



Ministry  
of Justice

# **Impact Assessment – Annex C: Supporting Evidence from Practitioner Focus Group Discussions**



# Summary of Methodology and Key Findings

This annex presents evidence from focus groups used in the Criminal Legal Aid Review (“the review”). Focus groups were set up to provide the review with qualitative insight on the views and experiences of the front-line professionals; and their perspectives on the impact of criminal legal aid on the criminal defence profession and working practices within criminal law. The focus groups explored questions such as how well criminal legal aid fee schemes pay for the work done, the suitability of the metrics currently used, and the general views and comments from practitioners on the criminal legal aid fee schemes.

In total, eleven focus groups across seven locations were held between July and September 2019 with practitioners working in criminal legal aid. Four focus groups were held with barristers (33 participants in total), and seven with solicitors and solicitor advocates (46 participants in total). The experiences of the practitioners involved were mostly from defence (as this was the focus of the exercise), although some barristers did also refer to their experiences prosecuting. Participants volunteered to take part, and were recruited via existing contacts such as The Law Society, the Bar Council and other organisations. Attempts were made to have a broad representation of practitioners across England and Wales. The majority of the attendees were experienced practitioners, although early-career practitioners were also represented.

This annex focuses on the attendees’ views on the areas described in the Consultation Document:

- how litigators and advocates are paid for work on unused material;
- how advocates are paid for work on paper heavy cases (also referred to as high pages of prosecution evidence (PPE) cases in this annex);
- how advocates are paid for cracked trials in the Crown Court (referred to as cracked trials and late guilty pleas in this annex); and
- how litigators are paid for work on sending cases to the Crown Court.<sup>1</sup>

Note, throughout this annex defence practitioners are often referred to as either barristers, solicitors, solicitor advocates, or practitioners - where the latter represents all groups. This is because the focus groups were set up for solicitors and solicitor advocates together, and barristers separately. Thus, the findings presented often rely on these distinctions. Defence practitioners that participated in the focus groups are also referred to more generally as “participants” throughout this annex.

Focus groups are methodologically strong because the researcher can interact with the participants and pose follow-up questions or ask questions that probe more deeply. The

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<sup>1</sup> These areas will collectively be referred to as the “accelerated areas” throughout this Annex, through the rest of the Impact Assessment and accompanying Consultation Document and Equality Statement.

results can be easier to understand than statistical data. However, there are some caveats around the use of qualitative data and quantitative conclusions should not be inferred. It is also important not to use comments and observations out of context as they may not be representative of the wider group nor the population as a whole, and can be misconstrued. For example, participants may bring an inherent bias to the evidence if they hold strong and polarised feelings about the subject under discussion. This is more likely to be the case where participants volunteer rather than are selected.

All views and opinions contained in this report represent the views expressed by the attendees of the focus groups and do not constitute a statement of Government policy.

## **Unused material (AGFS and LGFS)**

Barrister, solicitor advocate and solicitor participants, across all focus groups, explained that they were “obligated” to review unused material. Unused material was said to often reveal important information for the defence. Several participants described cases where they had reviewed unused material which had then contributed to acquittals or lower sentences for their clients. This review process was, however, described as stressful, as the participants worried they may miss something.

Focus group participants considered disclosure of unused material to be poor; schedules of unused material could be missing important pieces of evidence. They perceived changes in the police and Crown Prosecution Service (CPS) budgets as having led to more work for defence practitioners in reviewing unused material. In their view, police officers were not “providing proper schedules of unused” either because they lacked understanding of their legal obligation and withheld material from CPS, or because they were not looking through unused material in detail and missed evidence. In turn, as the CPS would rely on the schedules provided by the police, the materials forwarded to the defence would typically be lacking in similar ways. In other cases, participants also explained that instead of the police or CPS reviewing the unused material adequately, everything (such as full phone downloads) would be forwarded to the defence. This was explained to be one reason for increasing levels of unused material over time.

Participants said that this contributed to additional work for practitioners, firstly in chasing the undisclosed unused material, and secondly in reading the unused material in detail to ensure it had been assessed properly. Participants felt they had to examine everything in detail, as the defence could not be sure of the level of scrutiny the material would have had by the prosecution.

Participants across the focus groups said it was crucial that unused material was thoroughly investigated by both solicitors and barristers, as they had different perspectives on the material, and provided scrutiny so important factors would not be missed.

## **Paper heavy cases (AGFS)**

On paper heavy cases, the main views expressed by the barrister participants were that the paper heavy cases were currently underpaid under the Advocated Graduated Fee Scheme (AGFS), and financially not worth taking on. Participants said paper heavy cases tended to be more complex and required more preparation. Concern was expressed by some participants over the way cracked trials are currently paid for possibly leading to lower remuneration for paper heavy cases.

Fee cuts<sup>2</sup> on the paper-heavy cases were said to impact on the career and skills development of barristers, both junior and senior. Participants described that the incentive was for senior barristers to avoid taking on paper heavy cases that were long and complex, instead choosing to take simpler cases. This was seen to impact the profession two-fold: by limiting complex case management skills development in senior barristers, and blocking the access of junior barristers to the simpler cases suitable for their skill set. One impact perceived by participants was that junior barristers were therefore more likely to take on cases too complex for them, leading to lower quality advocacy and longer trials.

Participants considered neither offence type nor format of evidence to be a reliable predictor of the amount of work involved – the amount of work was described to be case dependent. Page counts as proxies for case complexity and the amount of work involved was said to be just one of the possible measures. Other indications of the level of work mentioned by participants were the number of complainants, incidents and witnesses, the amount of unused material, mental well-being of parties involved, and complexity of legal arguments.

## **Cracked trials and late guilty pleas (AGFS)**

On cracked trials and late guilty pleas, the main views arising from barrister participants were that the financial incentives encouraged avoiding early guilty pleas and encouraged waiting until juries had been sworn in. The barrister participants described a sense of duty to advise their clients correctly but also a sense of resentment that, in the case of cracked trials, this could be against their own financial interests. Reliably predicting cracked trials was said to be impossible. Reasons given by participants included that it depended on new evidence, witnesses, co-defendants, prosecution evidence, and risk appetite and personal reasons of clients. Late disclosure was said to sometimes lead to late cracks. Participants also mentioned the lack of and/or poor evidence at plea and trial preparation hearing stage meant barristers were not able to advise their clients appropriately, and would avoid guilty pleas.

Barrister participants said that the preparation for cracked trials were the same as for any trials. Their reasoning for this was the inability to reliably predict whether cases would crack. There were differing views among participants as to when the bulk of the work of preparing for a trial would be completed. In one focus group some junior junior barristers<sup>3</sup>

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<sup>2</sup> While not explicitly stated by the participants, these fee cuts refer to changes to fees as part of the move from scheme 9 to scheme 10/11

<sup>3</sup> Junior junior barristers are defined as barristers with up to seven years of experience

explained their work was front-loaded and included litigation aspects. In contrast, some senior junior barristers<sup>4</sup> in the same group explained they would do work at the last minute. When the matter was discussed amongst the focus group participants in question, the participants whose work was front-loaded agreed that most of the work would have been completed in the first two thirds of the case. Poor quality/limited solicitor work was said to drive front-loading.

Cracked trials were described by some barrister participants as a double punishment. It was explained that there was a loss in income from having done the work for preparing for a trial (and not being paid a trial fee) and then having an empty space in the diary, leading to more loss in income (not being paid refreshers, and not being able to find other substantial work). Filling diaries in the case of cracked trials was explained to be difficult. Several barrister participants across the focus groups described that there was a lack of shorter trials that could be picked up. This was perceived to be due to a systemic issue, where underfunding in police and CPS had led to a lower number of crimes being charged. Participants explained that there was previously a higher volume of cases, but that this had reduced in recent years.

## **Sending cases to the Crown Court (LGFS)**

There was limited discussion in the focus groups on sending cases to Crown Court, and most of the discussion focused on Crown Court and magistrates work and fees in general.

On sending cases to Crown Court, the main views expressed by solicitor participants were that many areas of work that were previously paid were now unpaid, and this was in addition to the impacts of inflation and subsequent reductions in fees. For example, they reported that previously litigators were paid a fee for dealing with the cases in the magistrates' court; and that there was also a fee payable if they were either sent or committed to the Crown Court for trial. The committal fee was said to have represented the work involved in representing the client, having to attend court, travel, dealing with the family, interpreter or psychiatric services, completing a Judge in Chambers bail application, going and seeing a client in custody and dealing with the sentence. Cases where prison visits were needed were explained to be particularly unprofitable due to travel and wait times involved.

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<sup>4</sup> Senior junior barristers are defined as barristers with eight or more years of experience

# Detailed Methodology and Findings

## Introduction

This annex provides qualitative insight into practitioner views on the accelerated items currently being consulted on in the review. Focus groups were set up to provide more evidence to the review on the views and experiences of front-line professionals; and on their perceptions of the impact of criminal legal aid on the criminal defence profession and working practices within criminal law. The focus groups explored questions such as how well legal aid fee schemes pay for work done, the suitability of the metrics currently used, and the general views and comments from practitioners on the criminal legal aid fee schemes.

This annex focuses on the attendees' views on the areas described in the Consultation Document:

- how litigators and advocates are paid for work on unused material;
- how advocates are paid for work on paper heavy cases (referred to also as high pages of prosecution evidence (PPE) cases in this annex);
- how advocates are paid for cracked trials in the Crown Court (referred to as cracked trials and guilty pleas in this annex); and,
- how litigators are paid for work on sending cases to the Crown Court.

All views and opinions contained in this report represent the views expressed by the attendees of the focus groups.

## Methodology

Focus groups for practitioners working in criminal legal aid were held between July and September 2019.

The focus groups participants were recruited through circulating an expression of interest via a variety of professional organisations.<sup>5</sup> This message asked for interested front-line criminal legal aid practitioners to express their interest in attending a criminal legal aid focus group as part of the Criminal Legal Aid Review.

The focus groups were divided based on profession, to enable a focused discussion. In total eleven focus groups were held: four with barristers, and seven with solicitors and solicitor advocates. There were 33 attendees altogether in the four barrister focus groups, and 46 in the seven focus groups for solicitors and solicitor advocates. The majority of the attendees were experienced practitioners, although early-career practitioners were also represented.

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<sup>5</sup> An expression of interest was included in the newsletters of The Law Society and Bar Council, and several other organisations such as Criminal Legal Solicitors Association, The Chartered Institute of Legal Executives, The Black Solicitors Network and other organisations part of the Criminal Legal Aid Review Panel also participated in circulating information about the focus groups.

The focus groups were conducted nationally; three in London, two in Birmingham, one in Nottingham, one in Newcastle, one in Cardiff, one in Bristol and two in Manchester. Focus groups were held in locations where there was either a concentration of expressions of interest or in locations which were easy for participants to travel to from a wider area. Our aim was to have a broad representation of practitioners across England and Wales. Once a date and location of a focus group was arranged, further expressions of interest were sought by asking potential participants and the local Circuit Leaders and The Law Society network leaders to circulate the message to their members.

Focus groups are methodologically strong because the researcher can interact with the participants and pose follow-up questions or ask questions that probe more deeply. The results can be easier to understand than complicated statistical data. However, there are some caveats around the use of qualitative data, and quantitative conclusions should not be inferred. It is also important not to use comments and observations out of context as they may not be representative of the wider group, nor the population as a whole, and can be misconstrued. For example, participants may bring an inherent bias to the evidence if they hold strong and polarised feelings about the subject under discussion. This is more likely to be the case where participants volunteer rather than are selected.

All focus groups were conducted under best practice guidelines. Focus group discussion was moderated based on a semi-structured discussion guide to enable analysis of the material and comparison across focus groups. This question framework included questions around accelerated items. The questions ranged from how well legal aid fee schemes cover the work done, to suitability of the metrics currently used, and asked for general views and comments on the criminal legal aid fee schemes from the view-point of front-line practitioners.

The focus groups were conducted under a confidential basis to enable sharing a variety of views and experiences. The participants were reminded of the confidential nature of the discussion at the focus group, and all information about the participants and the information they provided has been anonymised in this annex. The focus groups were recorded and transcribed to assist in analysis of the discussion. Informed consent was given by the participants for this prior to the start of the focus group. Transcripts of focus groups were coded to find emerging themes, which were then grouped accordingly and analysed to report the issues raised by professionals. Quotes from participants are used throughout to illustrate findings.

## Findings on unused material

Unused material is material that is relevant to a case (material that is capable of undermining the prosecution case and/or assisting the defence), but not used as part of the prosecution evidence presented in court.

### Disclosure of unused material

In all the solicitor and barrister focus groups, participants explained that they were obligated to review unused material. Focus group participants considered disclosure of unused material to be poor. Participants described defence solicitors and barristers usually being forwarded unused material without proper schedules, or distinguishing what might be relevant to the defence. Several solicitor participants described cases where unreferenced unused material contributed to acquittals or lower sentences for their clients, and said this proved it was important to read through all unused material.

*“I can’t tell you how many cases that we deal with where we find something amazing in the unused. ... really case breaking stuff in the unused material and it’s only because we’ve spent the time going through it, but we’re not paid for that.”*

From a viewpoint of a barrister participant, this was at times stressful.

*“You live in fear you’re going to miss something. You live in fear about the one boxed entry that was in there that becomes relevant in the trial and somehow or other you missed it because you were trying to speed read it. You can’t. You’ve got to go through it bit by bit by bit. It’s boring. It’s laborious. It’s tedious but you have to do it. That’s part of the job.”*

Solicitor participants reported that police officers were not “providing proper schedules of unused”. They described examples of police withholding material from CPS (deciding not to disclose it to CPS), or not looking through unused material in detail and missing evidence. In their view this impacted on the evidence forwarded to CPS and beyond.

*“The problem is from the police to the CPS to court staff to the bar to the cell staff to the prisons there’s not enough people, they’re all overworked, everyone is cutting corners, stuff is getting missed.”*

Barrister participants similarly described their workloads surrounding unused material as extensive because of poor disclosure practices. Across all four barrister focus groups, poor disclosure practices were discussed. Participants said that typically neither police nor CPS would look through the unused material adequately, and that it had become more common for them to forward all materials to the defence, such as full phone downloads, without reviewing the material first. The participants said that in their view they were not remunerated for looking at this material, and expressed concern that because they were professionally responsible for the defendant, they had no other choice than to “sort it all out”.



*“We’re doing several people’s jobs all at once. We’re doing prosecutors’ work for them because they don’t know how to disclose anymore. We’re doing solicitors’ jobs for them as well because they don’t send along their support services, and then we have to do all the returns as well. We have to email people in the middle of the night to tell them what’s been going on during the day. It’s very time consuming”*

It was the view of barrister participants that the police investigations were not as well prepared as previously, and that police officers “outsourced the responsibility of making a decision on charge to the CPS”<sup>6</sup>. In turn, participants said this had de-skilled the police officers, so they did not understand the legal obligations they had in disclosure and did not label unused material correctly. Barrister participants said that it was likely that the CPS reviewing lawyer used police advice to base their review on, and therefore might miss relevant material. In addition, participants felt the “reviewing lawyer may not have appreciated the entirety of the defence case”. This was said to be in contrast to the defence practitioner, who would have detailed instructions and a better understanding of the defence case as a whole.

The participants also explained that poor disclosure could lead to trials collapsing or cracking at a late stage, in addition to creating additional work for the defence. One example was of a case where material on a complainant’s phone showed that they had not been kidnapped as claimed. This came out in day three of the trial, with the participant estimating the cost from legal aid and court costs would have been close to £250,000.

Another example was of a solicitor advocate being told by a police officer they were not going to review social services records for evidence. The participant claimed that the police officer told them they did not want to review social service records as the police officer believed the prosecution to have a weak position and they did not want to weaken it further. After the unused material was reviewed and examples submitted as evidence to CPS the case was dismissed, resulting in a cracked trial instead of a two-week trial. In reference to having done the work of uncovering evidence “under our duty doing as we should have”, the participant lamented that they then received a lower fee.

## **Accessing unused material**

At both solicitor and barrister focus groups, participants explained how sometimes unused material increased bit by bit as a trial got closer rather than being provided at a single point in time. Participants mentioned their difficulty getting access to unused material and serving multiple section 8 notices<sup>7</sup>, or getting access “last minute”. This meant they could not cross-examine witnesses/complainants on it or instruct experts to review the material. They also reported sometimes never getting the material at all. Various issues were mentioned in the focus groups, including “cherry-picking” evidence, serving unused material at the last minute, or in password protected formats, or incorrectly uploading

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<sup>6</sup> Please see further explanation of the relationship between police and CPS on <https://www.cps.gov.uk/legal-guidance/police-and-cps-relations>

<sup>7</sup> Application to court for additional disclosure, if the applicant has reasonable cause to believe that there is prosecution material that should be disclosed but has not been

versions. Participants highlighted this increased the time and effort spent on unused material by defence practitioners. These issues were seen to be caused by “prosecution resource issues ... they are not funded sufficiently to do their job”.

*A solicitor advocate described an attempted murder case: “I’d listed it for three section 8 hearings. There kept being made orders that the Crown... literally just ignore it and then they sort of phrase it in a way that makes it sound as if they’ve really actually provided it albeit they haven’t or they serve discs at the last minute and then you try and open them and they’re password protected or it’s not been downloaded properly or they really needed to download something else to make it work and they didn’t want to do it via Egress<sup>8</sup> because, you know there was a Y in the month and they just weren’t bothered, or a million other reasons and, you know, you list it and you list it and you list it. ... I still received about 2,000 pages the day before the prosecution case was closed, you know, and there were things in there that I would have loved to have cross-examined the main complainant on had only they been served but unfortunately, you know, he’d given his evidence long before.”*

## **Solicitor perspectives on unused material**

Solicitors in the focus groups explained that it was important for both solicitors and barristers to independently read through the unused material. In their view, solicitors and barristers had very distinct roles, and they looked at the unused material from different angles.

Overall, both solicitor and barrister participants explained that, as litigators, solicitors would take instructions and read and chase for the unused material, and barristers would also review the unused material to see nothing had been missed and in order to prepare for trial.

Solicitor participants gave a range of reasons for dual oversight of the unused material including:

- “... barristers are a team with us [solicitors] and two eyes work well because you might be blinkered on something that you’re looking at”;
- a solicitor participant explained that solicitors need to know the unused material to give instructions to barristers properly, but that the barristers also need to know the unused material in detail in case they “have to take a different tack [during the trial] because of evidence that comes out” during the trial;
- “... the unused material may reveal lots of different things but it may reveal a defence witness who [a barrister] wasn’t aware of and a barrister can’t interview a defence witness. ... that would trigger a line of enquiry that the solicitor then needs to pursue involving going to interview a defence witness, ... and make a decision in relation to whether the defence witness should be called”;

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<sup>8</sup> Secure data transfer service used by CPS

- describing phone records in particular, a solicitor participant explained they would need to take detailed instructions from the clients, which barristers cannot do. The solicitor explained that their client may instruct them to look at a particular area of the phone records that would be beneficial for their defence – for example text messages from a complainant – that would otherwise be difficult to locate amongst the large amount of material; and,
- there may be issues that arise from unused material that mean experts are instructed. This instruction would be done by solicitors.

*“It’s really important to understand the different roles and, don’t get me wrong, it’s right that the barrister looks at the unused material as well but the barrister will look at it from a slightly different slant but it’s right that they look at it but it’s the solicitor who takes the action, who takes the instructions, who interviews the other witnesses, who makes the other enquiries and they both have very important but distinct roles and I think that it’s really important that you’re aware of that.”*

## **Barrister perspectives on unused material**

Barrister participants reported that previously, solicitors did a thorough job examining the unused material and provided the barristers with details of the areas that they needed to look at. However increasingly, in their view due to financial pressures, solicitors were doing this less and less and leaving it to the barristers.

Barrister participants used the term “good solicitors” in some of the focus groups. They explained that these “good solicitors” worked thoroughly to review unused material and highlight the relevant parts to the defence counsel when forwarding them the material. In their view, this cut down the amount of time barristers needed to spend on the unused material. Solicitors doing a “good job” were also described as using unused material to identify witnesses to contact, and other areas that they might need to take instructions from their client about.

Barrister participants, however, described solicitors as rarely doing all these tasks. In all the barrister focus groups, participants claimed that when they received unused material from solicitors, often nothing had been done to the unused material. The barrister’s expectation would be for solicitors to review the unused material and direct counsel to look at specific areas of interest within it. In their view, in practice the unused material had often been sent by CPS to solicitors who would then “just press forward”.

Barrister participants described this as a frequent occurrence. They believed this was caused by solicitors being “so overburdened with work” and having “so much pressure to make turnover”. In their view, unused material was said to “very often fall on counsel to look through”. One reason for this, according to barrister participants, was that as solicitors often couldn’t attend court, it was of limited use for them to understand the unused material. “Chronic underfunding of the whole system” was also described as the root cause for this by participants.

*“[Solicitors] earn so little in the magistrates’ court that the litigators’ fees for these cases are just a sort of bounty for them. They don’t do any work on them. It’s those fees that allow them to keep their practices running, so they just punt it all off to the barristers who then have to do all the work on it. If solicitors were properly paid and could employ the staff, I suppose if we could employ the staff as well individually, then you’d find a lot of the work was on a bit lower down the chain.”*

Where unused material was forwarded to the barrister without the solicitor reviewing it themselves, barrister participants felt that there was an expectation by the solicitors that barristers would “promptly” identify anything arising from it, and relay this to solicitors. Barrister participants said this could be disruptive to any other trial preparations that they might have at the same time.

Even in cases where the solicitor had reviewed the unused material and highlighted the relevant areas to the barrister, barrister participants explained they would still need to read it themselves. They had to decide whether or not it was relevant to the case and defence that they were running. One participant said, “there is [never] a situation where the barrister who is conducting the trial can get away with not reading unused”.

*“It helps me as a starting point but I then have to go through it myself because I am the person at the end of the day who has to be cross-examining the witness, I’m the one who has to make the decisions during the trial as to how to present my case and how to undermine the prosecution’s case. There is no way on god’s great earth that I am going to go there without having read every page, which is important.”*

Participants noted that in cases where there was a disclosure junior<sup>9</sup>, their workload around unused material was reduced and unused material disclosed appropriately and clearly. In these cases, participants said the unused material relevant to defence was highlighted to them, unlike in other cases. Disclosure juniors were however described as available only in rare cases, such as some serious and very evidence-heavy cases.

## **Payment for reading unused material**

The solicitor participants explained that if they did not review unused material carefully then the defence case may be lacking crucial evidence but they would still get payment – “If a solicitor doesn’t look at the unused material, they do not find this. They would still get paid the same.” Several comments in the focus groups addressed the need to continue to review unused material regardless of payment because:

*“Ministry of Justice is interested in this used and unused material differentiation. To us it’s actually just evidence and it’s either relevant evidence or not relevant evidence and the only way we get to determine that is when we have a look at it.”*

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<sup>9</sup> An assisting prosecution barrister, tasked with reviewing and disclosing unused material

*“What you have to understand also is that if you’re doing this job properly as a solicitor, you have to look at everything. You have to question everything.”*

*“I used to work when I got paid for unused evidence and I still try and do the same type of work because I am a hardworking solicitor and I actually don’t want to be sued for being a negligent solicitor”*

Participants felt it was unfair to have to review unused material without being sure they were getting paid for it.

*“Because of the rules of professional conduct, because of criminal procedure rules, that we ... have an obligation under a contractual retainer that required from a legal duty to act in a proper way and I’ve got a professional ethical duty enshrined in the solicitors’ code of conduct and I would run the risk of being struck off. So there’s things I do have to do in a proper way. Why can I not know in advance whether I’m going to be paid for it? Why am I left to the, as it were, mercy, ... of the Legal Aid Agency making their own assessment of whether it was relevant or not?”*

In the solicitor focus groups, the parity of resources between CPS and defence came up a couple of times. Solicitor participants explained that in an adversarial system, there should be “equality of arms” between prosecution and defence, and that the current structures of unused material payments do not enable this.

*“Everyone else in the criminal justice system is being paid to look at the unused material... The police officer gets paid for looking at it. The CPS lawyer, when they’re considering it for a charging decision, gets paid to look at all that material. They’re getting paid to review that case. When it comes to us, we get nothing. We have to replicate the work of those two agencies to look at that material and find out whether there’s anything in there that undermines the crown’s case or assists our own and we get paid nothing for it.”*

Furthermore, participants explained that because the overall fees were felt to be so low, they did not feel like large quantities of unused material in “anomalous cases” could be accepted as part of the “swings and roundabouts principle”.

*“Most of the problems that you are hearing are because fundamentally people are not paid properly for the work that they actually do and ... when they get dealt a duff hand for the anomalous cases, then they really feel the pain. If they felt they were being paid properly for most things they’d probably take the odd hit once in a while.”*

## **Improving unused material practices**

In the barrister focus groups, some ideas that could help in processing unused material were discussed. For example:

- using Digital Case System (DCS) for unused material could help in assessing the amount of pages, and could be used as a basis for payment;
- central hubs with paralegals could assess the unused material and deal with disclosure; and,

- training police officers to a required legal standard to understand disclosure, but this would be more expensive.

Overall, participants highlighted increased payments as needed. Participants said that “being paid fairly for the work [they] do” was key to retaining barristers and solicitors in the profession

*“We are all human and just feeling like I’m being paid, even if it’s a relatively small fee for a skeleton argument will ... give me that motivation to actually just do it and get it done ... rather than [not being paid anything] which I have to say really brings out a negative side in a lot of people”*

# Findings on Paper Heavy Cases

This section of the annex focuses on findings in relation to paper-heavy (evidence heavy) cases from the perspective of barristers. Paper-heavy cases are also known as high-PPE cases (high number of pages of prosecution evidence).

## Payments for paper heavy cases

*“In terms of evidence-heavy cases, they are underpaid, that’s the headline.”*

Barristers in the focus groups explained that the removal of PPE from the AGFS for most offence groups meant that the fees for anything between 10 and 10,000 pages were now the same for many cases. In three of the barrister focus groups, the overall opinion was that evidence heavy cases were now underpaid, and financially not worth undertaking by barristers<sup>10</sup>.

*“That’s simply just not worth doing anymore that’s the reality. The amount of time required to prepare them means they’re not financially viable anymore.”*

High PPE cases were also considered financially risky, as the participants claimed the preparation for them was extensive. In comparison with trial fees, participants felt the brief fee was undervalued. In the case of cracks or cases resolving early, participants said that the financial impact could be considerable due to loss of trial fees and missing out on alternative work. They said this was an issue especially as high PPE cases tended to be long and complex, meaning that the preparation stage was long and the expected trial length and thus trial fees were expected to be high. As will be discussed in the cracked trial section, many barrister participants explained that they found it difficult to find replacement work for empty diaries due to cracked trials<sup>11</sup>.

## Career and skills development of barristers

*“The fees are currently impacting the career progression, they are utterly undermining the sustainability of it as a career, the development of young barristers and the development of the judges and the QCs and all of those people that you want for tomorrow, and then the people who will train the younger juniors that are coming.”*

After fee cuts<sup>12</sup> for evidence heavy cases many barristers in the focus groups agreed that barristers were not taking these types of PPE cases, described by the barrister participants as “big”, “long” and complex cases. Compared to “high page count cases with long

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<sup>10</sup> In the fourth focus group evidence-heavy schemes were discussed only briefly.

<sup>11</sup> As in the cracked trials section; Barrister participants explained that lengthy gaps were difficult to fill. In their view, due to systematic underfunding police and CPS didn’t charge less serious cases. This resulted in shorter trials being more difficult to find to act as stopgaps. In addition, senior barristers tend to do longer cases, and typically, shorter cases would be offered to juniors.

<sup>12</sup> While not explicitly stated by the participants, these fee cuts refer to changes to fees as part of the move from scheme 9 to scheme 10/11.

estimates”, they said that taking shorter cases and getting more frequent brief fees would be financially more beneficial and “maximise your income”.

*“The senior people that are in it for the money will look to where the money is and that tends to be the smaller cases where the graduated fee scheme’s been a bit more kind. Which is what was intended for the junior people to look after, but when the solicitors are being offered a list of names ... [they’re] going to go for the senior guy”*

Barrister participants highlighted that the impact on skills and career development could be two-fold, and impact both senior and junior barristers. In their view, firstly, senior barristers could lack the skills to deal with long and complex cases. In the long run this could impact judicial skills as well, as senior barristers that become judges could lack skills in this area. Secondly, as senior barristers then replace the evidence heavy cases with other types of work, they could be more likely to express interest in “the simpler work that juniors would be doing”. In the participants view, solicitors and clients would be likely to take the most senior barrister available to represent them, so this in turn would reduce the opportunities and skills development for junior barristers.

Due to the perception of lower take up of evidence heavy cases by senior barristers, participants said that the only people who would take these cases on were either senior barristers who had the money to do cases on interest rather than remuneration, and “juniors that want to make a name for themselves”.

## **Level and quality of advocacy on cases**

According to barrister participants, one of the perceived impacts of the fee cuts on larger paper-heavy cases was said to be on the level and quality of advocacy on those cases. They expressed concern that this could increase the length of trials as the professionals would not be able to narrow the issues. Additionally, if the jury considered the defence to lack competency, they were concerned that this might lead to acquitting guilty defendants.

*“... What is the incentive to somebody who is properly qualified to take on the bigger cases? The headaches, the long hours. Because they are so badly remunerated people are just saying, “Well, you know what, I’m just not doing them. I can’t be bothered.” Let somebody else do them and so the solicitor will find that people less experienced who aren’t earning as much money will take those cases instead which would mean if that continues that the quality of representation goes down with all the knock-on effects.”*

One junior barrister participant explained that they were offered cases that they were “not yet senior enough to take”, because senior barristers would not “touch it with a bargepole because it doesn’t pay them enough money”. Participants reported that cases were “not being remunerated to any degree that’s representative of the amount of work involved”. Participants explained further that as senior barristers refused cases, the cases might then be passed to more junior barristers, who were not experienced and capable enough for the cases, but some take these cases on as they need the money.



*“The effect you are having is people who should not be taking that work, who are too junior, are taking that work or at some point, hopefully no one will take the work out, would be great but ... there will always be somebody desperate enough.”*

Another junior barrister described a case (5-week trial; 50,000 pages of evidence) where they said that they were at the “cusp of [their] ability” and where they believed the case should have gone to someone more senior. In their view, the fee gained was too low for the amount of work and said that these types of cases now got poor quality or inexperienced barristers.

Participants also felt that the fee cuts impacted the ability of barristers to adequately prepare the evidence-heavy cases. They reported extreme financial pressures and back-to-back listings pressure, meaning that barristers could not take enough time off for preparing.

## **Two-counsel briefs**

Barrister participants in two focus groups described how it appeared to have become more difficult to get two-counsel briefs, where they may previously have been very common for evidence heavy cases. Respondents believed that judges were put under pressure to reduce two-counsel briefs, and to refuse junior certificates unless absolutely necessary. In the experience of participants, applications for juniors from senior barristers were often refused by judges, as judges would say the senior barristers were capable of doing the cases by themselves.

Participants felt this underestimated the amount of work involved, and was detrimental to career development and skills development of younger barristers. One participant noted that “being able to be present and watch and work with more experienced barristers [is] how you really develop ... younger barristers”. Another barrister participant suggested that having two juniors in an evidence-heavy case might be a good way of receiving fair remuneration.

## **Level of work in a case**

Participants said that the quantity and type of evidence was case specific. Participants did not see that offence type was driving this for the most part, although sexual offence cases were raised as typically evidence-heavy. Participants were reluctant to generalise on the impact of the evidence format on the amount of work involved. Participants noted that the same number of pages could take different amounts of time, and searchability of documents made an impact as well.

The amount of time spent reading pages varied depending on their content and context according to participants. Pages of evidence were said to not be equivalent to each other. Participants indicated that understanding expert reports and the context required considerable work at times, and one report was said to need possibly hours of reading time. Participants reported that some documents would also need to be re-read and cross-referenced with other documents, meaning that they could take a considerable time. They

reported that ABE interviews<sup>13</sup> were also said to require considerable time due to viewing and editing transcripts. In contrast, an equivalent amount of pages of photographs on the other hand can be quick to go through.

Participants reported that searchability between documents also varied. In some cases, they found the documents might be served as photo documents or handwritten documents and it was not possible to search them electronically. Handwritten documents were perceived by participants to present an additional issue, as reading them may be time-consuming due to the handwriting, and at times the handwriting might be illegible. An example was given comparing pages of phone records and social services records – the first was considered easily searchable and did not need to be read in full. The latter was considered time-consuming and needed to be read thoroughly.

Participants described video-evidence as time-consuming, as it needed to be watched from the start to the finish to understand what had happened. Participants perceived an increase in this type of evidence from CCTV, dash cam footage and body-worn video by police.

## **Proxies for case complexity and the amount of work involved**

*“PPE is an indicator of work that is going to be done in a case. It’s not the only indicator, it doesn’t need to be the driving indicator, but it is an indicator of work that is going to be done in a case and to have removed it as a general position across the board is wrong in principle.”*

Some barrister participants considered that using pages was a “blunt instrument” to measure complexity of cases and was not right. While the simplicity of using pages was welcomed, participants said it was unfair in certain types of cases and could promote cherry-picking of certain types of page-heavy cases<sup>14</sup>.

Some barrister participants in two focus groups discussed difficulties surrounding page counts and CPS. They reported that CPS was reluctant to serve evidence as CPS was concerned about the costs. Participants also said that CPS was reluctant to provide the page count to barristers. They reported barristers would be asked to suggest the page count to CPS, and get it agreed by CPS.

Both the page count and the estimated length of the trial were said by participants to be estimators of the amount of work going into a case, and the potential complexity of it. Other proxies mentioned for complexity were witnesses served, number of complainants or incidents<sup>15</sup>, and the amount of unused material. Participants mentioned further

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<sup>13</sup> Achieving Best Evidence; Video-recorded interviews with vulnerable and intimidated witnesses, including children, or otherwise significant witnesses  
[https://www.cps.gov.uk/sites/default/files/documents/legal\\_guidance/best\\_evidence\\_in\\_criminal\\_proceedings.pdf](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf)

<sup>14</sup> Examples used were of cases with high amounts of phone evidence that practitioners would not need to read in detail

<sup>15</sup> This was said in context of sexual offence cases, where page count proxies were described as “unhelpful and unwieldy”

examples of complexities that increased the time spent on cases including mental wellbeing of clients or complex legal arguments. They argued that the work involved in different cases, even of the same offence type, could be significantly different. Participants acknowledged that measuring which case was easy and which one was hard was difficult without using these proxies.

## **Perceived financial impact of court room technology**

The perceived impact of increasing video evidence and the out of date technology in the court system was discussed. Participants described issues with receiving CCTV evidence in proprietary formats that could not be accessed and having to request open format versions, as well as trials being adjourned due to this.

Some barrister participants mentioned the need to purchase equipment for court use due to poor provision in the courts. This was said to be because courts had either poor equipment or no equipment, particularly for video evidence. Participants reported this was an issue for barristers, who as self-employed people had to pay for equipment themselves, as well as update the equipment periodically as technology ages.

At two focus groups barrister participants discussed the need for them to purchase two laptops to be able to show video evidence in court – two were needed due to memory issues and being able to use one computer while playing video evidence from the other. One example given was of a sexual offence case, where the prosecuting counsel would have to bring two computers to present the evidence and video interviews, as courts rarely had appropriate laptops for this use. At one focus group the barrister participants discussed the need to provide their own Bluetooth speakers to play the evidence, so juries can hear clearly.

## **Improving the evidence heavy fee schemes**

Participants mentioned a number of approaches to improving the evidence heavy fee scheme. For example:

- reducing the cliff-edges in the page counts that made the scheme difficult by having banding. A proportion of the fee would go up based on page increments, such as every 1,000 pages, in perpetuity. The barrister participants made the example that cases of 1,000 pages and 5,000 pages should have a proportionate difference that should be remunerated;
- similarly, another suggestion was that offence classes could have modest fee increases based on their page counts, depending on what was typical and what would be more than typical;
- a “safety valve” was also suggested, where there would be a standard fee for a standard amount of work, but where cases had page counts or work exceeding

normal limits, it was suggested barristers should be able to forward them to LAA for review<sup>16</sup>;

- participants highlighted the need for transparency and automatic registering of page counts so everyone would get the same fee; and,
- ensuring courts had the appropriate technology so that barristers did not need to provide it.

Some respondents considered that rather than page counts and other proxies, the issue was overall funding.

*“It’s not about whether you put the bandings at 4,000 pages or 5,000 pages. We just want there to be more money. There should be more money because this system is crumbling. The whole justice system is crumbling”*

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<sup>16</sup> It was said the “safety valve” requests should be forwarded to specialist teams and officers with sufficient understanding and knowledge of specific issues – an example of a team like VHCC was made

# Findings on Cracked Trials in the Crown Court (AGFS)

This section of the annex focuses on findings in relation to cracked trials (aka cracks) and late guilty pleas.

*“Cracked trial doesn’t equal bad, nor does it equal a cynical manipulation of the process by the lawyers, it is so much more complex than that.”*

## Financial interests of the lawyer and the best outcome for the client

Participants highlighted that, in their view, financial incentives now encouraged running a short trial with a sworn in jury, and then pleading guilty after the trial had begun, as opposed to encouraging a pre-trial late guilty plea. They explained that this could result in a worse outcome for the client, as they would get penalised and a longer sentence for guilty pleas once the trial had begun.

*“If you wanted to make money the best way to make money is probably to run a trial for a short period of time rather than to crack it. Now, do you want to incentivise that?”*

*“... The payment system has set up a conflict between the financial outcome the lawyer might desire and what is best for the client ... If you do the best for the client you get paid less and that is the truth.”*

Some barrister participants said they believed poor advice, motivated by avoidance of cracked trial fees, does happen. One case described was a multi-defendant case. The other defendants were acquitted or pleaded early, and one defendant appeared to have been advised to have a trial, despite being on CCTV and having a poor alibi. The barrister participant felt this was because there was “potential for pages to be served” and because it was a three-week trial.

Barrister participants felt that the financial incentives to avoid cracked trials were especially relevant to solicitors. One barrister participant suggested “for them there is this encouragement for fraud”. They described that, in their experience, some solicitor firms requested barristers to swear in the jury. The barrister participants felt this was done to gain higher fees. If, in these cases, the barristers considered pleading guilty was the right advise to give to their clients, and advised the clients to do this, the solicitors would take the instructions away.

Across all the barrister focus groups, participants described a sense of duty to advise their clients correctly, but also a sense of resentment that in the case of cracks this would be against their own financial interests.

*“I resent being put in the position that by virtue of doing the right thing by my client, saving a huge amount of public money, I get kicked in the teeth several times”*

and

*“Where the right outcome in a case is for a defendant to plead, even if it’s on the day of trial, there is then a punishment to us financially for having taken that step on that particular day”*

Some examples given of times when the barrister participants felt they went against their own financial interests were:

- pleading despite other lawyers wanting to continue the trial, and losing “three weeks’ worth of trial money”;
- having prepared for trial, cracking, and losing £5,000 payment;
- having made a legal argument to end a case (ahead of trial), leading to losing money and impacting future earning opportunities as “The solicitors never forgave me and never gave me any work again because they lost so much money”; and,
- having prepared for a trial, being in court until 4.30PM sorting various issues with witnesses and after co-defendants pleading guilty, the defendant was advised and pleaded guilty before the jury was sworn in. The counsel was paid cracked fee while having been at court the whole day.

## **Cracked trial fees and elected trials**

In one focus group, barrister participants also discussed the impact of cracked trial fees in the case of elected trials<sup>17</sup>. They mentioned that solicitors get a lower fee in elected trials that crack than in magistrates’ court. Therefore, they considered some solicitors would try avoiding elected trials or seek to keep trials in magistrates if they feel they may crack. The participants’ view is that if there was an elected trial that some solicitors think will crack, they might not attend it in the Crown Court.

*“There are incentives to discourage clients who should have a jury trial in the Crown Court where all the procedure is done properly, with all due respect to magistrate court practitioners, and because of the way the fee scheme works they’re having a magistrates’ court trial where the trial shouldn’t have been heard in the first place.”*

Some participants felt this lead to trials being inappropriately kept in the magistrates’ courts. An example given was of a domestic violence and arson case, with a child witness and no Ground Rules Hearing<sup>18</sup>, seen by a lay bench.

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<sup>17</sup> Elected trials are “either way” cases – triable in either magistrates’ court or Crown Court, and where the defendant has chosen to be tried in the Crown Court

<sup>18</sup> Ground Rules Hearing can be used in cases of vulnerable witnesses to adapt criminal proceedings for their benefit [https://www.judiciary.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_Children\\_Vulnerable\\_adults+\\_finalised\\_.pdf](https://www.judiciary.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_Children_Vulnerable_adults+_finalised_.pdf)

Participants noted that the lack of elected trials in Crown Court could impact on junior barristers particularly, with some either-way offences not being seen in Crown Courts anymore. Basic Section 47 (actual bodily harm) cases were given as an example.

## Predicting cracked trials

All focus groups agreed that reliably predicting cracked trials was impossible.

Participants highlighted a range of reasons for cracks including new evidence, witnesses, co-defendants, prosecution evidence, and the risk appetite of clients. Participants reported late disclosure as sometimes leading to late cracks. They also mentioned that clients could be irrational and motivated by personal reasons for early guilty pleas. The current levels of uncertainty in court systems, such as with floaters<sup>19</sup>, and allocation of opposing counsel (and their skills and experience) were said by participants to make predicting cracks difficult too.

Overall, participants felt the reasons for cracks were complex, inter-related and interacting, and at times exogenous.

## Reasons for cracked trials

Criminal Justice Statistics broadly classify trial crack reasons into four categories: defendant-led (defendant pleads guilty to the charge or an alternative charge); defendant is bound over; prosecution ends case; and other reasons (including death or incapacity of defendant).

The discussion in focus groups expanded on this, and specified factors leading to cracked trials. The examples used by the focus groups demonstrated that in many cases these factors might be simultaneous, inter-related and interacting. Participants felt many of the reasons for cracked trials were outside the control of barristers.

*“Imagine all the factors in play. The sort of people we deal with, prosecution suddenly deciding a witness had let them down, witnesses not turning up, etc., etc., and to be punished for that is completely unjustified by any logical processing.”*

Participants in one focus group mentioned that Crown Prosecutors were described as “not want(ing) to be held accountable for discontinuing a case” as they “suffer scrutiny from their managers”. The perception was that they would rather postpone than discontinue a case if they think it will not succeed.

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<sup>19</sup> A “floater” is a trial not allocated to a specific court or judge but which may be taken in any court in the same court centre on a specific day or within a period of time [https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Protocols/listing\\_crown\\_court\\_manual\\_050705.pdf](https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Protocols/listing_crown_court_manual_050705.pdf)

## Defendants as the decision-makers

One participant described the defendant as the “ultimate decision-maker” to whether a trial might crack or not. This sentiment was shared across the respondents of all the focus groups.

The defendant’s risk-attitude and previous experiences were described by participants as reasons for some late cracks. The argument is that some defendants were keen to wait until the last minute to plead as they have had previous experiences where they may have been released due to prosecutor-related reasons (lack of evidence, witnesses not turning up).

*“We represent people who are brinksmen or brinkswomen. They will take things to the nth degree in the hope that something is going to turn up and time and time again you get to court, you talk to people and you resolve the case but you resolve that ten minutes before you walk in the court door”*

Participants also explained that many barristers are “dealing with people who have all sorts of difficulties that may impact upon their decision-making process at any point in the process”. In their view, pleading guilty and receiving a reduced sentence could feel abstract for the defendants and difficult to understand as they were “imaginary numbers”. Participants explained this was “because defendants, people who commit crimes, do not think ahead. If they thought ahead they wouldn’t have committed the crime in the first place”.

*“Often we’re dealing with people who aren’t rational ... cases will resolve for all sorts of random reasons and there’s nothing we can do about some of them”*

Participants reported that personal reasons might also impact the defendant’s decision to plead guilty at a later stage. For example, having second thoughts when “being faced with a trial”, being persuaded by their “wife or girlfriend”, or wanting to be out by a certain date. One example given was of a defendant pleading guilty because they wanted to attend their child’s 18<sup>th</sup> birthday and not be in custody.

*“So really the problem is that we’re dealing with humans and so that’s why it is impossible to know. Because you have got the human aspect of your defendant, the witnesses involved, there is no way of telling”*

## Evidence and advice on pleas

Participants perceived that the system had an impact on when guilty pleas could be expected. For example, at the PTPH<sup>20</sup> the papers might be inadequate or inaccurate and therefore barristers could not advise the client to enter a plea on that basis.

Participants highlighted system issues such as:

- “the actual first hearing where people are expected to plead not guilty or guilty is before the service of papers”;

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<sup>20</sup> Plea and trial preparation hearing



- “you’re expected to enter a plea on the basis of an MG5<sup>21</sup> which so often is so inaccurate that you’d be crazy to be advising anybody to be entering a plea on that basis”; and,
- “you’re also dealing with a system when the Crown Prosecution Service do not comply with service dates, and so people do not get the material that they want to consider”.

Even after having pleaded not guilty at the first instance, participants highlighted that new factors emerged while waiting for the trial which they perceived impacted the decision-making of the defendant. For example:

- seeing new evidence emerge;
- co-defendants pleading guilty might persuade other defendants to plead guilty too; and,
- seeing a co-defendants trial crack - one example given in the focus groups was of a three-defendant case, where only one defence counsel thought their client might plead guilty, but all trials cracked one after another.

*“In a way there’s almost a perception it’s a lawyer’s fault if somebody doesn’t plead guilty at the earliest opportunity. We can give the client all the best advice in the world on the merits of their case, and to be fair it might even look like a really good case to start off with ... It’s only later on in disclosure where something might arise that causes your client significant difficulty and at that point you’ve got to advise them, “Well, you’re probably not going to win now, so you might as well enter a guilty plea at this stage,” but again it’s always up to the client at the end of the day”*

## **The role of the profession in cracked trials**

Participants reported that trials might also crack because of the differences in personalities or skill or understanding of the defence professionals working on the case.

Several examples were mentioned by participants including:

- a new prosecutor highlighted “a particular piece of evidence that his predecessor hadn’t”, and the defendant pleaded guilty because of that;
- a first prosecutor proceeded with preparations after counsel had explained the witness was awaiting his own trial, and the next prosecutor on the case proceeded with attempting to crack it because of this; and,
- a more senior barrister inherited a case from a junior colleague, and they considered more factors and advised the client differently.

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<sup>21</sup> Police report <https://www.judiciary.uk/wp-content/uploads/2015/09/bcm-mg5-how-to-complete.pdf>

While reliably predicting cracked trials was said to be impossible by participants, some barrister participants across the focus groups suggested that sometimes “you can have an idea” if a trial might crack. However, they noted that they cannot professionally commit to other trials before it does. Participants also said that even if barristers might think some trials should crack, their duty was to let their client to be the decision-maker.

*“But the reality is we are not there to strong arm people into entering a particular plea, we’re there to properly advise them on the law and if they choose to carry on, even in the face of [overwhelming] advice, it is extremely important that they get a fair trial with a lawyer who’s not overworked and underpaid.”*

## Timing and preparations for cracked trials

Across all focus groups barrister participants agreed that they would prepare for a cracked trial the same way as for any trial because they could not reliably predict cracks.

In two focus groups, the timing of the majority of the work was debated. There were differing views between some junior-junior and senior-junior<sup>22</sup> barrister participants over whether the majority of the work was done by the final third or begun in the final third of the case.

Most of the junior-junior barrister participants felt that the majority of the work was done at an early stage, and some more senior-junior barristers believed most of the work was done closer to the trial. The majority of the barrister participants who described their work as “front-loaded” said that this work would have been completed in the first two thirds. One participant summarised it by stating that “all of that substantive work should have been done by the stage dates<sup>23</sup> which will all fall into the first two thirds”.

Work for barristers was described by some participants to be front-loaded, originating from poor/limited instruction and disclosure issues. Setting up the defence statement and dealing with disclosure was described by participants as taking considerable time. Participants reflected that the process now was “such a piece-meal operation as opposed to back in the day” when they perceived that barristers would receive a complete brief.

One barrister participant summed it as “you’re spending the first two thirds of the period litigating the thing and the last third actually prepping it for advocacy”.

*“There is a front loading in going through everything, largely because the job hasn’t been done properly by those who instruct me.”*

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<sup>22</sup> Junior junior barristers refer to barristers with seven years or less experience, senior junior barristers refer to barristers with eight or more years of experience

<sup>23</sup> The stage dates are divided into four stages. In most cases the Crown Court will be able to set four dates to reflect four stages. Stage 1 is the service of prosecution case (50/70 days after sending depending upon whether defendant in custody); Stage 2 is the defence response (28 days after Stage 1 – includes Defence Statement); Stage 3 is the prosecution response to DS and other defence items (14-28 days after Stage 2); and Stage 4 is for defence to provide material/requests/applications <https://www.olliers.com/news/7-things-you-should-know-about-better-case-management/>

The participants who found preparation for trial to be front-loaded explained that at a PTPH they would “these days” have to do some degree of trial preparations, such as considering the witnesses and draft cross-examinations. After PTPH there would be further stages in the preparation for trial such as re-reading papers after more were served, and after unused material was served this would need to be read too.

Some participants explained that barristers would have completed most of the work before the two thirds, particularly before defence case statements. They explained that they would have looked at all evidence, including unused if it was received in time. This work would include multiple conferences, defence statements, leading the solicitor on any lines of enquiries, drafting ABEs<sup>24</sup> and serving legal documents such as bad character applications or special measure applications.

One barrister participant summed it as “if we need to properly advise the client what’s going to happen at trial if he doesn’t plead guilty earlier rather than later, I need to have done all the prep by that point”.

*“You start preparation for a trial the minute you get it ... because you can’t advise your client until you’ve considered what a trial might look like”*

Several of the barrister participants said that instructions and work done by solicitors might be lacking, and they had to do additional work because of this. They said that defence case statements should be drafted by solicitors, but in their experience, they weren’t always. Some barrister participants also expressed preference for doing it themselves because “it wouldn’t be done in a way that was actually anything comprehensible, the way you wanted it done because they don’t have the experience or training that we have” and because they want to know what their clients would be tied to in trial.

Participants mentioned that cases where more evidence came at the last minute might operate differently – examples used were sexual offence cases and murder cases. Some more senior barrister participants explained that for them work was backloaded, and that they spent less time on the defence statement, and more time the week or weekend before the trial to prepare questions.

*“I suppose it’s a different description of work, at the start you’re doing sort of advisory work and consideration and then by the time you’re coming up to trial you’re actually doing trial prep, it’s a different type of work by that point.”*

The division of the stages into thirds was also questioned by some barrister participants. One barrister said their opinion was that “it’s a five-part situation. Stage one, prosecution disclosure, you’ve then got to consider that ... for stage two, preparing defence statements. Stage three, sort of secondary disclosure, stage four, legal argument, stage five, trial”.

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<sup>24</sup> Achieving Best Evidence – guides for interviewing witnesses, especially vulnerable  
<https://www.cps.gov.uk/legal-guidance/achieving-best-evidence-criminal-proceedings-guidance-interviewing-victims-and>

## Financial impacts of cracked trials

*“A trial cracking is a personal, financial catastrophe for a barrister”*

The impact of a cracked trial on the barrister work load was discussed at all focus groups and the overall agreement was that the impact was considerable. Participants described them leading to loss in income in two distinct ways. Firstly, there would be the loss of income from preparing for the trial but not having a trial fee, and secondly, losing out on alternative work and not having refreshers for the length of the trial.

*“A double punishment because not only are you considerably earning less from that case but you are then depriving yourself, you’ve got the empty diary syndrome because you’ve been lined up to do a trial for you that was going to be three weeks and then you walk away on day two and you’ve got nothing in your diary for the next two and a half weeks.”*

Participants explained that filling diaries in the case of cracks could be difficult. Several barristers across the four focus groups described that there was a lack of shorter trials that could be picked up - “there’s just nothing at the junior end coming through being charged”.

At two focus groups, participants highlighted that losing a trial might be more difficult for senior barristers. They tended to have longer trials and because of their extensive experience, if they lost a lengthy trial, “no one is going to think of [them] for a small trial to fill in”. It was said that cracks and refilling diaries would affect junior juniors less as the trials typically would be shorter.

*“These days it impacts usually on the more experienced practitioners who’ve got diaries just full of four and six and eight-week trials, because the risk you take is just dreadful. ... it’s not just cracking because the courts [postpone trials leading to similar outcomes]”*

Across the focus groups, the perception was that while it used to be possible to re-fill diaries, it was not possible anymore and had reduced in recent years. One barrister participant described that cracks didn’t matter when they were “a youngster” as their clerks would find alternative trials. They continued that “that’s not the way the system works anymore and it’s getting worse because they are cutting the sitting [days]”. Another barrister participant said, “it used to be very different but there was enough slack in the system so that if your case went short the chances were that your clerk would be able to find you something to do later that week or the following week”. Another barrister participant explained that in their view there were “clients through with bits and pieces around but there isn’t the volume”.

*“It wouldn’t be so punitive if volumes weren’t so low. If all cases were being charged, that would at least compensate with the empty diary situation. It wouldn’t compensate how little you’re paid for a cracked trial and the amount of work that actually goes into a cracked trial. ... if there was volume that would at least compensate the empty diary but we don’t have the volume either.”*

Participants perceived this change in volumes and therefore reduced ability to fill up diaries was due to a systemic issue, where underfunding in police and CPS had led to a lower number of crimes being charged.

Participants highlighted that “the system isn’t getting the cases through efficiently and that the reasons were perceived to be “overlapping and you can’t address one in isolation”. Closure of courtrooms, less police officers and less charging, and the accused being released under investigation (and leading to cases being “lost”) were all mentioned by participants as systemic issues leading to lower volumes of cases in court.

## Vacated trials and floaters

Vacated trials<sup>25</sup> were described by participants as causing similar income issues as cracks. Participants perceived that counsel availability was not considered important to vacated trial decisions, meaning that if trials were moved, barristers might not be available to do it on the return date and they had to give the trial to someone else to do and “not get paid a penny”. Participants noted that even if the same barrister was able to do the new date, if cases were significantly delayed, the barristers may need to re-prepare it as it wouldn’t be “fresh in your mind anymore”. These were described as a common scenario across all focus groups, and that fees should reflect that.

Floaters were described as an issue as well, and that barristers need to book out that time even if they don’t know if they will get on the warned list system.

## Improving practice for cracked trials

In the focus groups some suggestions for improving payments for cracked trials and practices that may help in avoiding unnecessary cracks were given. These included:

- paying for client conferences to help ensure cracks happen as early as possible;
- payment for cracked trials should be front-loaded, just as the work preparing for trials is front-loaded; and,
- there should be some correlations between the time lost and the cracked trial fee as a longer time estimate means a more complex case and more preparation.

Some other things that participants suggested should be factored in fees were:

- floating trials, as barristers need to book time out even if they are not sure they will get on the warned list;
- re-scheduled trials with a significant time lag, where barristers might need to re-prepare; and,

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<sup>25</sup> A vacated trial is a trial that has been given a date for trial whether at a preliminary hearing or Plea and Case Management Hearing (PCMH) or by inclusion in a window for trial, and is taken out of the list (*stood out of the list*) **before** the date of trial. [https://www.judiciary.uk/wp-content/uploads/2010/04/cit\\_guidance\\_v3\\_1007.pdf](https://www.judiciary.uk/wp-content/uploads/2010/04/cit_guidance_v3_1007.pdf)

- re-scheduled trials where barristers who have done the prep were not able to attend (due to time clashes etc.) and need to give the case to someone else, and will not get paid for the preparation work. This was described as a common scenario.

In one focus group the barrister participants agreed that being paid for client conferences might help barristers to know in advance how clients were likely to plead, and if cases were going to crack. Face-to-face conferences were described as making it possible to provide more advice to the clients on the evidence and likely trial outcome. Participants argued that it would be beneficial to have them before the PTPH to advise on the plea. Some participants report that this was particularly difficult to arrange in prisons, and might be limited to court days or early mornings. All participants in this focus group agreed that the conferences needed to be face-to-face, rather than over a video link where confidentiality could not be guaranteed.

In another focus group the barrister participants discussed which third should determine the payment for cracked trials. One suggestion was to pay 75% after stage two and then 100% after the secondary disclosure<sup>26</sup>.

In that focus group the majority of the barrister participants said the work was front-loaded, and discussed that the full fee should be given at stage one or stage two. One view was “once they’ve completed their disclosure that’s when ... you’ve got to start doing the work”. Effectively, the view was that by the defence case statement, the barrister would have prepared on the basis that the client will go to trial. The final end-point for the majority of the preparation was said by participants to be at secondary disclosure, where they might “get the golden information that changes your defendant’s position”, and where they have to consider unused.

Across all focus groups, participants agreed that there should be some correlation between the loss in time and fee. One suggestion was a proportion of the estimated refreshers should be paid. Cracked trial fee could be based on the estimated length of trial, where a judge has certified and agreed the length. Participants said that the length of trial indicated complexity, irrespective of page count or offence category because qualitative content could differ between similar page counts. The length of the trial could be determined before it would be a cracked trial, so there wouldn’t be a negative incentive – the PTPH was suggested as a good time as barristers would have to let the court know at that stage if there were any additional witnesses or experts.

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<sup>26</sup> “Continuing disclosure” – supplied after the serving of defence statements  
<https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2018/07/FOI-request-220318-Attachment-5.pdf>

# Findings on Sending Cases to the Crown Court (LGFS)

The discussion in the focus groups was focused, in the main, on:

- the Crown Court fee scheme and the impact of it on solicitors and solicitor advocates;
- a view of the lack of funding across the criminal justice system leading to bad outcomes for defendant for a variety of reasons; and
- workloads in the Crown Court in general.

Proxies in the Crown Court fee scheme<sup>27</sup> were also discussed by participants as they were relevant to the overall workload and remuneration related to sending cases.

Sending hearings at the magistrates' court were formerly known as 'committal hearings'. Discussion on particularly *sending cases* to Crown Court was limited, and was mostly discussed as part of general work in preparing for Crown Court.

Overall, solicitor participants expressed the view that workload in Crown Court cases was considerable, and bar some "windfall cases" such as high PPE cases, or where defendants have a limited role<sup>28</sup>, they considered remuneration was at unprofitable levels. Participants felt this led to more solicitors choosing duty work, as it was comparatively better paid. Participants perceived that lack of funding across the criminal justice system had pushed more of the work previously done by the prosecution and court administration onto the defence solicitors.

Participants claimed the current proxies for complexity of offence category and PPE in the Crown Court fee schemes did not always reflect the work they undertook. While high PPE cases were generally described by participants as "windfall cases", it was also said that other factors could complicate the case management, thus requiring more time to be spent by solicitors.

Participants felt additional proxies such as defendant characteristics (mental health; need of an interpreter), vulnerabilities of participants (defendant, complainant or witnesses), number of witnesses and number of co-defendants would better reflect the workload if used in addition to existing proxies.

Solicitor participants explained that sending cases to Crown Court often required an amount of work that was currently poorly remunerated. They felt that this was especially in

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<sup>27</sup> Crown Court fee scheme was the terminology used by the solicitors and solicitor advocates in the focus groups. This terminology is thus used throughout the report as well. While not specified by the participants, Crown Court fee scheme can be taken to mean Litigators Graduated Fee Schemes due to the context and description of proxies and other factors involved.

<sup>28</sup> Where the client has got a very minimal role so solicitors can identify they need to only spend a certain amount of time on the evidence, whereas the fee structure is that the solicitor will get paid for the overall page count.

cases where elected Crown Court trials ended up as cracked trials<sup>29</sup>, but it was not possible for the solicitors to have an impact on whether or not the cases crack. Respondents highlighted that cases cracked due to defendant choices, new evidence emerging or prosecution or witness related reasons.

Participants felt that many areas of work that were previously paid, were now unpaid, in addition to the impact of inflation and a general reduction in fees. One area where payment was lost according to participants was serious cases going to the Crown Court. Previously, they argued litigators were paid a fee for dealing with the cases in the magistrates' court; and "when they were either sent or committed to the Crown Court for trial there was a fee payable there".

This committal fee<sup>30</sup> was said to have been taken away. Solicitor participants explained that while it was argued [by the Legal Aid Agency] that this was paid within the Crown Court fee scheme<sup>31</sup>, due to overall reductions in the Crown Court fee, they felt it effectively was not. The committal fee was said to have represented the work involved in representing the client, having to attend court, travel, completing a Judge in Chambers bail application, dealing with the family, interpreter or psychiatric services, "going and seeing the client in custody [and] dealing with the sentence."

The fees available for appeals from the magistrates' court to the Crown Court were also described by participants as not reflecting the work required. The fees for both magistrates' court and Crown Court were described to be problematic and too low for the amount of preparation involved. Cases where prison visits were needed were explained by participants to be particularly unprofitable due to travel and wait times involved.

One example was made of burglary where the fee was described as low in comparison to the workload. The fee was said to include "the solicitor appearing in the magistrates' court; the case then being sent to the Crown Court; it usually includes a bail application in the magistrates' court and/or Crown Court; considering the papers, either instructing counsel [or] doing it yourself... A prison visit. Then, if it's a not guilty plea it covers a trial in the Crown Court that may be one or two days". The hourly rate was claimed by the solicitor to be in pence. Another solicitor explained for them the fixed fees and the work required for another burglary case had meant they received £3 per hour.

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<sup>29</sup> This was described to be financially dis-incentivised via low fees, as an attempt to reduce solicitors sending cases to Crown Court

<sup>30</sup> Fee for moving from one court to another

<sup>31</sup> Term preferred by focus group participants; can be taken to mean LGFS