of recognition and appreciation. Particularly among more senior and experienced interviewees, there was a sense that cuts had been an affront to their worth and professional standing. Our interviews suggested that the financial challenges of undertaking legally aided CCRC work were also exacerbated by poor relationships, a lack of trust, and poor communication with external agencies, including the LAA and the CCRC. According to our participants, financial, emotional, and relational factors thus combined to make CCRC work more difficult and less attractive, reducing the supply of publicly funded representation and deterring junior practitioners from specializing in the area.

While previous work suggests that publicly funded defence lawyers may feel powerless and purposeless as a result of structural changes to funding, with implications for quality, the distinct nature of CCRC (and appeal) work – in terms of its low rates of success and marginalization within both policy and the wider criminal defence community – may make them especially vulnerable to feelings of alienation and dejection. CCRC lawyers with whom we spoke were clearly demoralized. While junior practitioners were quickly deterred from specializing in this area, raising sustainability concerns, more experienced practitioners had often continued to do the work long after it had become unprofitable. Though this suggests that CCRC work is not about money for those who do it, changes to public funding have evidently started to push even the most dedicated senior practitioners out of practice.

The Justice Committee recently recommended that the government should address funding problems in criminal defence work, and that the funding system should become more responsive for defence work at every level of complexity to be sustainable. Raising legal aid payment rates would certainly go some way towards addressing both the financial barriers to sustainability and the emotional effects of working in an area of legal practice that is literally and symbolically undervalued. Relaxation of the eligibility tests when considering whether a potential applicant qualifies for funding would also make the work more financially viable, while possibly alleviating practitioners’ feelings that their decision making is neither trusted nor respected by the LAA.

Governments must make difficult funding decisions. However, our research revealed that CCRC casework is already a particularly vulnerable area of criminal defence practice in terms of long-term sustainability. Very recent recommendations to increase funding rates for appeal and CCRC work, and to restructure the payment regime for CCRC casework according to the amount

109 See J. Robins, ‘Serious Miscarriages of Justice Will Go Undetected’ Says CCRC’ The Justice Gap, 11 October 2018, at <https://www.thejusticegap.com/serious-miscarriages-of-justice-will-go-undetected-says-ccrc/>. For an example of such miscarriages of justice, see the Post Office cases: CCRC, ‘Making Legal History with Post Office Cases’ CCRC, at <https://ccrc.gov.uk/case-studies/making-legal-history-with-post-office-cases/>.

110 Thornton, op. cit., n. 15.

111 Newman and Welsh. op. cit., n. 7.

112 Justice Committee, op. cit., n. 89.
of work done,\textsuperscript{113} have been met with a government commitment to only a 15 per cent fee increase across all legally aided defence work.\textsuperscript{114} This has resulted in national 'strike' action by barristers.

The Royal Commission on Criminal Justice recommended that the CCRC’s primary role should be to ‘consider and if necessary investigate cases which have already passed through the criminal justice system’.\textsuperscript{115} If lawyers are no longer able to assist the CCRC in the identification of possible miscarriages of justice, that role becomes more difficult to perform, especially in the context of budgetary constraints brought about by austerity. We began this article by acknowledging the significance of the CCRC’s role in holding the criminal process accountable. Without properly funded and emotionally resilient lawyers assisting the CCRC by identifying and working on concerning cases, that role is also vulnerable.

\textbf{ACKNOWLEDGEMENTS}

We thank the ESRC, which funded this research (grant ES/R008515/1), and the CCRC for allowing access to their organization. We thank all participants in this project for their generous contributions. We also thank Daniel Newman and Richard Vogler, and the anonymous peer reviewers, for their comments on earlier drafts of this article. The data associated with this article can be accessed on the UK data service site (DOI: 10.5255/UKDA-SN-855469).

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\textbf{How to cite this article:} Clarke, A. and Welsh, L. ‘F**k this game ... I’m off’: financial and emotional factors in declining legal representation in miscarriage of justice cases. \textit{J Law Soc.} 2022;1–24. \url{https://doi.org/10.1111/jols.12380}

\textsuperscript{113} C. Bellamy, \textit{Independent Review of Criminal Legal Aid} (2021), at \url{https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid>}

\textsuperscript{114} The government is seeking further evidence on restructuring the payment regime for CCRC casework: Ministry of Justice, \textit{Response to Independent Review of Criminal Legal Aid} (2022), at \url{https://www.gov.uk/government/consultations/response-to-independent-review-of-criminal-legal-aid>}

\textsuperscript{115} Royal Commission on Criminal Justice, op. cit., n. 1, p. 184.