Neutral Citation Number: [2024] EWHC 155 (Admin)

Case No: AC-2023-LON-000888

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2024

Before :

LORD JUSTICE SINGH
MR JUSTICE JAY

- -

Between :

The KING (on the application of the LAW SOCIETY OF ENGLAND AND WALES)	**Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**
- and -	
(1) THE CRIMINAL LAW SOLICITORS' ASSOCIATION (2) THE LONDON CRIMINAL COURTS SOLICITORS' ASSOCIATION	**Interested Parties**

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- -

Tom De La Mare KC, Jason Pobjoy, Gayatri Sarathy and Emmeline Plews (instructed by **Bindmans**) for the **Claimants**
Sir James Eadie KC, Catherine Dobson, Adam Boukraa and Isabella Buono (instructed by the **Government Legal Department**) for the **Defendant**
Adam Wagner (instructed by **Hay & Kilner** for the **First Interested Party** and by Mr **Edward Elwyn Jones** for the **Second Interested Party**) for **the Interested Parties**

Hearing dates: 12-14 December 2023

- -

Approved Judgment

This judgment was handed down remotely at 10 a.m. on 31st January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE SINGH AND MR JUSTICE JAY

Lord Justice Singh and Mr Justice Jay:

Introduction

1. This is the judgment of the Court.

2. This claim for judicial review arises from recommendations made by Sir Christopher (now Lord) Bellamy KC in the 'Criminal Legal Aid Independent Review' ("CLAIR") Report dated 29 November 2021. The Claimant is the Law Society of England and Wales. The Defendant is the Lord Chancellor. Although the Lord Chancellor accepted and has implemented many of the recommendations made by Lord Bellamy, the Law Society challenges two aspects of the response to the report:

   (1) The failure to implement the "Central Recommendation" in full, that is Recommendation 5 of the Report at para 16.4, that additional funding of at least £100 million per annum (an overall increase of some 15%) was required for criminal legal aid solicitors' firms;

   (2) The alleged failure to implement Recommendation 3(i) at para 16.2, that an Advisory Board should be established and that the Ministry of Justice ("MoJ") should consider, in conjunction with the Advisory Board as appropriate, the extent of unmet need in criminal legal aid and how those needs should be met, referred to by the Law Society as the "Non-Intervention Recommendation".

3. In outline, the four grounds of challenge are that:

   (1) The Lord Chancellor has breached the duty to provide criminal legal aid in accordance with section 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("Ground 1").

   (2) The Lord Chancellor has acted irrationally ("Ground 2").

   (3) The Lord Chancellor has failed to provide adequate reasons ("Ground 3").

   (4) The Lord Chancellor has breached the duty to make adequate enquiries (often referred to as "the *Tameside* duty", after the leading case on the subject, *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1065) ("Ground 4").

4. Ground 4 was added with the permission of Fordham J shortly before the hearing before us but logically comes between Grounds 1 and 2, which is how we will deal with it below.

5. We are grateful to all counsel and solicitors in this case, including those acting for the Interested Parties, for their written and oral submissions, and for their diligent preparation and presentation of this important case.

The Facts

The Fee Schemes

6. The principal focus of these proceedings has been three of the various fee schemes laid down by secondary legislation for the remuneration of publicly-funded solicitors' work in the field of criminal justice. Each of these schemes is administered by the Legal Aid Agency ("the LAA"). What follows is a necessarily simplified version of the regimes currently in place, principally under the provisions of the Criminal Legal Aid (Remuneration) Regulations 2013, as amended from time to time.

7. The schemes in question are the Police Station Advice Scheme, the Magistrates' Court Fee Scheme and the Litigators' Graduated Fee Scheme ("LGFS"). Little time was spent during the hearing examining the detail of the Magistrates' Court Fee Scheme and we may therefore address it quite briefly. In short, if the solicitor has applied to the LAA and obtained a representation order for a case in the Magistrates' Court (in other words, the accused has satisfied both the means and the interests of justice tests), the level of remuneration will depend on whether the work on the case qualifies for a Lower Standard Fee, a Higher Standard Fee, or a non-standard fee. Payment is based on a combination of hourly rates, fixed fees and thresholds.

8. The Police Station Advice Scheme was first set up in 1986 to meet the pre-requisites of the Police and Criminal Evidence Act 1984 ("PACE"). Section 58(1) and PACE Code C provide suspects with a right of access to private, independent legal advice which is not subject to any means test. In general terms a suspect who wants legal advice may not be interviewed or continue to be interviewed until such advice has been received, and the custody officer must act "without delay" to secure its provision. Further detail appears under para 89 below.

9. Currently, there are approximately 190 police station and Magistrates' Court duty solicitor schemes across England and Wales, and in addition 15 Magistrates' Court schemes in London. As at January 2023 there were 1,127 law firms (or "providers") holding a contract to deliver criminal legal aid advice, and 4,023 duty solicitors on the duty schemes. Advice and assistance under this scheme may also be given by police station accredited representatives who are either employed by or consultants to the solicitor's firm, or they may be supplied by independent agencies. There were 3,053 of these in June 2021.

10. The Police Station Advice Scheme will normally require the physical attendance of the solicitor or accredited representative at the police station, typically for the police interview. The suspect is also entitled to telephone advice. Precise figures are unavailable and those set out in the voluminous documentation before us vary, but according to Dr Vicky Kemp, who gave evidence to Lord Bellamy, only about 50% of suspects seek advice at the police station.

11. For administrative purposes, individual police stations and courts are grouped into geographical duty scheme areas. These are aligned to postcode areas (or groups of postcodes) and a provider's scheme eligibility is based on the postcode location of their office or offices. Providers on the rota will receive an allocation of duty rota slots in proportion to the number of duty solicitors they engage, although they can rely on the wider pool of solicitors and police station accredited representatives to conduct some

of the attendances. Under the terms of the Specification to the Standard Crime Contract, providers are contractually required to ensure that they are able to service the rota slots allocated to them. If they are unable to cover a case for any reason, for example owing to a conflict of interest, they must make alternative arrangements to cover that slot, which may include handing the case back to the Defence Solicitor Call Centre ("DSCC") so that it can be deployed to another provider. The DSCC, operating a back-up system, will either allocate the case to another provider within the scheme, or will contact providers from neighbouring schemes. Beyond using "all reasonable endeavours", there is no contractual requirement to accept back-up work.

12. It is part of the contractual requirement that a provider accepts 90% of cases referred to it on the rota. This is a Key Performance Indicator ("KPI"), compliance with which is monitored by the LAA through Provider Activity Reports.

13. Once a case has been accepted, a solicitor must use reasonable endeavours to contact the client by phone within 45 minutes, and that target must be met at least 80% of the time. Under clause 9.48 of the Specification, there is an obligation to "arrange attendance at the Police Station, if necessary, within 45 minutes". In some areas the LAA has relaxed that requirement in recognition of the travelling times often entailed, although even in those areas the expectation is that the solicitor will use best endeavours to attend at the time agreed.

14. Since January 2008, fixed fees are paid under the Police Station Advice Scheme for all work relating to police station attendance, and these vary according to geographical area, the highest fees being paid in Central London and Heathrow. These fixed fees cover travelling time, however long that may be, and are not paid if the police interview is cancelled. There is also an "escape fee", normally three times the fixed attendance fees, ostensibly to deal with exceptional cases. Only some 0.2% of attendance claims result in an escape fee being payable.

15. Turning now to the LGFS, this scheme was introduced in 2007 and is based on a series of fees and proxies to arrive at the final fee. The final fee will vary according to: the basic fee for the offence in question; whether there is a guilty plea, a "cracked" trial (i.e. where a trial does not proceed for some reason such as a late guilty plea), or a trial; the length of the trial (i.e. the "Trial Length Uplift Element"); the number of pages of prosecution evidence ("PPE"); whether more than one defendant is represented; and any necessary adjustment for transfers and retrials. The calculations are complex, and need not be set out for present purposes, but the central point is that the higher the PPE, the higher the fee. The LGFS is the most significant part of criminal legal aid spending by far and it cross-subsidises other types of work. More specifically, the evidence of Professor Abigail Adams-Prassl is that the PPE and trial length uplift elements of the LGFS account for the largest category of criminal legal aid solicitor fee income. In particular, they account for 76% of LGFS payments overall and 43% of overall criminal legal aid funding.

16. As Mr Richard Miller, Head of the Justice Team at the Law Society, explains at para 11 of his first witness statement:

> "Until the limited increases to remuneration that began to be implemented in 2022, there had been no increase in Criminal

> Legal Aid remuneration rates since 1998. Instead, there had been a steady series of cuts over the preceding 15 years."

Here, Mr Miller is referring to cuts in nominal or cash rather than real terms expenditure, the former not adjusted for inflation. If the latter were brought into consideration, the value of the cuts would be significantly higher.

17. An analysis of the detail is not required. The most significant cut was introduced on 20 March 2014 when the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014 came into force. These brought about a blanket 8.75% cut to criminal legal aid fees.

18. In February 2014 Otterburn Legal Consulting provided its report, "Transforming Legal Aid: Next Steps", to the Law Society and the MoJ. One of the conclusions was:

> "On average firms were achieving a 5% net profit margin in crime. Larger firms with 40+ solicitors were achieving lower margins than smaller firms. Previous reductions in fees, specifically for crown court work, may not yet be fully reflected in these figures. Firms in London are the least profitable."

The 5% figure did not reflect the March 2014 cuts.

19. In April 2018 the Law Society published a "heatmap" showing those regions where there was a dearth of duty solicitors as a result of fewer and fewer entering the profession. According to the Law Society, the average age of duty solicitors was 47, and in many regions considerably higher; and in several regions there were no duty solicitors under 35. In an accompanying press release the Law Society warned that "criminal defence lawyers in England and Wales could become extinct". Further, it was said that within five to ten years there could be insufficient criminal defence solicitors in many areas.

The Criminal Legal Aid Independent Review

20. A review was launched in December 2018 in response to stakeholder concerns about the long-term sustainability of criminal legal aid. In August 2020 it was announced that most parts of the review, from then on known by the acronym "CLAIR", would proceed on an independent footing. Lord Bellamy KC was charged with taking this forward.

21. During the currency of the review, the Justice Select Committee published its report on "The Future of Legal Aid". It pointed out that the number of criminal cases going through the justice system was likely to increase significantly over the following decade, and that an increase in the number of police officers was likely to lead to a 15% increase in demand by 2023. The Committee's overall conclusion was:

> "… [u]nless there is significant change to criminal legal aid, there is a real risk that the balance between defence and prosecution, which is at the heart of our adversarial justice system, will be unfairly tilted in favour of the prosecution."

22. CLAIR's Terms of Reference were ambitious. The purpose was to assess the entire criminal legal aid system in the context of the Lord Chancellor's statutory duty. Specifically:

> "The ultimate objective of the Criminal Legal Aid System is to provide legal advice and representation to those who most need it, in line with the Lord Chancellor's statutory duty to ensure that legal aid is made available, and to uphold and ensure the constitutional right to access to justice. This objective will provide the foundation for all analysis and recommendations."

23. The main themes of the review were to "support the sustainability of the market, including recruitment, retention, and career progression within the professions …" and to "consider whether the Criminal Legal Aid system can be made more resilient" according to a number of criteria, including whether "the number and distribution of providers is sufficient to meet the demand for the service and maintain access to justice throughout England and Wales".

24. Mr Tom de la Mare KC drew our attention to the expertise of Lord Bellamy's advisory panel and what he called the "richness of data available to the review", including in particular practitioner and student law surveys. Given that the Lord Chancellor does not dispute Lord Bellamy's findings and conclusions, it is unnecessary to address much of the detail. One matter which we should address is the LAA published figures showing that there were 1,510 firms doing some criminal legal aid work in 2014/15, and that number had fallen to 1,090 by April 2021. There was a comparable decline in the number of solicitors doing this work.

25. Lord Bellamy's report was finalised on 29 November 2021 and published shortly thereafter. We draw attention to the following conclusions.

26. Addressing the issue of sustainability (described in more detail in para 6.3 of the report), Lord Bellamy highlighted the difficulties in attracting young and energetic lawyers to criminal defence work, given its relatively poor pay and high intellectual, physical and emotional demands, and then in retaining them. "Of particular importance", as he put it, was the pay of those who prosecute and those who defend and, in this context, the disparity in remuneration levels even before account was taken of pension benefits, holiday entitlement, maternity leave, working conditions etc. Lord Bellamy also concluded that the average net profit margins of those specialising in criminal legal aid had fallen from 0 to 5% in 2018/19 to -10 to -5% in 2020/21. The reasons why the sector had survived at all were that those working in it had adopted a series of strategies to maximise revenue and reduce the amount of work done, and were relying disproportionately on a small number of high page count cases under the LGFS.

27. By way of conclusion on this issue:

> "6.70 Criminal legal aid firms can neither attract new blood, because the fee levels restrict the salaries that can be offered, nor retain experienced practitioners because of the higher salaries offered by the CPS … In real terms fees have declined by about

> one third from 2008, and many fees have remained the same for 25 years. Profits too have declined, to a level well below those in other areas of legal practice and are at present unlikely to incentivise new investment in the sector or compensate business owners for the risks to which they are exposed.
>
> 6.71 The situation has also led to a significant imbalance between the resources available to the defence as compared to the prosecution, undermining the principle of equality of arms. …
>
> 6.72 I therefore recommend that the remuneration of criminal legal aid firms under the Regulations be substantially increased as soon as practicable."

28. In assessing the level of fee increase that was required to support the sustainability of this market, Lord Bellamy considered that he was hampered by an absence of data and the difficulty in determining in the abstract the "right" price for a particular piece of work. His approach was to address the problem through the lens of sustainability and, by taking a necessarily broad-brush approach, taking CPS salary levels as a reasonable comparator. Overall:

> "7.20 Calculations by analysts in the Review team indicate that a sum of at least £100 million per annum is required to enable criminal legal aid providers to offer more competitive salaries and come nearer to achieving a more level playing field as between the prosecution and the defence. This is based on illustrative modelling which has been carried out to assess, in broad terms, how much criminal legal aid fees would have to increase by so that the gross salaries of solicitors and equity partners/shareholding directors working in CLA firms could become broadly equivalent to those in the CPS. This approximates to an increase of 15% above 2019/20 spend plus the modelled increase resulting from the accelerated items. This increase in funding could be distributed in a number of ways to achieve the desired outcomes."

29. Lord Bellamy emphasised that two key assumptions underpinned this "high-level illustrative analysis": the first was that the split between employee-related expenses and partner or shareholding directors' profits remained unchanged; the second was that other employee-related costs remained constant in nominal terms. Plainly these assumptions would be invalidated in the event of significant inflationary increases.

30. In conclusion:

> "7.22 Taking a baseline of 2019/20, plus the modelled impact of the accelerated measures, that would represent an overall

> additional increase in funding of some 15% on the solicitor's side. As a cross-check, MoJ calculations indicate that it would cost some £61 million per annum to reverse the fee reduction of 8.75% dating from 2014, from which the taxpayer has had substantial benefit in the meantime. But simply reversing the 2014 pay cut would not in my view ensure sustainability, given the costs and other pressures arising since that fee cut nearly 8 years ago.
>
> 7.23 I emphasise that a sum of the order of a minimum of £100 million per annum does not necessarily put the criminal defence side "on a par" with the CPS in any precise sense. The private sector has to take risks and make investments. On that basis, one could legitimately argue for a higher sum than the minimum that I recommend. Moreover, it is not certain that the sum I suggest will suffice. I consider £100 million to be no more than a minimum starting point, to be kept under review going forward.
>
> 7.24 As indicated in the Introduction above, there is in my view no scope for delayed implementation of this recommendation, given particularly the expected increase in demand and the pressures of the back-log."

31. In the Summary of Recommendations section of the CLAIR report (Chapter 16), the £100 million per annum increase (Recommendation 5) is subject to no further qualification or explanation. However, Lord Bellamy's earlier summary of what he called the "Central Recommendation" (see para 1.37) referred to an increase "as soon as possible to an annual level, in steady state, of at least 15% above present levels". The concept of "steady state" is of some significance because it recognises that it will take some time for the impact of new fee levels – operating as they do only on new cases – to work their way into the system. We will revert to this issue when we come to consider the financial implications in more detail.

32. According to para 1.40 of the CLAIR report, "in parallel" with this Central Recommendation the LGFS system should be reconstituted along the lines of the Magistrates' Court scheme, in order to ensure that the overall level of fees was sufficient properly to reward the work done. As the report makes clear elsewhere, under the existing regime fees are too high in some cases and too low in others. In particular, using the PPE as a proxy for work carried out leads to what was described as "a perverse system of incentives and inefficiencies" consequent on payment being calculated on the basis of the pages of evidence served whether those pages are read or not. Consequently, providers are not incentivised to do the actual work they are supposed to do but to try to obtain cases with a large amount of served material, and then delay the outcome until the trial begins.

33. However, Lord Bellamy's Recommendation 5 (para 16.4 of the CLAIR report) uses slightly different wording from "in parallel". It advises that this Central Recommendation "should be accompanied by" various structural reforms, including the restructuring of the LGFS. There is an issue between the parties as to whether the

Central Recommendation was linked to the structural reforms in the sense that the former might await the completion of the latter.

34. Lord Bellamy did not consider that more money alone would provide the solution. He recommended that an independent Advisory Board should be established to advise the Lord Chancellor at regular intervals. Its remit should include, amongst other things, advising the MoJ on the data needed to ensure that criminal legal aid is efficient and responsive throughout England and Wales. In recognition of the general paucity of the data available to the MoJ, Recommendation 3(i) was in the following terms:

> "The MoJ should consider, in conjunction with the Advisory Board as appropriate, the extent of unmet need in criminal legal aid in Wales or England, for example in terms of particular geographical areas (whether rural locations, small towns or inner cities), particular types of user (such as suspects/defendants, or those with mental health issues), particular communities (such as those from a minority ethnic background) or particular types of work (such as appeals or prison law); and if so, how those needs should be met, in particular by support grants to not-for-profit or similar organisations, or other measures, with a view to pilot schemes. Such consideration should include new possible ways of working as discussed in Chapter 15, including "holistic models" that span both criminal and civil needs, focussing on the needs of the user."

35. Chapter 15 had suggested that consideration be given to "non-profit models", including Community Interest Companies. This was because:

> "15.14 Even with the reforms I recommend, it is not a given that the private sector will always be able to provide adequate criminal legal aid coverage in all areas. Particular difficulties arise for one reason or another in parts of Wales, the Isle of Wight, South West England and East Anglia, although there may also be problems in some inner cities as well. …"

The Response to CLAIR

36. We do not propose to cover all the occasions on which the CLAIR report was considered at Ministerial level.

37. On 30 November 2021 the recommendations of the CLAIR report were considered by the Lord Chancellor and Minister Cartlidge. There were two separate submissions bearing that date. In the first, Ministers were advised that Lord Bellamy had advised "an immediate uplift" in solicitors' remuneration. In the second, they were informed that the CLAIR element of the MoJ bid to HM Treasury for 2024/25 was £68 million, which fell "significantly short" of the Bellamy recommendation. Further:

> "Whilst HMT are clear there is no more money for CLAIR, we have always held the position that we will need to revisit this position once we have received [the Bellamy] report and you have made a decision on the proposed Government response. Part of that discussion will also need to consider the extent to which there is further funding available, through our allocations process, to deliver on those recommendations – i.e. HMT will expect us to make some prioritisation choices before going to them for further funding."

In practice, these "prioritisation choices" would need to be made in areas of MoJ activity which are not "ring-fenced".

38. On 17 January 2022 the Lord Chancellor, Minister Wolfson and Minister Cartlidge were informed that (1) the risk of action by solicitors was lower than it was for barristers, and (2) "our internal analysis" suggests that investment in solicitors' fees is more urgent than bar fees. On 19 January the same Ministers were provided with a series of data which illustrated in studiously neutral terms the financial impact of complying with the Bellamy recommendation in full, and then on a 66% and 75% basis. Again, it was pointed out that there would have to be prioritisation choices, and that even without the implementation of CLAIR the criminal legal aid profession would see a substantial increase in funding consequent on the increase in demand.

39. On 20 January 2022 there was another CLAIR meeting attended by the same Ministers. A "read out" in the form of an email dated 25 January is available. During the course of the meeting the Lord Chancellor asked if it were possible to fund 75% of Bellamy from within departmental budgets. He was told that it was, although there would be "discretionary activity" which would not be able to be carried out.

40. On 27 January 2022 the Lord Chancellor and Minister Wolfson were presented with a submission addressing the future of the Public Defender Service ("the PDS"). The recommended option was that PDS capacity should be increased to address "market failures" and "legal aid deserts", with estimated additional costs in the region of £6-18.5 million. Mr Paul Daly, Head of Criminal Legal Aid policy at the MoJ, has explained that these are not references to *existing* market failures but to the risk of these occurring. The civil servant responsible for the drafting of this submission, Mr Hugo Gillibrand, has given a witness statement making the same point. We accept their explanations, not least because the intention no doubt was not to go further than the conclusions of CLAIR.

41. On the same date, three other submissions were also provided. In one of these Minister Cartlidge was told that CLAIR recommended an immediate uplift of 15% to amongst others the LGFS fees followed by structural changes. Officials asked the Minister to approve the "working up" of an option which would involve increasing only the basic element of the LGFS fees immediately. The submission entitled "CLAIR: Reform of Crime Lower Schemes" made it clear that further work would have to be done, and advice given, to achieve the CLAIR objectives. It was also noted that the funding was not available to implement the full recommendations of CLAIR. On 1 February 2022 Minister Cartlidge agreed to consult on the immediate fee uplift that had been recommended and on "re-shaping the scheme".

42. On 11 February 2022 Minister Cartlidge was sent a submission entitled "CLAIR: Fee Uplift Options". He was advised that MoJ officials considered that CLAIR had provided a strong case for additional investment in "the police station/early stages" to ensure that cases are resolved at the earliest possible opportunity, and in the solicitor's market generally because it is "more at risk of becoming unsustainable". Table 1 to the submission put forward a number of options which could form the basis of consultation, all of which "are scalable to respond to affordability and the consultation responses". Option 2 was for an immediate £100 million increase for both solicitors and the bar, i.e. 75% of the CLAIR recommendation, with the risk that the cost might be up to £22 million more "because the professions will use the future reforms as another opportunity to argue the case for further investment". At that stage officials had in mind an overall 6% increase in LGFS fees with no increases in the PPE and Trial Length Uplifts. The Minister was reminded that the department was currently funded only to 50% of the CLAIR recommended amount, and that any decision to increase funding above that would lead to decreases elsewhere.

43. On 14 February 2022 Minister Cartlidge was sent a submission addressing the CLAIR recommendation for long-term structural reform to avoid "perverse incentives". It was noted that systematic data on how work was conducted under the various fee schemes, including the LGFS, did not exist, "and so the Government will need to collect data first before going ahead with some of the wider reforms".

44. In an email dated 14 February 2022 Mr Gillibrand identified as a "policy problem" the "areas of duty solicitor provision which have, realistically, already failed". By this he meant, "the areas which already consistently fail to provide a full service on the duty roster". On 17 February Mr Malcolm Bryant of the LAA did not wholly accept this viewpoint:

> "Whilst some duty schemes are in trouble, they have been for some time, and we don't have evidence of unmet need. We will try and find the numbers of duty calls that could not be dealt with by their own scheme and in those cases they are referred to a neighbouring scheme for help."

45. On 21 February 2022 the Lord Chancellor and Minister Cartlidge were sent a submission inviting them to consider a range of funding options. Option 2B, the recommended option, was predicated on an overall spend (including barristers' fees) of £100 million at 2019/20 volumes and up to £125 million at 2024/25 volumes. Excluding the PPE and Trial Length Uplift Elements, the overall increase in LGFS fees was 5%. A further saving would be achieved by excluding the whole of the increase for prison law recommended by CLAIR. The justifications for this approach were as follows:

> "We only secured 50% of the money recommended in the SR [Spending Review, 2021-25]. If we were able to find 75% by finding savings within the department that is equivalent of an investment of £100m p.a. by 24/25. Against the projected volumes and estimated total spend in criminal legal aid in 24/25, £100m would only equate to 60% of CLAIR recommendations. Our judgement is that any uplift below 75% of the projected

> spend in criminal legal aid in 24/25 is likely to result in negative action from the professions, is unlikely to avert disruptive action and will be seen by practitioners as insufficient to improve the sustainability of the criminal legal aid service. [Bellamy] explicitly said in his report that "reversing the 2014 pay cut [8.75%] would not in my view ensure sustainability". We therefore recommend that you invest £125m [based on 2024/25 case volumes].
>
> As previously advised, the financial headroom available through allocations is sufficient to fund up to £100m in 24/25. Proceeding with the recommended approach above would add up to a further £25m p.a. pressure that we would need to consider through our broader allocations discussion.
>
> …
>
> This option would see the solicitor profession getting a smaller percentage increase than barristers, only 9% for solicitors compared to 15% for barristers. This is because the basic fee is only one element of overall LGFS fees. Most of the overall fee is determined with reference to [PPE]. However, CLAIR argued that the reliance on PPE was "the central weakness of the LGFS" and does not reflect the work done or whether the pages were read or not. Our justification is that the PPE elements of LGFS need reform and investment would further embed the 'perverse incentives' CLAIR identified. Increasing the basic fee alone will provide proportionally better reward for early guilty pleas. There is a real risk that solicitors' bodies will regard the lesser increase as unacceptable and we are likely to face strong pressure during consultation to increase our proposed investment in the solicitors' profession, particularly given the strength of the case made in CLAIR. However, this option does leave some funding available for future LGFS reform so this immediate uplift would not be the only funding the solicitor profession would receive."

46. Other options were put forward, including an option which would yield a further 2% (Option 2C) and one which would achieve the full 15% increase (i.e. one of £100 million p.a. for solicitors based on 2019/20 case volumes) without increasing the PPE and trial uplift elements. Option 2C was £10 million more expensive than Option 2B.

47. At a meeting which took place on 24 February 2022 the Lord Chancellor "decided that he would agree the 2C", and said that he wanted the extra £10 million to be spent on solicitor advocacy. Apparently, in his words "[t]his allows us to do 15%". That would be right, provided that the Lord Chancellor understood that Option 2C carved out the PPE and trial uplift elements of the LGFS and so did not amount to a 15% uplift across the board. In oral argument Mr de la Mare pointed out with some force that the advice the Lord Chancellor received orally from one of his officials about these various options

was, at best, confusing. However, and given that he was not at this stage making any final decision, we do not think that anything turns on this.

48. On 15 March 2022 the Government published its interim response to CLAIR. In the tabulated financial analysis it was contended that what was now Option 1 (previously Option 2C) was "the Government's preferred option as it best meets the policy objectives". It was said that Option 1 would yield an additional "steady state" annual benefit to solicitors' firms of 9% or £58-66 million. Under the heading, "Rationale and Policy Objectives":

> "The principal policy rationale behind the options assessed in this IA is equity. The Government considers the reforms necessary to achieve sustainable provision of legal aid, in order to promote access to justice, better achieve the aim of reflecting, and paying for, work done as well as increasing efficiency and protecting the taxpayer."

Nowhere in this paper is there any explanation of how Option 1 would achieve sustainability in the context of Lord Bellamy advising that a minimum 15% increase in all areas (equating to an additional £100 million at 2019/20 case volumes) was necessary to secure that.

49. Consultees had 10 weeks in which to provide their responses to the Government's proposals. Perhaps unsurprisingly, the overwhelming preponderance of opinion amongst solicitors was that Lord Bellamy's full 15% was required. 17 respondents, out of a total of 204, accepted that the PPE proxy in the LGFS was not a good substitute. On 14 June 2022 the Lord Chancellor and Minister Cartlidge were advised to implement Option 1 with effect from 30 September. Two days later the Lord Chancellor accepted this advice.

50. On 20 July 2022 the Government published its Interim Response to the CLAIR consultation on policy proposals. Having summarised the results of the consultation, the Government stated that it would proceed with the fee increases as consulted. That said:

> "Given the department's financial allocation we cannot increase fees any further at this point. However, respondents, including the Law Society and others, suggested that the further £20m p.a. that was proposed for investment in longer term reform proposals, including a reformed LGFS, the Youth Court and sustainability and development of solicitors' practice would be better spent on increasing fees. We will consider these responses further and set out our conclusion in our full response in the autumn. We want to avoid embedding any perverse incentives in the fee schemes and want to do further work in relation to issues such as the role of PPE in the LGFS before we consider increasing fees any further.
>
> The increases (other than for VHCCS) will come into force on 30 September 2022 and apply to cases where a determination is made on or after that date."

51. By 8 November 2022 Ministers were being asked to focus on the amount available for investment in longer term reform proposals. By way of background:

> "In response to [CLAIR] the Government identified £21.1m of the total £135m for high-level long term reform proposals. This funding was due to commence in 24-25 (the third year of the SR) and £11.6m is allocated for that year rising to £21.1m in steady state. We would reach 91% of steady state in 2025-26, and full steady state in 2026-27.
>
> … The Law Society … have warned that it would advise members that there is no viable future in criminal legal aid work if the Government does not offer the minimum 15% fee uplift recommended for solicitors by CLAIR by the end of November. Whilst [the Law Society] will welcome the allocation of the resource in the way proposed in option 2, this would bring the total uplift, based on 2024/25 case volumes, to the solicitor profession to around 11% (£84m) …"

52. Three options were advanced for consideration, each based on an aggregate increase in spending of £21.1 million. Option 2, which was recommended, would yield an overall increase for solicitors of just over 11%. The rationale for this proposal was as follows:

> "In light of responses, we now assess additional funding on police station fees (Option 2) is preferable. This would mean re-allocating the proposed £21.1m in steady-state funding away from PDS expansion, training grants and LGFS reform. Instead, that funding would be allocated to police station work (£16m) and youth court work (£5.1m) and would allow for the first step towards harmonising fees (see police station submission). The package would benefit the whole solicitor profession, increasing the sustainability of the market and reduce, although not remove, the risk of the Law Society advising members not to undertake criminal legal aid work. Alongside this we would spell out a timetable for LGFS reform which will see any new spend incurred fall during the next spending review period."

53. On 11 November 2022 a submission was presented to the Lord Chancellor and Minister Freer inviting them to agree to the carrying out of modelling work to identify possible options for a replacement fee structure for the LGFS. This was against the backdrop of the consultation responses, the majority of which agreed that PPE requires reform and should be considered further once an evidence base was established.

54. On 28 November the same Ministers were asked to approve the publication of the Government's final CLAIR consultation response ("the Final Response") on 30 November 2022, which indeed took place. In that response, the Government explained why the plan for the expansion of the PDS was not being pursued as well as the rationale

for the establishment of an Advisory Board ("the CLAAB"), which had met for the first time at the end of October 2022.

55. Table X in the Financial Summary section provides a breakdown of the financial implications of the fee increases. The initial 9%, as set out in the Government's Interim Response, was a global figure based on an 18% increase for police station work, 15% for Magistrates' Court work and 4% for LGFS (taking into account here that the LGFS basic element was being increased by 15% but the PPE and Trial Length Uplift components were remaining the same). Table X was expressed in 2024/25 case volumes because the work was expected to increase by about 29% between 2019/20 and that period. It is clear both from the Ministerial Submission dated 8 November 2022 and from the foreword to the Government's full response to CLAIR that the additional 2%, even when implemented, will take time to work into the system. "Steady state" has built within it an inherent time lag.

56. The fee increases announced in the Interim Response were implemented in respect of future cases by a statutory instrument which took effect on 30 September 2022. For LGFS cases, these were uplifted in respect of existing cases through a statutory instrument which took effect on 23 December 2022. As will already be clear, the additional £20 million for youth court and police station fees has not yet been implemented. These two additional fees increases and accompanying reform have been considered on a number of occasions by the CLAAB and its sub-groups. It will be the subject of a consultation expected to take place early in 2024.

57. Progress is being made with the issue of LGFS reform and the issue has been considered at a number of meetings of the CLAAB and its LGFS sub-group. According to Mr Daly, the MoJ remains committed to consulting on a reformed scheme in 2024. Beyond that, no specific timetable has been indicated, and much may depend on the nature of the reforms proposed. Whether or not primary legislation is required is unclear, and that too may depend on the nature of the reforms proposed.

58. As we have already said, the Law Society labels the decision to raise fees by 11% in all as the "Remuneration Decision", and the decision to respond to the CLAIR recommendation to consider the extent of unmet need by doing nothing beyond the establishment of the CLAAB as the "Non-Intervention Decision".

Further Analysis of the Financial Implications of the Fee Increases

59. The second witness statement of Mr Daly contains a lengthy section dealing with the Lord Chancellor's reasons for the choice of fee uplift. These reasons may be reduced to two: first, that insufficient funding was available to pursue the full CLAIR recommendation (costed at £135 million, including barristers' fees, at 2019/20 case volumes, and at £165 million, at 2024/25 case volumes); and, secondly, because Ministers had indicated that they did not want to increase the PPE or trial length uplift elements of the LGFS. Given these starting points:

> "… [t]he other options would have involved uplifting other elements of the LGFS without information on the potential impact of making such an uplift. Option 2D [the full CLAIR

> recommendation] would have involved a very large increase in LGFS basic fees (which would have been uplifted by 100%). However, there was no evidence on the likely impact of such a large increase to LGFS basic fees, and insufficient time to collect it in light of the need to respond urgently to the Report's recommendations."

60. At para 30(b) of her first witness statement and expert report, Professor Adams-Prassl has queried how the £21.1 million figure has been arrived at and how it translates into a percentage increase in the funding of 2% relative to the 2019/20 baseline. According to the witness statement of Rebekha Wright, joint Head of the Legal Aid Analysis team in the Data and Analysis Directorate at the MoJ, the relevant table in the Interim Response of March 2022 took a figure of £18.4 million based on 2019/20 case volumes. This amount took into account PDS expansion and training grants, both of which were not dependent on case volumes (c.f. the remaining elements where the impact of "steady state" over a period of time would be felt). By November 2022, it had been decided to reallocate the amount previously destined for PDS expansion, training grants and LGFS reform to police station work (bringing the increase for that work to 30%), and to invest £16 million in that work in "steady state". The final sentence of para 28 of Ms Wright's witness statement reads:

> "The £16 million represents the funding available for police station work. It was based on 2024/25 case volumes in steady state in the sense that it used the sum previously allocated for PDS expansion, training grants and LGFS reform, but expressed in 2024/25 case volumes."

61. The sums previously allocated for these three matters totalled £15.7 million at 2019/20 case volumes, although – as we have said - the PDS expansion and training grants were not sensitive to case volumes. The arithmetic is not entirely straightforward and Ms Wright's statement is slightly opaque in places, but it has not been questioned by Mr de la Mare. The bottom line is that it may be discerned from Ms Wright's statement that making certain assumptions in relation to the increase in case volumes in the situations where this matters brings the total criminal legal aid spend assessed against a 2024/25 baseline to £751.3 million, representing an increase of 11.3%, rounded down to 11%.

62. The 11% increase does not of course reflect the impact of inflation over time. We have already noted that Lord Bellamy's recommendations were predicated on there being no significant inflationary increases between the date of his report and implementation. The Lord Chancellor's evidence states, as must be obvious, that officials were aware of the impact of inflation and took it into account, but it is unclear to us in what way. Paras 36 and 37 of Mr Daly's second witness statement note that in a submission to Ministers dated 14 June 2022 the First Interested Party had made a representation to the effect that the increase to the fee schemes should be weighted to take inflation into account, and that this was "said to be at 9%". No further analysis is provided.

63. Mr Miller's evidence is that the impact of inflation has been felt on salaries, premises and IT. Salaries are a primary cost for all legal practices (about 60%). Legal aid solicitor salaries are markedly lower than those of solicitors undertaking privately-funded work, but have still increased over time. As he puts it, "the net result is that salaries have increased but remained very low but profitability has also declined". He adds that because just under 90% of fees earned by a fee earner are used to cover their costs, in practical terms this means that for a firm to generate any profit an average fee-earner would need to generate around three times their salary to be viable. On the basis of the Law Society's research, Mr Miller's evidence is that the "three times salary metric" is unachievable in firms specialising primarily or exclusively in criminal legal aid defence work because the cost per hour is over twice the hourly rates on which most fees are based, and does not therefore allow for any profit.

64. Mr de la Mare also drew our attention to the first witness statement of Fadi Daoud, the owner of Lawrence & Co practising in Harrow Road, London W9. The financial realities of work at the metaphorical coal-face are stark. He illustrates his point in various ways, but the following short analysis is revealing:

> "13. … Below is a worked-through example based upon a £242.41 fixed fee, with the escape fee being £822:
>
> **Escape Fee Case (in a rare case, such as murder or "drug swallower" (with an interpreter) at stations close to ports**
>
> | | | |
> |---|---|---|
> | Travel | 1 hour 30 mins @ £30.22 per hour | £45.33 |
> | Attendance | 10 hours @ £58.97 per hour | £589.70 |
> | Waiting | 8 hours @ £30.22 | £241.79 |
> | Total value of time spent | | £876.79 |
>
> **The firm cannot claim for time between £242.41 and £822.54. It can only claim the fixed fee plus any work done over the escape fee amount of £822.54. In this case, the claim is therefore £54.25 + £242.41 = £296.66. The firm has effectively lost £580.13 (or done that work for free).**"

65. Mr Daoud also points out:

> "The increases in funding made in September 2022 have not made any difference to the financial health of the firm because they have already been swallowed up by inflation. We have significant overheads such as utilities that have gone up but our fee income has not kept pace with it. We had to reduce office space by 50% in order to survive."

66. On the evidence before us we find that the Lord Chancellor has not engaged with any of this evidence. According to para 93 of Mr Daly's first witness statement:

> "No modelling was carried out to assess the sustainability of the market for the immediate increase in funding taken forward. There are a number of reasons that additional modelling was not considered necessary to take the decision about the immediate level of fee uplift to introduce. Lord Bellamy's recommendation on the amount of additional funding to provide legal aid solicitors was based explicitly, in light of the lack of reliable data, on a broad-brush assessment. While less than the sum he recommended, the amount of funding allocated to criminal legal aid solicitors in the Final Response amounts to a substantial increase on existing funding to be accompanied by immediate steps to reform the fee schemes which were not increased. The intention was, and remains, to revisit the amount of uplift once this reform has taken place. It would have been difficult to assess the impact of the smaller increase with any certainty, both in light of the lack of reliable data and because the amount of funding provided through the LGFS (and its PPE element in particular) varies significantly across different firms."

67. During the hearing before this Court Sir James Eadie KC was asked whether the modelling that had been carried out by those assisting Lord Bellamy could be made available. The Law Society had already sought disclosure of it but this request had been refused. On the third and final day of the hearing (14 December 2023) the Lord Chancellor provided an Excel spreadsheet which showed the results of the CLAIR model, as well as an accompanying note which purported to show what the result would be on the basis of the increases set out in the Interim and Final Responses. Given the nature of this material and that the Law Society was seeing it for the first time, we directed that the Lord Chancellor file a witness statement to adduce this as evidence in proper form and that the Law Society have a proper opportunity to respond.

68. On 15 December 2023 the Lord Chancellor filed a witness statement from Dr Pascual Iniesta-Martinez, who is an adviser in economics in the Legal Aid analysis team at the MoJ. He had been seconded to Lord Bellamy during the CLAIR review. We summarise Dr Iniesta-Martinez's evidence, including his second witness statement, as follows.

69. The CLAIR model is built on a number of assumptions many of which do not appear to be in dispute. CLAIR received financial information from CLA firms as part of the overall financial survey it carried out, as well as information received from the CPS about CPS median salaries as at June 2021. Dr Iniesta-Martinez has confirmed in his second witness statement that the CPS had provided details of those salaries for four of the five roles identified as comparators, and that for Senior District Crown Prosecutors (where no such information had been provided) an extrapolation was made on the basis of the information that was available. The CLAIR model also assumed that the split between employee-related expenses and equity partner shareholding/directors' profits would remain unchanged, and that overheads and other non-employee related costs would remain unchanged in nominal terms. Applying these assumptions would mean

that the 15% increase in fees (in fact, if an additional £100 million were provided, the increase would be closer to 15.5%, but that is a detail) would translate into a *higher* percentage increase in solicitors' gross salaries and in the profits of equity partners/shareholding directors. The figures illustrated the impact on a typical provider who specialised in CLA – that is to say, 80% or more of their annual turnover coming from CLA work. On the other hand, the CPS figures, although in some instances slight under-estimates, did not include other employee benefits such as pensions. We have seen from other evidence in this case that for a CPS employee on £45,500, the annual employer contribution to the pension is £12,330 per annum.

70. Dr Iniesta-Martinez's evidence is that taking the CLAIR recommended increase of 15.5% and excluding the proportion of AGFS income that would go to solicitors' firms and then comparing it with "CPS gross salaries of equivalent roles" produces the following outcomes:

> "Solicitors' salaries
>
> with the 15.5% CLAIR increase £43,300
>
> CPS comparator £45,300
>
> Equity Partner/Shareholding Director
>
> with the 15.5% CLAIR increase £76,300
>
> CPS comparator £64,700"

(If AGFS income were included, the remuneration for equity partner/shareholding director is slightly higher, and the variances set out below very slightly less.)

71. Dr Iniesta-Martinez then re-ran the model late into the night of 13/14 December 2023 using the 9% and 11% uplifts made in the Interim and Final Responses. His evidence is that this exercise was "done at pace", and that with further time (in fact, less than 48 hours) he has fined-tuned the figures having refreshed his memory as to the details of the model. In summary, taking an uplift of 11% yields figures of £41,600 (for solicitors' salaries) and £73,000 (for equity partners/shareholding directors, AGFS income excluded). The variances are, therefore, £1,700 and £3,300 respectively, in other words about 3.9% and 4.3%.

72. On 3 January 2024 the Law Society filed a further witness statement from Professor Adams-Prassl. She points out that the CLAIR model used CPS salaries based on the 2021 CLAIR solicitors' firms survey and that these appear to reflect CPS pay levels for 2019/20. Professor Adams-Prassl was asked to re-run the model to account for the impact of changing the CPS equivalent salary estimates in the light of civil service pay awards since 2021, and she was provided with the CPS 2022/23 pay bands in order to do so. For those CPS roles that she could identify as equivalent to a CLA solicitor, the minimum pay bands increased by between 2 and 11% between 2019/20 and 2022/23. For those CPS roles that she could identify as equivalent to an equity partner, the minimum pay bands increased by between 4 and 6% over the same period.

73. Professor Adams-Prassl's analysis is that the CLAIR model implies that the measures included in the Final Response generate CLA solicitor salaries that are 8% lower than their 2021 CPS equivalents (on the basis, presumably that £43,300 is 8% less than £45,300). For equity partners/shareholding directors, their remuneration is 14% higher relative to 2021 CPS equivalents (on the basis that £76,300 is 14% greater than £64,700). In her view, the model – as very recently re-run by the Lord Chancellor - also implies that the salaries for both solicitors and equity partners implied by the Final Response were 4% lower than if the CLAIR recommendations were implemented in full. However, re-running the model on the basis of the CPS 2022/23 pay bands – and therefore comparing like with like - gives a different picture. Professor Adams-Prassl has produced a graph which shows the percentage difference from the CPS benchmark using percentage increases in CPS median salaries rising from 0 to 11%. By way of illustration, we have decided to take 6.5% being the mid-point between 2 and 11%, and we have then plotted the relevant point on the graph. On that premise, CLA solicitors' salaries are about 13.5% lower than their counterparts in the CPS. A similar exercise conducted for equity partners/shareholding directors (taking the mid-point of 5%) shows that their remuneration is about 8.5% higher than their counterparts in the CPS.

74. Professor Adams-Prassl also addresses the assumption in the CLAIR model that overheads and other non-employee related costs remain unchanged in nominal terms. In other words, the model assumes that all additional funding will flow to salaries and profits. The CPIH price index increased by 6.7% between November 2021 and July 2022. Factoring in this increase (Professor Adams-Prassl has rounded it up to 7%) reduces the increase in solicitor salaries achieved by the Interim and Final Responses by £1,200 and for equity partners by £2,200, relative to the case where non-employee costs remain the same. Furthermore, the changes in non-employee cost inflation would cause the gap between CLA lawyer and CPS equivalent salaries to grow to 7% and 11% under the Final and Interim Responses relative to the CLAIR (inclusive of AGFS) figures deployed by Dr Iniesta-Martinez for both solicitor salaries and equity partner remuneration.

75. Professor Adams-Prassl's conclusions are tabulated under Table 4 to her second witness statement. In relation to Table 4(a), Professor Adams-Prassl concludes that modelling which properly adjusted for changes to CPS salaries and the increase in non-employee costs:

> "… impl[ies] that CLA solicitors' salaries would be 14.5% and 15.3% lower than their identified CPS equivalents at 20 July 2022 and 30 November 2022 under the Final Response. They would be 18.1% and 18.9% lower than their CPS equivalents at 20 July 2022 and 30 November 2022 under the Interim Response"."

76. Equally, once those same adjustments are made for CLA equity partners' remuneration, the alternative versions of the modelling:

> "… impl[ies] that CLA equity partners' remuneration would be 6.4% and 5.4% higher than their CPS equivalents at 20 July 2022 and 30 November 2022 under the Final Response."

77. In relation to Table 4(b), Professor Adams-Prassl concludes that the model when adjusted for the same factors:

> "… would cause the gap between CLA lawyer and CPS equivalent salaries to grow to 7% and 11% under the Final and Interim responses relative to the CLAIR inc. AGFS figures reported by Iniesta-Martinez for both solicitor salaries and equity partner remuneration."

78. By our Order made on 18 December 2023 we granted permission to the Lord Chancellor to file any evidence in response to the Law Society's evidence and submissions by 4pm on 12 January 2024. By our Order made on 16 January 2024 we also granted permission to the Lord Chancellor to file brief written submissions. Since providing the draft of our judgment to the parties our attention has been drawn to Bindmans' letter to the Court dated 19 January 2024. We have considered its terms carefully but it does not alter our reasoning and conclusions.

79. The Lord Chancellor's answer to Professor Adams-Prassl's evidence is, essentially, two-fold. First, it is pointed out that Professor Adams-Prassl has misunderstood Dr Iniesta-Martinez's evidence. As we have already pointed out, the CLAIR model was produced using CPS median salaries as at June 2021 and was not based on the 2019/20 pay bands. Secondly, it is said that the CLAIR model was not designed to accommodate changes in underlying assumptions over time, including increases in CPS salaries (since June 2021), intervening inflation, and increases in overheads and non-employee related costs. Dr Iniesta-Martinez explains that the approach adopted by Professor Adams-Prassl of updating just some of the inputs to the model without updating other inputs on which the model relied is methodologically flawed. In order to avoid these flaws, it would be necessary to re-design the model and update it by obtaining further evidence relating to CPS salaries and partner remuneration as well as changes to CLA firms' non-employee related costs and costs structure, including in response to inflation.

Material legislation

80. The statute which now governs the legal aid scheme is the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). In this case we are concerned with Part 1 of LASPO, which is headed 'Legal aid'.

81. Section 1 of LASPO, which has the sidenote 'Lord Chancellor's functions', provides:

> "(1) The Lord Chancellor must secure that legal aid is made available in accordance with this Part.
>
> (2) In this Part 'legal aid' means –
>
> (a) civil legal services required to be made available under section 9 or 10 or paragraph 3 of Schedule 3 (civil legal aid), and

(b) services consisting of advice, assistance and representation required to be made available under section 13, 15 or 16 or paragraph 4 or 5 of Schedule 3 (criminal legal aid).

…

(4) The Lord Chancellor may do anything which is calculated to facilitate, or is incidental or conducive to, the carrying out of the Lord Chancellor's functions under this Part.

…"

82. This case is concerned in particular with criminal legal services under section 1(2)(b).

83. Section 1(4) is a statutory codification of the doctrine of implied powers: similar provisions are often to be found in legislation such as that which confers powers on local authorities: see section 111(1) of the Local Government Act 1972.

84. Section 2 of LASPO provides:

"(1) The Lord Chancellor may make such arrangements as the Lord Chancellor considers appropriate for the purposes of carrying out the Lord Chancellor's functions under this Part.

…

(3) The Lord Chancellor may by regulations make provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made for the purposes of this Part.

…"

85. Section 13 of LASPO provides:

"(1) Initial advice and initial assistance are to be available under this Part to an individual who is arrested and held in custody at a police station or other premises if the Director [of Legal Aid Casework] has determined that the individual qualifies for such advice and assistance in accordance with this Part (and has not withdrawn the determination).

(2) The Director must make a determination under this section having regard, in particular, to the interests of justice.

…"

86. Section 15 of LASPO makes provision for regulations to be made that prescribed advice and assistance is to be available under Part 1 of the Act to an individual described in subsection (2) in the prescribed circumstances. Those individuals include individuals who are involved in investigations which may lead to criminal proceedings (other than individuals arrested and held in custody at a police station or other premises); and individuals who are before a court in criminal proceedings and individuals who have been the subject of criminal proceedings.

87. Section 16 of LASPO provides for representation for the purposes of criminal proceedings to be made available in specified circumstances. Under section 17(1) of LASPO, the relevant authority must determine whether an individual qualifies for representation for this purpose in accordance with section 21 (financial resources) and regulations made under that section.

88. It is clear therefore that not every individual is entitled in all circumstances to the provision of legal aid even when facing criminal charges. Nevertheless, it is also clear that, in circumstances where a person qualifies for advice, assistance or representation in accordance with Part 1 of LASPO (including any regulations made under that Part), there is a duty to secure that legal aid is provided to them.

89. It is unnecessary for present purposes to go into the underlying regulations in any detail. Nor is it necessary to go in detail into the provisions of codes of practice made under PACE which govern the right of access to independent legal advice. Suffice to say that there is such a right under section C:6. In particular, para C:6.5 states that, whenever legal advice is requested, and unless Annex B applies, the custody officer must act without delay to secure the provision of such advice. Para C:6:1 provides that, unless Annex B applies, all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available. Annex B relates to circumstances where, for example, an appropriate officer of senior rank has reasonable grounds for believing that the exercise of the rights will lead to interference with, or harm to, evidence connected with an indictable offence. It is not material in the present case. The combined effect of s. 13(1) and (2), and s. 21, of LASPO and regulation 5(1) of the Criminal Legal Aid (Financial Resources) Regulations 2013 is that suspects in police custody are entitled to free legal advice which is not means-tested.

90. Article 6 of the European Convention on Human Rights ("ECHR"), which is one of the Convention rights set out in Schedule 1 to the Human Rights Act 1998 ("HRA"), provides that:

> "(3) Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> …"

91. Although, at first sight, Article 6(3) might be thought not to be triggered until the point when a person has been formally "charged", the concept of a "criminal charge" in Article 6 is an "autonomous" concept in the ECHR and so is not to be determined by domestic law. The Grand Chamber of the European Court of Human Rights has confirmed earlier authority to the effect that it applies long before a criminal charge is formally laid against a person, indeed in circumstances where there may never be a formal charge laid at all. In *Beuze v Belgium* (2019) 69 EHRR 1 the Court said, at para 119:

> "The Court reiterates that the protections afforded by art.6(1) and (3)(c), which lie at the heart of the present case, apply to a person subject to a 'criminal charge', within the autonomous Convention meaning of that term. A 'criminal charge' exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him."

See also *Salduz v Turkey* (2009) 49 EHRR 19, at para 55; and the domestic authorities of *Cadder (Peter) v HM Advocate* [2010] UKSC 43; [2010] 1 WLR 2601; *McGowan v B* [2011] UKSC 54; [2011] 1 WLR 3121; and *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435.

92. It was common ground before this Court that, although it would not be entirely apt in this context to refer to the constitutional right of access to a court, there is at least a cognate right to have legal advice and assistance when a person is detained and questioned at a police station and that, if they do not have sufficient means to pay for this, they must be given it free when the interests of justice so require. Quite apart from the common law and the Convention rights in the HRA, that right is, in any event, reflected in section 13(1) of LASPO and gives effect to the important rights which were conferred under PACE from 1986. This was in part to meet the concerns which had arisen about the miscarriages of justice which can occur when there is inadequate access to legal advice at the police station, for example if a person makes a false confession.

Legal framework

93. It is common ground before this Court that section 1(1) of LASPO imposes a duty to secure that legal aid is made available in accordance with Part 1 of the Act. This is neither a discretion nor is it a "target duty". Several consequences follow from this.

94. First, the Court is not performing the function of reviewing the exercise by the Lord Chancellor of a discretionary power. Rather, it is deciding whether the Lord Chancellor has (or has not) breached the statutory duty imposed upon him by Parliament.

95. Secondly, and related to that first point, the Court's function is that of primary decision-maker.

96. This analysis is supported by what was said by Laws LJ in *R (London Criminal Courts Solicitors Association and the Law Society) v Lord Chancellor* [2015] EWHC 295 (Admin) ("*Law Society (No. 1)*"), at para 26:

> "It must be obvious that if the Lord Chancellor failed to comply with his duty under LASPO ss.1(1), (2)(b) and 13(1), the court's inevitable judgment against him would not be qualified by any considerations of respect for his role as primary decision-maker. He would simply be acting illegally, and the court would say so. But although the claimants assert that the November 2014 decision puts compliance with the LASPO duty at risk, they do not (and cannot) assert that it will be violated. If the new scheme goes badly wrong, the Lord Chancellor will have to mend it or adopt another. He accepts without cavil that he must ensure that criminal legal aid is made available to those who are entitled to it."

97. It will be seen from that passage that it was *obiter*, because, on the facts of that case, the claimants were not in fact asserting that the duty had been or "will be violated." It is of some interest to note, as Laws LJ makes clear in that passage, that the claimants in that case did not argue that a "risk" of breach of the duty was sufficient.

98. It is also important to note that, at para 28, Laws LJ said that the reality was that the claims' true target in that case was action taken under section 2(1) of LASPO and he regarded that as "quintessentially, involv[ing] the making of discretionary judgments."

99. In that case there were two claims for judicial review. The second claim was brought by the Law Society in respect of the Lord Chancellor's decision in 2014 to restrict the number of Duty Provider Work contracts to 527 contracts. The Lord Chancellor had also introduced a cut in legal aid fees of 8.75 percent in March 2014, and a further cut of 8.75 percent was planned for July 2015.

100. The hearing before the Divisional Court was a "rolled up" one. In the result, the Court granted permission to bring the claims for judicial review but dismissed the substantive claims: see para 95. In the course of his judgment, in particular at paras 25-37, Laws LJ addressed the "applicable standard of review" but, as we have noted, this was in the context of challenges which were to discretionary decisions under section 2(1) of LASPO rather than any suggestion that the duty in section 1(1) had been breached. In those circumstances, Laws LJ concluded, at para 33, that the conventional *Wednesbury* standard of review was applicable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

101. *Law Society (No. 1)* went to the Court of Appeal, which dismissed the appeal: [2015] EWCA Civ 230; [2016] 3 All ER 296. In the judgment of the Court, which was given by Sales LJ, it was noted that it was common ground in that case that, under LASPO, the Lord Chancellor has "a binding duty to ensure that legal aid in the form of the kind of legal services to be provided under the DPW contracts is in fact provided at local police stations (and, so far as relevant, in magistrates' courts), but that he had a discretion as to how to achieve that end result": see para 12.

102. The Court also stated that, in their view, the usual *Wednesbury* standard of review in relation to decisions regarding investigative steps, as set out in *R (Khatun) v Newham LBC* [2004] EWCA Civ 55; [2005] QB 37, at para 35 (Laws LJ) was applicable: see para 18 in the judgment of Sales LJ.

103. The next important decision in the chronology is the decision of the Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869. The Lord Chancellor had exercised his power under section 42 of the Tribunals, Courts and Enforcement Act 2007 to make the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, which provided that claims in the Employment Tribunal and appeals to the Employment Appeal Tribunal could only be commenced and continued on payment of fees, subject only to an individual qualifying for remission. The fees were very high and led to a very large majority of claims simply not being brought. The Supreme Court held that the Order was *ultra vires* the enabling power because it breached the constitutional right of access to the courts and Parliament had not clearly granted power to do any such thing.

104. In giving the main judgment, with which the other members of the seven judge panel agreed, Lord Reed JSC said, at para 87:

> "… [T]he Fees Order will be *ultra vires* if there is a real risk that persons will effectively be prevented from having access to justice."

105. It will be apparent therefore that:

(1) *UNISON* was not a case about the duty in section 1 of LASPO.

(2) It was a case about the *vires* of an order which imposed fees and did not concern legal aid at all. Indeed, it is important to recall that legal aid has never been available in the Employment Tribunal or the Employment Appeal Tribunal. Reference to the constitutional right of access to the courts, fundamental though it undoubtedly is, needs to be considered in that context.

(3) The case turned on the well-known principle that secondary legislation which unduly interferes with constitutional rights at common law will not be *intra vires* a general, broadly worded rule-making power, because Parliament will be presumed not to intend to authorise such interference unless it says so clearly. This is akin to the principle of legality in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at page 131 (Lord Hoffmann).

(4) Although the language of "real risk" is to be found in the judgment of Lord Reed, in substance there was already an interference with the constitutional right of access to the courts. The relevance of risk was that it permitted the introduction of statistical evidence, so that it was not necessary to show that there had actually been unfairness in a particular case: see further para 118 below.

106. It is worth noting that in *UNISON*, at paras 83-84, Lord Reed cited with approval the decision of the Divisional Court in *R v Lord Chancellor, ex parte Witham* [1998] QB

575. In that case the Lord Chancellor made an order, under statutory powers, which repealed a power to reduce or remit court fees on grounds of undue financial hardship in exceptional circumstances. This had the consequence that an applicant in receipt of Income Support could not afford the relevant fees and there was a variety of situations in which persons on very low incomes were in practice denied access to the courts. At page 580, Laws J, with whom Rose LJ agreed, said that the wide discretionary power did not permit the Lord Chancellor to deprive the citizen of his constitutional right of access to the courts. At page 586 Laws J said the following, which will be of relevance to an argument we consider later in this judgment:

> "Mr Richards [counsel for the Lord Chancellor] submitted that it was for the Lord Chancellor's discretion to decide what litigation should be supported by taxpayers' money and what should not. As regards the expenses of legal representation, I am sure that is right. Payment out of legal aid of lawyers' fees to conduct litigation is a subsidy by the state which in general is well within the power of the executive, subject to the relevant main legislation, to regulate. But the impost of court fees is, to my mind, subject to wholly different considerations. They are the cost of going to court *at all*, lawyers or no lawyers. They are not at the choice of the litigant, who may by contrast choose how much to spend on his lawyers." (Emphasis in original)

107. The principal decision on which Mr de la Mare relies is the decision of the Divisional Court in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 ("*Law Society (No. 2)*"), in which the judgment of the Court (which also included Leggatt LJ) was given by Carr J.

108. In that case the Law Society challenged a decision by the Lord Chancellor to reduce the amount of money made available as legal aid for defending people accused of crimes. The decision reduced fees payable under the LGFS. The effect of the decision was to reduce the maximum number of PPE which could be counted in fixing graduated fees from 10,000 pages to 6,000 pages.

109. The decision was challenged on four grounds, which are summarised at para 4 of the judgment. It is notable that the grounds did not expressly raise any issue under section 1 of LASPO. The particular ground which is relevant for present purposes was Ground 3, under which it was said that the 2017 Regulations made in order to implement the decision constituted a disproportionate and unjustified interference with the right of access to justice protected by the common law. Accordingly, this ground appears to have been that the powers of the Lord Chancellor had been exercised in a way which was unlawful rather than that there was a breach of the duty in section 1 of LASPO. This ground of challenge was in fact rejected in the result, on the evidence placed before the Court by the Law Society: see para 136 of the judgment. But Mr de la Mare cites the judgment for two principal reasons.

110. First, he cites the passage at para 98, where the Court set out its formulation of the ground of judicial review traditionally called 'irrationality'. We set out that passage in the context of our analysis of Ground 2, at para 226 below.

111. Secondly, Mr de la Mare relies on the test which was posed by the Court in assessing whether there was a violation of the common law right of access to justice: see paras 125-136 of the judgment. At para 125 the Court cited the decision of the Supreme Court in *UNISON*. At para 126, the Court, in summarising the arguments made on behalf of the Law Society, referred to section 1 of LASPO. It was submitted that that provision had to be interpreted in the light of the rights of criminal defendants to publicly funded legal assistance and, on this basis, it was argued that the 2017 Regulations were unlawful because "there is a real risk that they will effectively prevent some people charged with criminal offences from receiving effective legal representation or in any event will have a disproportionate effect on the right of access to justice of some criminal defendants."

112. At paras 129-130, the Court cited the decision of the Court of Appeal in *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92, in which the Court held that the removal of legal aid from certain categories of decision-making involving prisoners was unlawful because it gave rise to "an unacceptable risk of unfairness". The test applied by the Court, described as a "high test", was whether the risk of unfairness was inherent in the policy or system itself, as opposed to there merely being a possibility of individual instances of unfairness: see paras 48-50. In *Law Society (No. 2)* the Court said that, although the *Howard League* case was decided before the decision of the Supreme Court in *UNISON*, "the approach of the Court of Appeal seems to us to be consistent with that subsequently taken by the Supreme Court."

113. In *Law Society (No. 2)*, at para 131, the Court set out the test which it was to apply in the following terms:

> "… [I]t would need to be shown that there is a real risk that the fee reductions imposed by the Regulations will result in some criminal defendants being denied adequate legal assistance. It further seems to us that what would need to be demonstrated is not just a possibility of individual instances of unfairness which would not undermine the integrity of the system but a risk of systemic unfairness of the kind discussed in the *Howard League* case."

114. At para 132, the Court rejected an argument made on behalf of the Lord Chancellor that the assessment of whether such a risk exists was solely a matter of predictive judgment for the Lord Chancellor and was only susceptible to challenge if the Court was satisfied that his assessment was irrational. The Court took the view that this misconceived the nature of this ground of challenge. This ground did not involve an argument that the Lord Chancellor had failed to exercise his powers in accordance with common law duties. Rather, it was an argument that the measure adopted interfered with individual rights. The question was not whether the decision-maker properly considered whether there would be an unlawful interference with individual rights but whether there had in fact been such an interference (or, as is alleged in that case, a real risk of systemic interference). That was a question for the Court to decide for itself. In doing so, the Court may give weight to opinions of the decision-maker which reflect its institutional expertise but it was the Court's judgment that was determinative. As we have said, the

Court then went on to apply that test to the evidence before it but found that the real risk of a systemic effect of preventing some criminal defendants from obtaining adequate legal assistance had not been made out.

115. As we have seen, the decision of the Divisional Court in *Law Society (No. 2)* came after the Supreme Court decision in *UNISON* but it came before the Supreme Court decision in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931 ("the *A* case"), which provides the mainstay for the submissions made to us by Sir James Eadie on behalf of the Lord Chancellor. The issue in that case was the correct approach to be taken in law to challenges to the lawfulness of a public authority's policy. The main judgment was given by Lord Sales JSC and Lord Burnett of Maldon CJ, with whom the other members of the Court (including Lord Reed PSC, who had given the judgment in *UNISON*) agreed. The Court held that the test was that which had been set out by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. This was best encapsulated in the formulation, at para 38:

> "does the policy in question authorise or approve unlawful conduct by those to whom it is directed?"

116. At paras 54-83, the Court considered challenges to policies based on other legal principles. This is important because a number of decisions of the Court of Appeal were considered, in which the test applied was not that in *Gillick* but rather whether there was "an unacceptable risk that an individual will be treated unfairly": see para 64. The genesis of that test was to be found in the decision of the Court of Appeal in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219. It will be seen immediately that that formulation is very similar to the formulation based on the *Howard League* case which the Divisional Court applied in *Law Society (No. 2)*. In the *A* case, the Court was at pains to stress that, although many of the decisions in this area can "readily be assimilated with the approach to be derived from *Gillick*" (see para 62), if one simply asks whether a policy creates an unacceptable risk that an individual will be treated unfairly, "there is a danger that this could be taken as a freestanding principle distinct from that in *Gillick*" (para 64).

117. The crucial test of principle was set out as follows in the *A* case, at para 63:

> "We agree that this is a fundamental distinction for the purposes of analysis. If it is established that there has in fact been a breach of the duty of fairness in an individual's case, he is of course entitled to redress for the wrong done to him. It does not matter whether the unfairness was produced by application of a policy or occurred for other reasons. But where the question is whether a policy is unlawful, that issue must be addressed looking at *whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way*." (Emphasis added)

118. At para 66, the Court observed that there is "in truth a distinct and valid principle of access to justice" to be found in the *UNISON* case. The Court returned to this at para 80, where it noted that the test applied was whether the making of the order in *UNISON* created "a real risk that persons will effectively be prevented from having access to justice". For this purpose statistics may have a part to play in making that assessment. At para 82, the Court expressly noted that the *Howard League* case was a case in relation to the lawfulness of removal of legal aid from certain categories of legal claims affecting prisoners. In that case the substance of the analysis was "whether there had been an unlawful infringement of the constitutional right of access to a court or tribunal." The Court said:

> "In our view, the formulation of the test in *Refugee Legal Centre* is not a helpful way of approaching that issue. In future, the framework of analysis in *UNISON* should be applied instead."

119. At para 83, the Court concluded that:

> "In our view, on a proper understanding of the legal principles discussed above, the wider formulation of a test of systemic inherent unfairness in relation to a legal scheme which has been taken to be laid down in the line of cases stemming from *Refugee Legal Centre* will in most, if not all, circumstances dissolve into the *Gillick* principle and the *UNISON* principle, each with its own precise focus."

120. On behalf of the Lord Chancellor, Sir James Eadie stresses in particular what was said at para 80, in analysing the *UNISON* decision:

> "In *UNISON* this Court held that there is a fundamental right under the common law of access to justice, meaning effective access to courts and tribunals to seek to vindicate legal rights, which means that the executive is under a legal obligation not to introduce legal impediments in the way of such access save on the basis of clear legal authority …"

121. We agree with Sir James Eadie that that is how the *ratio* of *UNISON* must be understood, consistent with the *A* case.

122. On the same day as the decision in the *A* case, the Supreme Court gave judgment in *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38; [2021] 1 WLR 3967, in which again the judgment was given by Lord Sales JSC and Lord Burnett of Maldon CJ, with whom the other members of the Court (again including Lord Reed PSC) agreed. Of particular importance for present purposes is the way in which the Court analysed the principle in *UNISON*, at paras 68-70:

> "68. In our judgment, *UNISON* [2020] AC 869 does not assist the respondent in this case and the Court of Appeal erred in thinking that it supported their approach in testing the lawfulness of criterion C. *UNISON* is concerned with the lawfulness of policy or delegated legislation which creates an *unreasonable or unacceptable impediment to being able to have access to a court or tribunal for the determination of legal rights and obligations*: see our judgment in the *A* case [2021] 1 WLR 3931, para 80. But in the present case, nothing in the policy promulgated by the Secretary of State creates any impediment for an immigrant in gaining access to the courts for the determination of their rights.
>
> 69. As we have sought to explain in the *A* case (paras 73, 75 and 80), we respectfully consider that the Court of Appeal erred in the present case by mixing together the principle with which *UNISON* is concerned and the distinct jurisprudence on inherent systemic unfairness in cases such as *Refugee Legal Centre* [2005] 1 WLR 2219 in order to arrive at the test which it applied in relation to criterion C. As we have mentioned, Mr Hermer did not seek to support the Court of Appeal's reasoning in so far as it rested on the latter cases.
>
> 70. Similarly, we consider that, contrary to the opinion of the Court of Appeal, the judgment of Lord Mance in the *Northern Ireland Human Rights Commission* case [2019] 1 All ER 173, para 82, provides no support for the test applied in this case: see our judgment in the *A* case, para 78. When reviewing, on a prospective basis, the compatibility of domestic legislation with one of the Convention rights set out in the Human Rights Act 1998, Lord Mance said that 'The relevant question is whether the legislation itself is capable of being operated in a manner which is compatible with that right, or, putting the same point the other way around, whether it is bound in a legally significant number of cases to lead to unjustified infringement of the right'. This is a test which is similar to that in *Gillick*, in that it involves comparison of two normative statements, by looking to see if action as directed by the legislation *will necessarily involve a violation of the Convention right in a significant number of cases*." (Emphasis added)

123. Sir James Eadie stresses that that is a very particular kind of situation, where there are "legal impediments" imposed in the way of access to justice. He contrasts that with situations in which the state may not have provided sufficient public funding for legal aid. In that context he reminds us of what the Divisional Court had said in *Witham* (quoted at para 106 above), a decision which was cited with approval in *UNISON*. In essence we accept the submissions of Sir James Eadie in this regard.

124. In our judgment, the "unacceptable risk of unfairness" test, which was to be found in earlier decisions such as the *Refugee Legal Centre* case and the *Howard League* case, which was expressly relied upon by the Divisional Court in *Law Society (No. 2)*, must now be understood as explicable only in accordance with the principles set out in *Gillick* and *UNISON*. Accordingly, in our view, the correct test to be applied is that in para 63 in the judgment in the *A* case.

125. Further, the *UNISON* test, which does refer to a "real risk", is to be applied in the sort of case with which that case was concerned, where a "legal impediment" was imposed – in that case by the imposition of very high fees to bring a claim at all. It may also be appropriate in a case such as *Howard League*, where legal aid was completely removed from a certain type of work, but, in our judgment, it is not the correct test in a case such as the present, where legal aid continues to be available – indeed there has been an increase in funding – but what is complained of is that the increase is not sufficient.

126. In accordance with the statement of principle in the *A* case, at para 63, there may be cases in which an individual is able to establish that his or her right to legal aid, in accordance with the applicable legislation, has been breached. That will be a straightforward breach of section 1 of LASPO. But that is an exercise of the court's traditional function of adjudicating on rights and obligations *after* the event, on the basis of evidence that an event has *already* occurred. Where, as in the present context, the nature of the challenge is to an entire system, and the challenge is brought *ab ante* (in advance), we accept the submission made for the Lord Chancellor that it must be shown that the system is inherently defective in the sense that it can be seen in advance that it *will* produce unfairness in at least a significant and identifiable number of cases (not that there is a real risk of this).

127. It is that test that we must apply when addressing Ground 1. Mr de la Mare submits that, even if that is the test to be applied, the evidence before the Court establishes that it is met and there has been proved to be a breach of section 1 of LASPO.

Burden of proof

128. Before we turn to the grounds of challenge, we can dispose of one issue which arose during the course of the hearing, which concerns the question of the burden of proof. Mr de la Mare submitted that the Lord Chancellor had conceded in his skeleton argument, in the heading above para 34, that the Law Society bears only the "evidential burden" rather than the legal burden, so that, if it has adduced some evidence to raise the issue, the legal burden is on the Lord Chancellor to prove that the decision does not breach section 1 of LASPO.

129. In our judgment, this is based on a misunderstanding of the Lord Chancellor's skeleton argument and is wrong in principle. The Lord Chancellor was merely using the heading "evidential burden" to mean that the Law Society bears the burden of proving its case on matters of fact by evidence. He was not using the phrase, as it is sometimes used in the law, to distinguish the evidential burden from the legal burden of proof.

130. The Law Society's approach would also be contrary to principle, since, in judicial review proceedings, as in civil proceedings generally, the general principle is that the

burden of proof lies on a claimant to prove its case (the standard of proof being the balance of probabilities): see Lewis, Judicial Remedies in Public Law (6th ed., 2021), para 9-133. There are exceptions to this, for example in cases of executive detention, when the importance of the right at stake (personal liberty) leads the law to place the legal burden of proof (for example that a person is an illegal entrant) on the executive: see *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74. In the present context, we can see no reason to depart from the general principle, that the Law Society bears the burden of proof. This is the approach which the Court implicitly took in *Law Society (No. 2)*, at para 136, where it found that the claimant in that case had not established its case on the evidence.

Scope of these judicial review proceedings

131. It is well established that proceedings such as these should not be permitted to be turned into a roving commission of inquiry into the future of the particular system under scrutiny. That is not the function of the Court in judicial review proceedings. The focus of these proceedings must be the two decisions under challenge. Ground 1 raises the additional complication that, as we have said above, the Court is the primary decision-maker (Grounds 2-4 inclusive are examples of the standard approach). The Court has received a mass of post-decision evidence which is sought to be relied on by both parties. In our view, that evidence is admissible on this straightforward basis: that the Law Society's case is that the failure in November 2022 to implement the two core recommendations places the Lord Chancellor in breach of section 1 of LASPO, that breach being identifiable – at least in part – by the consequences of the non-implementation. Thus, the Law Society adduces evidence to support that proposition, and the Lord Chancellor adduces evidence in rebuttal. Other post-decision evidence, in particular the evidence we have received after the hearing, is admissible in that it goes to grounds of challenge which are said to render the decisions unlawful at the time that they were taken, for example by showing (on the Law Society's contention) that certain steps were not taken by the Lord Chancellor which ought reasonably to have been taken before those decisions were taken. Provided that sight is not lost of the nature of the decisions under challenge, we see no difficulty with this approach.

Ground 1

The Law Society's Case

132. The Law Society has filed witness statements from a number of criminal legal aid practitioners. This evidence seeks to demonstrate, in line with the conclusions of CLAIR, that there are grave issues with retention and recruitment; that duty solicitors operate under severe and often intolerable working conditions, many being "on call 24/7"; and that in some areas of England and Wales suspects do not have access to any or any adequate legal assistance. What follows is a summary of just some of the witness statements including those filed on behalf of the First and Second Interested Parties.

133. Ian O'Rourke of Ian O'Rourke & Co Solicitors is the only remaining duty solicitor on the Berwick and Alnwick scheme. He is on call for 24 hours a day, 7 days a week and

as a panel member is required to "use all reasonable endeavours to accept calls which come through … referring new arrested clients". His contract extends to a police station approximately 80 minutes away from his office, and travel time is not paid. Conflicts of interest arise in around 15-25 matters a year, and in such circumstances the accused will not see a solicitor who is able to take instructions until the door of the Magistrates' Court hearing. Mr O'Rourke is now 64 years old and on the cusp of retirement. At that point, there are unlikely to be any duty solicitors in the area.

134. John Halewood-Dodd of LHD Solicitors works in two schemes, Kendal and Lancaster. There are three firms on the Lancaster scheme with five solicitors in all. Often, solicitors are on duty for the two police stations, Lancaster and Kendal, on the same day, leading to obvious delays. There have been some weeks where he was in court all week and then on call the entire weekend. Over one three-day period, he had just six hours sleep. In his experience, the significant delays in the system lead some suspects to forgo their right to a solicitor rather than wait as long as it takes.

135. One solicitor whom, for reasons of privacy that will become apparent, we will anonymise is the joint Managing Partner of a firm which is currently a member of the duty schemes attached to four outer London boroughs. There are 36 firm solicitors across these four schemes as at April 2023. In his view, the key problems with the present schemes are centred around capacity and a rise in consequence of "the chronic and predictable problems of long-term under-funding". The decline in the number of duty solicitors on the rotas is due to the ageing workforce and the reluctance of newly-qualified solicitors to do criminal defence work due to poor remuneration and long hours.

136. The evidence this witness gives is particularly cogent:

> "In the past 3-5 years, I had a nervous breakdown due to this job and was again prescribed anti-depressants for over a year, as well as sleeping tablets. I contemplated suicide. My wife wanted me to walk away as she thought I would kill myself. I couldn't walk away as I am a 50% owner of the firm and have responsibilities to my staff and clients. I still have panic attacks and migraines over the finances of the firm and the work that we have to do just to keep the firm afloat.
>
> I constantly worry about the finances of the firm. I do all the Crown Court billing for the firm and despair every time a Crown Court bill is slashed by the LAA, usually due to issues over PPE. The LAA's challenges to the LGFS bills make it almost impossible to do any financial planning.
>
> I work every day, including weekends and bank holidays. I take work away with me on every holiday. I have missed much of my daughter's childhood, and I often see my wife when I go to bed. When I do sleep, I am woken by clients getting arrested and therefore called by the [DSCC]. My equity partner and I are the "back up" numbers for all our duty solicitors so if they miss a call one of us gets it."

137. Katharine Todd is a partner at Jacobs and Todd Solicitors based in Exeter. All four solicitors working at this office are members of the Exeter Duty Solicitor Scheme. Ms Todd has informed the Court that her last duty solicitor slot was from 1pm on 31st August to 1pm on 1st September 2023. She says that what happened on those two days is "fairly typical". On the Thursday, she left home at 8am to travel to Taunton Magistrates' Court and then did eight duty calls between 2pm and past midnight the following morning. A conflict of interest arose in relation to the last of these calls, and Ms Todd will not therefore get paid for it. She did not go to sleep until 2.30am and was awake by 6.30am. She then worked flat out until about midnight, doing a mix of duty calls and other work. Her duty slot officially ended at 1pm that day and so overran by about 11 hours.

138. Kerry Morgan is a solicitor of Morgan Brown and Company Solicitors, employing six duty solicitors. The firm is on two duty rotas: the Bury and Salford rota. In her experience:

> "Clients … sometimes waive their rights and are interviewed because it has been impossible for us to get to them quickly enough before they buckle and just want to get their interviews over and done with. This happens more frequently than it did before due to the lack of available staff and the number of police stations required to be covered at any one time with a limited level of staff."

139. We have summarised only two of the witness statements filed on behalf of the First and Second Interested Parties although we bear in mind the helpful summaries of other statements in Mr Adam Wagner's helpful skeleton argument. He has also identified six key themes which emerge from the 22 witness statements relied on. These are: (1) unbearable working conditions; (2) market failure; (3) ever fewer solicitors; (4) the "vicious circle" (i.e. people leaving for better pay and conditions, but not being replaced because of the poor pay and conditions); (5) the "ticking time bomb" (i.e. an ageing cohort); and (6) nothing has improved. Mr Wagner's overarching submission is that chronic underfunding of the system lies at the heart of the problem.

140. We are not ignoring the copious evidence filed on behalf of the Law Society which is to similar effect. The Law Society's characterisation of this evidence is that it shows a "system pushing criminal defence solicitors to the very limit of their physical and professional ethical limits".

141. Sir James Eadie describes much of this evidence as "anecdotal" but in our view that understates its value. The Court is being confronted by a mass of convergent evidence from honest, professional people working up and down the country, and its nature and consistency enable us to conclude that in the main it should be regarded as cogent, particularly in the context of Mr Wagner's items (1), (3), (4) and (5). What this impressive body of evidence brings home is the women and men working up and down the country at all hours of the day and night, in difficult and stressful circumstances, carrying out an essential service which depends to a large extent on their goodwill and sense of public duty.

142. It seems to us that Mr Wagner's item (2), market failure, involves at least two factors which are to some extent inter-connected. The first is the argument that more accused persons at police stations are waiving their rights owing to the delays in getting a solicitor to them. The second is the proposition that there are areas of the country where the system has broken down to such an extent that there are, in truth, legal aid deserts. It is convenient to address the Law Society's case on those issues in that order.

143. The Law Society's case on increasing numbers of unrepresented defendants is summarised under paras 27-29 of Annex A to its skeleton argument. We have already referred to individual solicitors' experience of suspects waiving their rights owing to the delays in arrival. Dr Kemp's research shows a direct relationship between the frequency of requests for legal advice and representation and the length of time suspects remained in custody. In 2014 she concluded that delays in attendance "could lead to suspects changing their minds" about having a solicitor in attendance. In 2017 she concluded that 30% of suspects declined legal advice because they were concerned about the delays. Separate research in that year showed that suspects were spending substantially longer in custody, and research participants "commented on the lack of availability of solicitors during the night as being the main cause of the delay". Dr Kemp's report, 'Examining Children's Experiences in Custody', closely examined 32 case studies. All but three child participants received legal advice, but in those cases "this was mainly due to concerns that having a lawyer would delay the police interview".

144. In oral argument Sir James Eadie's answer to this evidence was that the reasons for a suspect declining legal representation are multifactorial, and that no solid conclusions may be inferred from this body of material. Plainly, the point could fairly have been made that Dr Kemp's child study was looking at a small sample with only 10% declining legal representation. We think that, considered in the round, what this particular seam of evidence shows is that the delay in providing legal representation to defendants increases the risk that they may decline it, but that it goes no further than that.

145. Ms Anna Powell-Smith, founder of the Centre for Public Data, has analysed some of the data on the digital Common Platform for Magistrates' Court and Crown Court cases and her preliminary conclusion is that in 2022 35% of defendants charged with custodial offences triable summarily only did not have a lawyer whereas for the first six months of 2023 the figure had risen to 48%. Ms Powell-Smith has also done an analysis of serious indictable offences where significant numbers of defendants, appearing in the Magistrates' Court before their cases are sent to the Crown Court, were legally unrepresented. However, we accept Sir James Eadie's submission that this data is of very limited value, not least because there may be many reasons why a defendant is not represented and, furthermore, it sheds little light on the primary case being advanced by the Law Society – that the problem lies in the absence of representation at police stations. In that regard, the evidence base may fairly be described as anecdotal and does not properly give rise to an inference of causation.

146. Turning to the second issue, legal aid deserts and unmet need, a mass of material has been brought to our attention. We have considered all of it but a tailored approach is required for present purposes.

147. The LAA publishes Provider and Contract Capacity Reviews at frequent, often three-monthly, intervals. The review for the period April to September 2022 revealed that 90% of the duty schemes continued to have sufficient duty solicitors, although overall solicitor numbers continue to fall. These are the schemes with a "green" RAG (Red/Amber/Green) rating. As for the remainder:

> "The other 10% of duty schemes (amber and red schemes) are functioning; however, for the majority, a further reduction in provider/duty solicitor numbers that results in them being no longer viable have very limited, sustainable, operational solutions. This is illustrated by the consultations held over summer 2022 over the Barnstaple and Skegness duty schemes where short-term, unsustainable, solutions are now in place.
>
> …
>
> …
>
> We have employed short-term solutions in Barnstaple and Skegness, but a short/medium term policy intervention (e.g. fee levels) is required in those and other schemes in order to increase capacity. We are therefore engaging MoJ policy leads on this point for consideration as part of the policy response to CLAIR."

148. The RAG ratings appear to be rough and ready measures which depend on the number of duty solicitors on the rotas at the relevant time. A RAG rating of "red" is achieved when there are 4 or fewer duty solicitors on the rota. In his fifth witness statement, filed with the Court's permission after the hearing, Mr David Phillips, who is the Deputy Director for Service Development and Commissioning within the LAA, has clarified that RAG ratings are based on metrics supplied by the Law Society. A "red" rating should not be interpreted as indicative of an actual or imminent market failure, or an actual or imminent breach of the Lord Chancellor's statutory duty. It is merely a trigger for the carrying out of further monitoring. Further, the RAG ratings fall to be distinguished from the BRAG (blue, red, amber and green) ratings that are applied to the corporate risk register. Mr Phillips has explained that a BRAG rating of "red" means "high impact" defined to mean "major impacts on LAA objectives and delivery compromised" which is "likely to occur". His gloss on this is that a "red" rating does not mean that the impact has already occurred or will imminently occur.

149. The Provider and Contract Capacity Review published in October 2023 includes the following:

> "The LAA monitors capacity and takes action to ensure that criminal legal advice remains accessible in the event of issues. Usually, this entails merging schemes with neighbouring ones to increase the number of duty solicitors available.
>
> There are limits to this approach, particularly when it comes to the blue duty schemes on Slide XX. These are schemes with

> fewer than 7 duty solicitors, that are in rural areas with distant neighbouring schemes. In summer 2022, consultations were held to explore merging Barnstaple and Skegness with their neighbouring schemes. However, the neighbouring schemes were only willing to provide exceptional or voluntary coverage for these schemes, and short-term solutions have been implemented on that basis."

It is clear from slide XX that for Barnstaple the neighbouring scheme is up to 2 hours away. For Skegness the travelling time is at least 1 hour. For 4 of the duty schemes, there has been a decrease in solicitor numbers since the previous capacity review; and a number of these are dependent on some help or "back-up" from neighbouring schemes.

150. We received excellent submissions from Ms Gayatri Sarathy on the state of the Barnstaple and Skegness schemes. These schemes were examined in some detail because they represent the high watermark of the Law Society's case on the issue of "legal aid deserts" and unmet need. It was submitted that these areas should be regarded as the "canaries in the mine" and, as Mr de la Mare was later to put it in oral argument, as current instances of a section 1 breach. Another way of putting the point is that, if the Law Society cannot prove a section 1 breach in what they say are the two worst cases, they cannot prove such a breach elsewhere.

151. Ms Sarathy submitted that the LAA was aware from at least early January 2022 that there were concerns over coverage. The number of duty solicitors in Barnstaple was in the process of being reduced from four to one. There are problems in the summer months when both schemes tend to be busier.

152. The LAA consulted on changes to the Barnstaple duty scheme in August 2022. Four options were presented, each of which entailed a merger with one or more neighbouring schemes. In relation to all the options the LAA stated that it would not expect providers to attend Barnstaple police station within 45 minutes but "would still expect them to make best endeavours to attend" within that timeframe. On 21 September 2022 the LAA published its response. Consultees consistently stated that the travel times had been under-estimated, that the neighbouring schemes were insufficiently resourced to permit additional demand, and that the proposals might not be financially viable. On the other hand, the provider in Barnstaple stated that it was sufficiently resourced to service the scheme, with back-up called on as and when needed. The LAA therefore selected that option, stating that it would continue to monitor performance.

153. A similar picture emerged in relation to Skegness after the consultation which started in May 2022. The LAA noted that none of the options was strongly favoured by any of the consultees. In the end, the LAA selected an option which involved a merger of some of the existing Lincolnshire schemes with the Skegness scheme.

154. Ms Sarathy took us to a series of LAA internal emails. An email dated 10 August 2022 contains the following frank assessment:

> "we've got an issue on 2 duty solicitor schemes where we've essentially seen failures in the local duty solicitor market. There is simply no appetite from local firms to cover these rural

> schemes any more. The result is that in both areas we have insufficient numbers of firms and duty solicitors to effectively cover the rotas from 1 October."

The author suggested three possible options: paying for travel; providing advice remotely; and expanding the PDS.

155. These options were rejected by those higher up the decision-making chain. Paying for travel was thought to create a damaging precedent; providing advice remotely was felt to be a non-runner given *inter alia* the provisions of PACE; and the PDS option was thought to be too expensive. It was recognised that the solutions adopted would be "sticking plasters" and no more.

156. There was an LAA market capacity review meeting on 5 July 2023. The Barnstaple, Skegness and Isle of Wight schemes were identified as being at risk of not having sufficient cover. A bespoke rather than a generic solution was required. Barnstaple has on average three calls per week, with one duty solicitor and seven accredited representatives. One possible solution was to adopt a system of remote working. It was also recognised at this meeting that the available data were insufficient and that they did not know the extent of unmet demand, if any.

157. The LAA briefed Minister Freer on 12 July 2023. He was advised that the LAA had exhausted the measures that were typically deployed to maintain the viability of duty schemes "and we need to consider some form of unprecedented intervention". The LAA floated the three possible options to which we have already referred. It is unclear what happened with this briefing document.

158. On the foot of all this material, Ms Sarathy advanced four submissions. First, she submitted that the capacity risks in relation to these areas were not raised with Ministers before the Final Response to CLAIR in November 2022. Secondly, she argued that the solutions adopted following consultation were acknowledged to be short-term, and have not worked. Thirdly, the Lord Chancellor accepts that the data does not exist to measure unmet need. Fourthly, the additional 2% funding, most of it earmarked for the duty solicitor schemes, will not come on stream until mid-2024 at the earliest.

159. Mr de la Mare advanced a series of detailed submissions directed to the inadequacy of the Lord Chancellor's system of monitoring more generally. Logically, those submissions cannot advance the Law Society's case on Ground 1 because it shoulders the burden of proof: absence of evidence is not evidence of absence. These submissions were more relevant to aspects of the Law Society's *Tameside* and irrationality case, and we will address them at the appropriate stage. However, to the extent that the results of the Lord Chancellor's monitoring provide positive evidence of a possible section 1 breach, we will consider it under the rubric of this ground.

160. Mr de la Mare submitted that the decisions create a real systemic risk that material numbers of suspects will be prevented, or substantially impeded, from receiving effective legal advice and representation. Before CLAIR, there were significant concerns with the provision of criminal legal aid, and the CLAIR report and recommendations must be read in that context. It is contended that through years of underfunding, criminal legal aid work has been hollowed out to such an extent that there are some duty rota schemes that are no longer viable due to the reduction in the numbers

of firms and solicitors. Secondly, Mr de la Mare argued that the failure to implement the CLAIR report and recommendations has resulted in a real risk that suspects would be prevented from accessing effective legal representation: in this regard, reliance is placed on Ms Sarathy's submissions, and the position on the Isle of Wight. These are said to be examples of wider emerging patterns across the criminal justice system, or indicative of a wider systemic problem. The solutions proposed for those areas are, it is submitted, plainly inadequate.

161. Addressing the Lord Chancellor's argument that the CLAIR report contains no finding that current level of criminal legal aid funding creates a systemic risk that substantial numbers of suspects are denied access to legal advice, Mr de la Mare pointed out that Lord Bellamy was not asked to address that issue. However, the CLAIR report does provide highly persuasive and unchallenged evidence of the parlous state of the system and why, in the absence of any evidence to the contrary, it is reasonable to infer that increasing funding by a smaller amount will worsen the dire straits of the criminal justice system and create a real risk of lack of access to justice.

162. When pressed by the Court as to whether the correct legal test was "real risk of breach" or the more stringent test set out at para 63 of the judgment of the Supreme Court in the *A* case (as we have explained above, we consider that it is the latter), Mr de la Mare maintained that the test is the former but argued in the alternative, that, if it is the latter, the available evidence also satisfies that test.

The Lord Chancellor's Case

163. According to Mr Phillips' first witness statement, the LAA monitors the operation of the duty schemes in two key ways: first, by "intelligence-led, real-time monitoring of duty schemes with potential capacity issues based on information gathered by the LAA's network of regional contract managers located throughout England and Wales"; and, secondly, by routine internal reviews fn the capacity of the market.

164. Mr Phillips explains that contract managers work at grass-roots level and therefore receive feedback from police, court and local stakeholders on the operation of the duty schemes. His first witness statement provides no further detail about this process. As for the internal reviews, we have referred to a number of those in connection with our review of the Law Society's case. Mr Phillips accepts that these do not provide a complete picture of how a scheme is operating. The RAG ratings, in particular, are insufficiently sensitive to address how different schemes, with different capacity issues, are operating. In particular:

> "Another example is provided by looking at schemes where there is only one duty solicitor. The LAA closely monitors the operation of these and other smaller schemes to ensure that there is sufficient capacity to cover available rota slots. However, whilst for some schemes this reflects capacity issues that are being addressed, for others the scheme is functioning either because of the low levels of demand or because the single duty solicitor is supported by a larger number of fee earners."

165. In Barnstaple, the single duty solicitor is supported by seven fee earners and, as Mr Phillips reminds us, by Exeter and Bridgwater providers acting as back-up in exceptional circumstances. On the other hand, Mr Phillips is somewhat vague about what would happen if the single provider for Berwick & Alnwick were to withdraw or retire.

166. Paras 50 and 51 of Mr Phillips' first witness statement merit setting out in full:

> "50. For the reasons set out in some detail above, the LAA is satisfied that there is currently adequate provision of criminal legal aid services across all areas of England and Wales. There are no schemes without duty solicitors. The schemes where there is one duty solicitor, or a small number of duty solicitors, are able to service the needs of that particular area. The LAA carefully monitors the operation of smaller schemes to ensure that there is sufficient capacity to cover available rota slots. Where problems arise, the LAA has a series of steps which it can take to ensure coverage. For these reasons, the LAA does not accept the Law Society's claim that there is existing market failure in the criminal legal aid market.
>
> 51. The LAA nonetheless accepts that some of the solutions currently in place are not viable in the long term. In the October 2022 capacity review, the LAA sounded a note of caution that in some areas (particularly Barnstaple and Skegness), while short term operational solutions have been deployed, they were unlikely to be sustainable in the medium/long term and there were limited viable solutions that the LAA could utilise as an alternative. The capacity review, therefore, highlighted that policy intervention would be required to increase capacity in these schemes."

167. In his second witness statement, Mr Phillips clarified that the LAA does monitor all factors which are known to impact on demand for criminal legal aid services. Demand is measured by the needs of the police and the local courts, and the LAA works out the duty solicitor requirements of each area based on that information. Thus, when all slots are covered (including, as Mr Phillips' fourth statement makes clear, any additional slots sought by police forces from time to time), the LAA considers that there is adequate provision. By "market failure", the LAA means that the local market is not operating as efficiently as it should rather than it has collapsed.

168. Mr Phillips explains that contract managers have access to a variety of datasets which they can use to build a picture of the performance of individual providers and schemes. There is information available which includes, for example, the number of cancelled requests for advice and the percentage of cases accepted within 30, 60, 90 and 240 minutes. However, the LAA does not hold data on the number of suspects in custody who choose not to take up legal advice (and, by implication, why a suspect may refuse). In addition to dealing with capacity risks as and when they arise, contract managers

conduct a regular series of reviews with providers, including the level of their fulfilment, or otherwise, with KPIs.

169. In situations where "capacity risks" are identified, the LAA's primary tool for addressing the issue is by consulting on a scheme merger, although it is open to other solutions if suggested by providers. Mr Phillips accepts that there is no single, overarching policy or guidance which sets out how the LAA identifies capacity risks or determines how to respond. In January 2023 Mr Phillips set up the "Market Capacity Risk: Active Management" group which is intended to identify and manage risks before gaps in service provision occur. Mr Phillips accepts that Barnstaple and Skegness continue to present a challenge, and that the way forward, albeit very much as a measure of last resort, may have to be increasing the reach of the PDS into those areas.

170. It is unnecessary to summarise Mr Phillips' third witness statement. His fourth witness statement is, in the main, a commentary on the criticisms of the LAA's monitoring as set out in the Re-Amended Statement of Facts and Grounds. Mr Phillips' answer is that many of the gaps in the LAA's evidence base would be disproportionate to fill and/or would place an excessive burden on the providers.

171. Sir James Eadie advanced four headline submissions on Ground 1, and more generally. First, he submitted that there is nothing to indicate that there are currently any, still less significant numbers, of people being unable to access legal aid services: in other words, no good evidence of actual failure. Secondly, the Bellamy report does not provide evidence of actual failure. The concerns Lord Bellamy expressed were that a number of structural and financial reforms were necessary to ensure that the system was sustainable in the medium to long term. Thirdly, Sir James Eadie contended that the ministerial submissions reveal the sheer scale, complexity and detail of the decision-making needed for the fee increases alone, putting aside other structural changes. Fourthly, he submitted that the programme of reform has been embarked on with urgency, and is continuing.

172. Sir James Eadie advanced five responsive points to the Law Society's contention that the failure to raise fees by 15% - across the board and immediately - generated a breach of the section 1 LASPO duty. First, he submitted that Lord Bellamy's Central Recommendation did not seek to identify the level necessary for the Lord Chancellor to discharge his section 1 obligation. CLAIR was not deploying sustainability as a proxy for breach. Secondly, Lord Bellamy well understood that the impact of any fee increase could not be felt immediately, and that it would take time for "steady state" to be attained. Thirdly, Sir James Eadie did not accept that there was a significant gap between the Bellamy recommendations and the Lord Chancellor's response. In particular, the latter took forward nearly all of the 19 recommendations and he has agreed to fund about 80% of CLAIR (i.e. 11/15ths) within the period of the current spending review. Fourthly, the Lord Chancellor is committed to reform LGFS fees with a view to uplifting them once this reform has been completed. Fifthly, Sir James Eadie submitted that simply because the response is staggered, it does not follow that the objectives of Bellamy are not being furthered. This submission brought Sir James Eadie's wheel round in a circle, inasmuch as his first submission (an essential plank for this fifth submission) is that there is no evidence of current breach.

Discussion and Conclusions on Ground 1

173. For the reasons we have explained above, the issue in this *ab ante* challenge is whether we are satisfied on the balance of probabilities that the system of criminal legal aid, particularly in relation to the Duty Solicitor Schemes, is inherently so defective, in the sense that it will produce unfairness in at least a significant and identifiable number of cases, that a breach of section 1 of LASPO has been made out. Proof of an actual or at least an imminent breach is required, taking the date of the Lord Chancellor's decision as the yardstick. It is not sufficient to prove that the defects and deficiencies in the system are such that there is a real risk of a breach or breaches of the section. Further, the Law Society's other grounds are not directly relevant to Ground 1. Public law defects in the decision-making process would not prove, without more, that the Lord Chancellor is in breach of his statutory duty.

174. The Law Society's case on its first ground is tethered to the Central Recommendation in Lord Bellamy's report and the knock-on effects of the Lord Chancellor's failure to implement it. In our judgment, that report is relevant in two important respects. First, the Lord Chancellor has not sought to undermine its premises, reasoning and conclusions in any material respect. These can therefore be regarded as givens in this case, making due allowance for the obvious point that Lord Bellamy well knew that he was not advising in the realm of economic certainty. Secondly, the Law Society's argument is that the reason it must succeed on Ground 1 is that the Lord Chancellor's failure to implement CLAIR both immediately and in full places him in breach of his statutory duty. The history leading up to CLAIR is relevant to the extent that it demonstrates that the system was broken and needed to be fixed in the very near future. However, the challenge is firmly and squarely based on the failure to implement the Central Recommendation of CLAIR.

175. We accept Sir James Eadie's submission that Lord Bellamy's terms of reference did not require him to reach a finding on whether the Lord Chancellor was currently, or would imminently be, in breach of his statutory duty, and it is unsurprising that Lord Bellamy was not asked to address that question. Mr de la Mare sought to be derive a forensic advantage from this but in our view that attempt was misplaced: whether asked to or not, we do not think that Lord Bellamy did address that question in any shape or form. Rather, the scope of his endeavour was broader and more wide-ranging: in particular, he was being asked to make recommendations which would bear on the medium- and long-term sustainability of criminal legal aid work. In our judgment, Lord Bellamy's report must be interpreted in that light. Our rejection of this plank of the Law Society's case is not fatal to its argument on Ground 1 more generally but it is an unpromising platform for what follows. Given that Lord Bellamy was not stating, either expressly or by necessary implication, that unless a 15% increase were effectuated forthwith the Lord Chancellor would be in breach of section 1 of LASPO, a principal focus of the Law Society's case has been removed.

176. We have already set out our main conclusions on the impressive, compelling body of evidence that the Law Society and the Interested Parties have assembled. In short, the evidence from solicitors working at grass-roots level is that the system is slowly coming apart at the seams. The system depends to an unacceptable degree on the goodwill and generosity of spirit of those currently working within it. New blood in significant quantities will not and cannot be attracted to criminal legal aid in circumstances where what is on offer elsewhere is considerably more attractive both in terms of financial

remuneration and other benefits. Unless there are significant injections of funding in the relatively near future, any prediction along the lines that the system will arrive in due course at a point of collapse is not overly pessimistic.

177. However, the available evidence falls short of showing that the system either is or will imminently be inherently defective in the sense we have explained. Looking in particular at Barnstaple and Skegness, we consider that the duty solicitors working there are just about managing with back-up from elsewhere. Despite some of the language used in internal emails, there are no legal aid deserts and no identifiable cases of unmet need. Considering the position more widely, the majority of Mr Wagner's submissions were well-founded but they did not go far enough to show a section 1 breach.

178. The evidence of a more general or statistical nature does not in our judgment prove the Law Society's case. For example, the BRAG and RAG ratings are fairly blunt instruments and we are constrained to agree with Mr Phillips that a "red" rating does not amount to evidence of actual or imminent section 1 breach. In addition, one of the recurring themes of Mr de la Mare's submissions was that the Lord Chancellor's evidence base was inadequate, and that he had not undertaken sufficient steps to investigate and monitor the position. Those submissions have some force, but they cannot logically provide the basis of a finding of existing breach.

179. The statistical evidence to the effect that suspects are increasingly waiving their rights is difficult to interpret and is insufficiently compelling to prove an actual or imminent breach. These studies are quite small and the reasons for suspects waiving their rights in individual cases have not been explored. Those reasons are likely to be multifactorial. Furthermore, we are, as Sir James Eadie consistently reminded us, focusing on the Lord Chancellor's failure to implement the Bellamy report in full. Even if there has been an increase in unrepresented suspects and defendants since November 2022 (and most of the studies have not examined that period), we are unable to reach the inferential conclusion that this phenomenon has been brought about by the Lord Chancellor's decisions which are under challenge in these proceedings, i.e. that a causal link has been proved.

180. We deal finally with the economic evidence that we have summarised above. In our judgment, it is of little relevance to Ground 1. It is obvious that the difference between a 9 or 11% uplift in fees, and an increase of 15%, could not be expected to have an immediate impact. Lord Bellamy was well aware that it would take time for the effects of his Central Recommendation, if implemented in full, to infiltrate the system, not least because the achievement of "steady state" takes years. In the short-term, solicitors' firms will tend to adopt "fire-fighting" measures such as reducing office space to save costs etc. Furthermore, if an examination of what is happening at grass-roots level does not lead us to the conclusion that a section 1 breach has been made out - and it does not - we do not consider that wider economic arguments are capable of tilting the forensic balance in favour of the Law Society.

181. Troubled though we are by the depressing evidential picture depicted by the Law Society and the Interested Parties, for all these reasons Ground 1 fails.

Ground 4

The Law Society's case

182. By this Ground the Law Society contends that the Lord Chancellor breached the *Tameside* duty of sufficient enquiry in discharging his section 1 LASPO duty to secure legal aid at any time either before or after the decisions under challenge, alternatively in addressing what measures could be taken to bring about the sustainability of criminal legal aid if the Central Recommendation by Lord Bellamy were not accepted in full. In particular, it is said that the breach occurred as a result of (1) the failure to have in place any policy to determine the sufficiency or quality of legal aid, (2) the failure to gather any or any sufficient information to determine whether there is an unmet need, (3) the inadequacy of the qualitative information that has been gathered, and (4) the failure to undertake further analysis of the underlying data by remodelling or otherwise.

183. In elaboration of these headline points, the Law Society submits that the Lord Chancellor has accepted that there is no single, overarching written policy or guidance which sets out how the LAA identifies capacity risks and no internal written policy or guidance documents used by either the MoJ or the LAA to assess sufficiency of CLA supply. It is said that the only measure adopted by the Lord Chancellor for determining whether legal aid provision is sufficient is by examining whether the LAA has covered the slots on the duty solicitor rota. That metric, it is contended, is inadequate for the purpose of discharging the Lord Chancellor's section 1 functions. The Law Society advances a number of submissions in support of that contention, in particular that this metric does not in fact inform the decision-maker whether the slots are covered in practice and, if they are, anything about waiting times for access to legal advice, the frequency of suspects waiving their rights, and so forth. Further, the Law Society submits that the LAA has not identified any monitoring in relation to how the slots which have been allocated to sole or small numbers of duty solicitors are in fact covered, and by whom.

184. The Law Society's second point is that the Lord Chancellor has not gathered any or any sufficient evidence to determine whether there is unmet need. Annex D to the Law Society's skeleton argument itemises the categories of data or information, of critical relevance to the discharge of the section 1 function, which are said to be lacking:

(1) The number of duty solicitors required to fill slots on duty rotas, as opposed to whether the rotas are covered for any single week.

(2) Whether the slots on duty rotas are in fact covered, as opposed to there being a duty solicitor down on a rota who is obliged to accept 90% of call outs.

(3) How duty slots are in fact covered and by whom, and whether the duty rota for a particular area is covered by a sole solicitor as opposed to non-duty solicitor fee-earners or freelance agents.

(4) Information and/or policies regarding how often conflicts of interest arise, how they are managed, and what impacts these have on suspects.

(5) Waiting times for access to legal advice and representation at police stations.

(6) What calls for legal advice and representation are cancelled by police.

(7) The frequency of interviews at police stations carried out without a duty solicitor or accredited police representative present.

(8) The frequency with which suspects waive their right to legal advice and representation owing to waiting times, including where suspects initially request legal advice and representation.

(9) Whether waiting times have particular impacts on certain groups, e.g. vulnerable adults, children and young people under 18.

(10) Conviction/caution rates in relation to interviews at police stations and/or courts.

(11) Travel times.

(12) Salaries of duty solicitors.

(13) The reasons for the difficulties in recruiting and/or retaining duty solicitors.

(14) CPS hiring patterns and the medium- or long-term impact on capacity or sustainability issues of criminal legal aid work.

(15) Typical retention periods of both junior and senior solicitors.

(16) Impact of working conditions and pressures of criminal legal aid providers on the quality of legal advice and representation.

185. It is submitted that the lack of data has been repeatedly recognised in internal emails sent both before and after the decisions. For example, on 6 July 2023 Mr Phillips sent an email which stated:

> "Our data is limited. We don't know what unmet need is. We generally use the proxies of offices and providers rather than practitioners supplemented by market intelligence from provider engagement. Even in the case of duty solicitors where we can cite total practitioners, we know that police station accredited representatives are regularly used to increase capacity but have limited insights into overall numbers devoted to this work. Therefore, variations in office/provider numbers does not necessarily equate to changes in practitioners."

186. The Law Society's third point is that the qualitative data and analysis that has been gathered is inadequate. The only categories of data that are collected by the LAA are Provider Activity Reports and Scheme Performance reports. What these reports contained in general terms was described in the second witness statement of Mr Phillips, but it was only on 29 November 2023, two weeks or so before the hearing, that any documents in these categories were disclosed, objections being taken on the grounds of relevance and proportionality. In our judgment, a representative sample should have been disclosed to the Law Society much sooner.

187. Having now seen examples of these reports, the Law Society contends that the only metric of potential relevance contained in the Provider Activity Reports is KPI 2, the requirement that a provider must accept and deal appropriately with a minimum of 90% of communications from the DSCC for police station advice. It follows, submits the Law Society, that these reports do not contain the kind of information set out under para 184 above. As for the Scheme Performance Reports, we have already summarised what these do contain but the point is made that what they do not record is the waiting times for legal assistance at police stations once the calls have been accepted, nor do they record the frequency of suspects cancelling the request for advice owing to waiting times or why a suspect chooses not to seek legal advice.

188. The Law Society also advances a series of detailed submissions as to the alleged inadequacy of qualitative data and analysis. It is pointed out that the LAA states that it monitors the operation of duty schemes by "intelligence-led, real-time monitoring … based on information gathered by the LAA's network of regional Contract Managers", and by internal capacity reviews based on the number of firms and duty solicitors in the firms. This monitoring operation is characterised as being *ad hoc*, cursory and lacking in proper qualitative analysis. Further, it is complained that the causal connection between these issues and legal aid fee levels has not been properly investigated although, in the light of the academic research that has been carried out, it is known to exist.

189. The Law Society's overarching submission on this topic is put forward in these terms:

> "The above (inadequate) materials also fail to collect, or prompt collection of, any evidence regarding the quality of CLA provision, despite the substantial objective evidence of the issues, and the causal connection between those issues and current levels of legal aid fees. The MoJ had before it not only the CLAIR report, which was unprecedented in its resourcing, but the MoJ also had available to it a significant body of qualitative and quantitative research available from academics, NGOs and other reporting bodies. In light of this evidence, before considering the response to the Recommendations, any reasonable decision maker would consider it necessary to enquire into the demands placed on duty solicitors and providers through their working conditions and fee levels; the availability and uptake of legal advice and representation (including by reference to factors such as regional area, age, other protected characteristics, type of offence and mode of trial); the increasing proportion of unrepresented defendants and the causal connection between this and issues with delay/access to legal aid; the effect on case outcomes of being unrepresented; the management, frequency and effects of conflicts of interest arising."

190. For all these reasons, the Lord Chancellor's approach to data collection is said to be "light-touched and unsophisticated".

191. The Law Society also advanced submissions on the issue of inadequacy of the financial information obtained by the Lord Chancellor to address the discharge of his statutory duty under section 1 of LASPO and the fulfilment of the aims and objectives of the CLAIR report. Our understanding both of Mr de la Mare's oral argument in reply at the end of the hearing and his written submissions filed subsequently is that he was advancing two closely-related arguments. First, that the Lord Chancellor did not ask himself the right question, which is whether not implementing the Central Recommendation in full would enable him to be satisfied that his section 1 function was being fulfilled and/or would still achieve the aims and objectives of the CLAIR report. The Lord Chancellor's failure to undertake any modelling on the basis of lower fee increases demonstrates that proper enquiry was not undertaken, or at the very least it shows that he did not have the evidence available to answer that question. Secondly, that in failing to undertake any further modelling the Lord Chancellor failed in his *Tameside* duty to pursue due enquiry. Furthermore, once the results of the modelling are properly considered and interpreted, it is apparent that the deviation between the Central Recommendation and the outcome is significant.

192. Para 79A of the Re-Amended Statement of Facts and Grounds pleads these failures under the rubric of Ground 2 and not Ground 4:

> "79A. Further, after the claim was issued, the Lord Chancellor, has confirmed that "[n]o modelling was carried out to assess the sustainability of the market for the immediate increase in funding taken forward" (Daly 1 §93) and that the model produced by CLAIR to match salaries of CLA firms with those in the CPS (whilst available to the Lord Chancellor) was "not used … as part of any MoJ work" (Response, §5). The Lord Chancellor states that modelling was not necessary because the Central Recommendation was based on a "broad brush" assessment (Daly 1 §93). That is wrong, and is [in] any event no adequate justification for the Lord Chancellor's failure to undertake *any* evidenced-based analysis prior to making the Remuneration decision: see further Miller 2 §22-30. Thus, the Remuneration Decision was irrational for the further reason that it was not based on any evidence that the level of funding provided was in fact sufficient to meet the objectives of the Central Recommendation and the Review."

193. However, we are able to interpret this pleading as relating also to Ground 4, not least because it alleges that the Lord Chancellor failed not merely to ask himself the right question but to carry out essential evidentiary steps. We do not understand the Lord Chancellor to be taking a pleading point in circumstances where these two grounds are so closely interrelated. It is also relevant that the Lord Chancellor was so late in disclosing the CLAIR model in these proceedings: without it, the Law Society was hampered in the advancement of its best case.

The Lord Chancellor's case

194. The Lord Chancellor contends that he had a significant body of evidence available to him in the form of the material gathered through CLAIR and set out in the Bellamy report, including the Data Compendium which drew on existing evidence comprising the legal aid datasets gathered during the first phase of CLAIR as well as new evidence drawn from surveys, engagement with stakeholders and qualitative interviews. The Data Compendium summarised data relating to criminal legal aid firm income as well as the characteristics of criminal legal aid firms and duty solicitors including age, reasons for leaving firms, and destinations of leavers. Further, the Lord Chancellor took into account the response to the consultation on the CLAIR report, direct engagement with stakeholders, the impact assessment accompanying both the Interim and the Final Responses, as well as the funding envelope available to him and the financial risks associated with different options.

195. As for the Law Society's specific points, Sir James Eadie submits first that it is incorrect to assert that the MoJ has no policy to determine sufficiency or quality of legal aid services. He reminds us of the evidence of Mr Phillips which we have already summarised. Further, as Mr Phillips explains at para 53 of his second witness statement, the newly created Market Capacity Risk: Active Management group considered in July 2023 that no change to the existing approach was required, because:

> "… risk is about local gaps not overall supply; the cause of the risk is varied and cannot be linked back to a single root cause … [there is] not one single straightforward formula which could accurately capture supply requirements in a single location. Therefore any assessment can only be general/indicative …"

196. In relation to waiting times, the Lord Chancellor accepts through Mr Phillips that the LAA does not gather data about actual waiting times because (a) he considers that the time taken for a duty solicitor to arrive at the police station is the best indicator of the effective operation of the scheme, (b) he considers that actual waiting times would not provide an accurate picture, and (c) there are very good reasons why it would not be possible to gather this information, in particular the demands this would place on providers, individual police forces and the LAA itself. At para 27b. of his fourth witness statement, Mr Phillips explains that actual waiting times depend on a range of factors, including whether the police force is ready to interview the suspect.

197. In relation to the alleged absence of quantitative or qualitative data, the Lord Chancellor contends that Mr Phillips provides in respect of each category of alleged deficiency a rational explanation as to why the additional data identified is not reasonably required. Mr Phillips also explains that the references in internal emails to unmet demand and unmet need should be understood in their proper context. What the LAA is saying is that it does not have data on the number of people who are entitled to legal aid but do not take up that advice. What the LAA is not saying is that it has insufficient information to know whether those who have requested legal advice and assistance in police stations or courts are unable effectively to access it. Information in this second category is available.

198. The Lord Chancellor's submission on the alleged insufficiency of data and information (the Law Society's third argument: see para 186 above) is that the Law Society is merely repeating its second point in less forceful terms.

199. The Lord Chancellor's submissions on the alleged failure to re-run the CLAIR model are as follows. First, it is said that he could reasonably decide that further modelling evidence was unnecessary in circumstances where Lord Bellamy's conclusions were both broad-brush and based on numerous variables and assumptions. Secondly, the model itself was based on reasonable assumptions, not all of which were conservative (still less, as the Law Society says, "very" conservative), and by taking CPS June 2021 median salaries a proper comparison with CLA data was carried out. Thirdly, the CLAIR model is not designed to accommodate changes in the underlying assumptions over time: that was not the purpose for which it was designed. In order to update the CLAIR model for changes since the CLAIR report was published, it would be necessary to gather further evidence relating *inter alia* to CLA firm salaries and partner remuneration, and changes to CLA firms' non-employee related costs and costs structure, including in relation to inflation. Fourthly, as it now transpires, although this was not known at the time, re-running the model on the basis of the 11% uplift produces differences which are not significant: had this material been available to the Lord Chancellor at the time of his Final Response, the outcome would highly likely not have been substantially different.

Discussion and Conclusions on Ground 4

200. The proper focus of Ground 4 needs to be identified with care. As with Ground 1, we are not undertaking a wide-ranging, roving enquiry into the criminal legal aid system and the workings of the MoJ, nor are we considering the level of information that might ideally be obtained. The gravamen of Ground 4 is or at least ought to be that, before deciding how to respond to Lord Bellamy's central recommendation, it was incumbent on the Lord Chancellor to conduct further data collection, research and analysis. Moreover, Ground 4 can have no bearing on Ground 1, where the court undertakes its own assessment on the information currently available and not the further information that should have been obtained; and, unlike Ground 1, it must focus on the position as at the date of the Lord Chancellor's Final Response, and not later.

201. There is no dispute between the parties as to the applicable legal test. Lord Diplock's formulation of the test in the *Tameside* case itself (at page 1065) is firmly rooted in the *Wednesbury* principle:

> "… it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see [*Wednesbury*]. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to

> acquaint himself with the relevant information to enable him to answer it correctly?"

202. Lord Diplock's formulation has been repeated in slightly different language on numerous occasions: see, for example, *R (Khatun) v Newham LBC* [2004] EWCA Civ 55; [2005] QB 37 (at para 35); *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin); [2015] 3 All ER 261 (at para 139); *R (Law Society) v Lord Chancellor* [2015] EWCA Civ 230; [2016] 3 All ER 296 (at para 15); and *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647 (at para 70).

203. We emphasise that Ground 4 is concerned with process and not with the outcome of that process. As the Divisional Court said in *Law Society (No 2)* at para 98 (set out at para 226 below), if the reasoning of the decision-maker involves a serious logical or methodological error, the Court is entitled to intervene by way of judicial review. In doing so, it does not pre-empt what the outcome of a lawful decision-making process would be. It is concerned only to uphold the law and, in particular, to ensure that the executive reaches its decisions according to a proper, lawful method.

204. Applying these principles, we consider that the majority of the Law Society's *Tameside* arguments lack force and that there is an air of unreality about them. Lord Bellamy's Central Recommendation was that a minimum 15% increase across the board should be implemented without delay. There was, in fact, a full year's delay between the publication of the CLAIR report and the Final Response, although the 9% fee increase was introduced in September 2022. The CLAIR recommendation was based on a mass rather than a paucity of data, as the Law Society naturally accepts, and thereafter the Lord Chancellor had the benefit of further data, information and submissions following the process of consultation that took place. The further information that the Law Society contends had to be obtained before a rational decision could properly be made would, we think, have generated significant further delay.

205. Allied to this consideration is Lord Bellamy's Recommendation 3(i) – that the Lord Chancellor should consider the extent of unmet need in criminal legal aid in particular areas and in relation to particular classes of applicant and, as appropriate, how that need might be met. It is true that the very fact that this recommendation was made lends support to the Law Society's case that the obtaining of more information would, at the very least, be desirable, but in our judgment Lord Bellamy cannot be understood as advising or suggesting that the implementation of his Central Recommendation should await what on any view would be a lengthy data collection and research exercise. Further, the Law Society's case on Ground 4 is in danger of proving too much inasmuch as no one is saying that Lord Bellamy's Central Recommendation is flawed, or should be revisited, because *he* failed to undertake the lines of enquiry and investigation that the Law Society now demands of the Lord Chancellor.

206. We draw particular attention to the submission made under para 99Z of the Re-Amended Statement of Facts and Grounds:

> "In circumstances where the Defendant was receiving and acknowledged clear signals of a system in dysfunction, as

> predicted in the Review, the failure to conduct any form of consequential research to better understand the causative link between (i) legal aid rates and (ii) the quality of legal advice and representation in fact provided; the availability and uptake of legal advice and representation; and the increased proportion of unrepresented defendants before rejecting the Central Recommendation and making the Non-Intervention Decision, was irrational."

The Law Society has not sought to place any likely timescale on this research exercise but it would probably take years.

207. In any event, at para 27 of his fourth witness statement Mr Phillips has explained why in the LAA's view (a) the existing data are sufficient to assess the effectiveness of the CLA system, and (b) the steps urged on the Court by the Law Society would either be unworkable or disproportionate. We have no doubt that the LAA's evidence base falls well short of the ideal and could be supplemented. However, the question for us is whether Mr Phillip's analysis betrays any *Wednesbury* error, and in our view it does not. In oral argument Mr de la Mare did not address any of that analysis but chose instead to highlight and repeat his written arguments.

208. We are far more troubled by the submission that the Lord Chancellor's *Tameside* duty required him to undertake further modelling on the basis of uplifts of 9% and 11%. The Lord Chancellor's failure to disclose the CLAIR model before the last day of the hearing, and then only in response to an enquiry made by the Court, has meant that this issue has been addressed without the benefit of oral argument, which is far from ideal. What is clear is that the CLAIR model could be re-run on the basis of 9%, 11% or any other uplift without much difficulty. Dr Iniesta-Martinez conducted this exercise overnight. It is surprising that this step was not undertaken in the 12 months or so between the CLAIR report and the Final Response. It could hardly be suggested that the information obtained from any re-modelling exercise could not be of value.

209. Dr Iniesta-Martinez is not of course in a position to say why he was not asked to undertake any remodelling between 2021 and November 2022. The Lord Chancellor's explanation for not carrying out further modelling has come from para 93 of Mr Daly's first witness statement (see para 66 above) and from no one else. Examining Mr Daly's reasons one by one, although Lord Bellamy made a broad-brush assessment based on examining comparable salaries and remuneration within the CPS, the Lord Chancellor has not questioned his methodology and reasoning in any way. Aware that any precision was impossible, Lord Bellamy's Central Recommendation was conservative. The fact that any remodelling would be equally broad-brush is not a reason for not carrying it out, particularly in circumstances where it would have been such a straightforward exercise to do so. Although 9 or 11% were substantial increases, they were less than Lord Bellamy recommended in the context of 15% being in his opinion the minimum necessary to ensure the sustainability of criminal legal aid. Furthermore, although the impact of smaller increases could not be assessed "with any certainty", in the light of the lack of reliable data etc., that scarcely removes the obvious need to obtain as much information as reasonably practicable to make the relevant assessment. If a desire to achieve certainty were the threshold for obtaining further information, it would never be attained. Finally, we cannot accept the related arguments that a reason for not undertaking further enquiries could properly reside in the fact that the Lord Chancellor

was committed to revisiting the amount of uplift after LGFS reform had taken place, and that the amount of funding provided through the LGFS varies significantly across different firms. Not merely will it take considerable time for the LGFS reforms to be implemented, in themselves they cannot logically amount to a proper reason for not seeking further information. Lord Bellamy was aware that the amount of funding provided through the LGFS varies significantly across different firms.

210. In our judgment, the Lord Chancellor's reasons for not carrying out any further modelling on the basis of uplifts lower than the 15% recommended in the CLAIR report do not bear scrutiny. The Law Society having lost on Ground 1, the issue for consideration at this stage of the analysis is not whether further remodelling might have availed the Lord Chancellor in deciding whether his section 1 LASPO duty would be discharged (we have found as a fact that he is not in breach of that duty in failing to implement the Central Recommendation in full) but whether the aims and objectives of the CLAIR report, in particular ensuring the sustainability of criminal legal aid, would be furthered if lower uplifts were implemented. We have little hesitation in concluding that the Lord Chancellor failed in his *Tameside* duty to undertake further modelling on the basis of lower uplifts.

211. The next question to determine is more complex: is it highly likely that the outcome would not have been substantially different had further modelling been carried out? There is no issue between the parties regarding the test we should apply to the issue arising under s. 31(2A) of the Senior Courts Act 1981: see, for example, *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, at para 273.

212. By submissions filed on 19 January 2024 it was contended on behalf of the Law Society that it would be close to unconscionable to permit the Lord Chancellor to rely on the provisions of section 31(2A) in circumstances where (1) no remodelling was carried out at any stage before the hearing itself, and (2) it was only conducted on the prompting of the Court. Although we recognise the obvious force of this objection, we consider that it is preferable, and would be in the public interest, to address the issue on its merits.

213. Had the Lord Chancellor been provided with remodelling evidence based on an 11% uplift, he would have seen that the variance with the CLAIR recommendation was in the region of 3.9% for solicitors' salaries and about 4.3% for equity partner/director remuneration. The Lord Chancellor would have been aware that the extra 2% uplift would not come into effect until 2024. Mr Jonathan Cousins and Mr Fadi Daoud have filed witness statements to the effect that even on this basis these differences in salary and remuneration are significant. More importantly, the Lord Chancellor would also have been told by Dr Iniesta-Martinez that the remodelling was based on overheads and non-employee costs remaining constant, and that it would be difficult to carry out further modelling which reflected inflationary increases in these costs since November 2021. Even if the remodelling might struggle to quantify those increases, they could be considered in general terms using the remodelling that could readily be undertaken as a baseline. Another factor of which the Lord Chancellor would have been aware regardless of any advice given by Dr Iniesta-Martinez is that the value of the CLAIR recommendation has in any event been whittled down in real terms by significant inflation in the economy after November 2021.

214. Although there could be no precision about what any remodelling would have shown, and certain highly broad-brush judgments would have had to be made about the impact of inflation, we have reached the conclusion that it is impossible to say in the light of all these facts that it is highly likely that the outcome would not have been substantially different had further modelling been undertaken.

215. For all these reasons, the Law Society's case succeeds on Ground 4, but only in relation to the failure to undertake due enquiry as to obtaining further financial evidence.

Ground 2

The Law Society's Case

216. The Law Society's primary case under Ground 2 has been put forward in a number of ways and in considerable detail but may be reduced to the following straightforward propositions. The Lord Chancellor has accepted the findings and conclusions of Lord Bellamy's report in their entirety. The CLAIR report, as we know, recommended that there should be an increase in the overall level of funding by 15% per annum in steady state, representing a sum of at least £100 million per annum, as soon as practicable: there was no scope for delay. This was the minimum amount necessary to ensure sustainability of criminal legal aid. The Lord Chancellor's failure to implement the Central Recommendation in full is, it is contended, irrational. The evident funding gap amounts to a significant disparity in terms of outcome, and the only reasonable conclusion must be that the Lord Chancellor has failed to achieve the aims of the CLAIR report – the sustainability of criminal legal aid.

217. The Law Society's alternative formulation is that the Lord Chancellor has failed to ask himself a relevant question: if, as is the case, the findings and conclusions of Lord Bellamy's report are accepted, will the objectives of that report be achieved if the Central Recommendation is not implemented in full; and, if not, what are the possible ramifications? The Law Society's submission is that it is clear from all the documents disclosed evidencing the Lord Chancellor's decision-making process that this question was never posed. Instead, the Lord Chancellor reasoned backwards from a position that only a certain amount of Treasury funding was available and that factor, together with wider political considerations, determined the outcome.

218. In response to the contention that the reasons why the Central Recommendation was not implemented in full were essentially because the Lord Chancellor did not wish to embed the perverse incentives located within the LGFS fee structure, and that the Lord Chancellor was committed to revisiting LGFS fee levels once a revised fee scheme had been implemented, Mr de la Mare submitted that these reasons do not bear scrutiny. First, Lord Bellamy had recognised these concerns but had nonetheless recommended a 15% increase across the board. Secondly, the overall result, a £100 million per annum increase, could have been achieved by some other means, and Lord Bellamy did not recommend how that result could be attained. Thirdly, it is clear that no attempt was made to revert to the Treasury for more funding in light of the Central Recommendation.

219. As for what the Law Society calls the “Non-Intervention decision”, it is contended that the failure to respond to it was irrational. Although Lord Bellamy did not recommend any particular course of action, he made it clear that the Lord Chancellor should one way or another take steps to measure unmet need and intervene as required. The Law Society submits that after the proposal to expand the PDS was abandoned following consultation, the Lord Chancellor did not propose any action to address the unmet need and risk of market failure in areas where that risk was acute. Further, it is said that the establishment of the CLAAB to monitor unmet need does not amount to an intervention in the market in areas where there is potential unmet need; and, in any event, it is unclear what steps have been taken by that body over the past year or so to confront the issue highlighted by Lord Bellamy. Overall, submits the Law Society, the Lord Chancellor has done nothing in response to Recommendation 3(i).

The Lord Chancellor’s Case

220. The Lord Chancellor contends that his Final Response sought to strike a balance between the aims of supporting the sustainability of the legal aid market, limiting perverse incentives and ensuring value for money for the taxpayer. These were the factors that provided the framework for the Remuneration Decision. Furthermore, the context for that decision was that only 50% of the money recommended by CLAIR was allocated to the MoJ for the current spending review period (SR21, i.e. 2021 to 2025) and any funding beyond that amount would need to be found by reallocating funds from other parts of the departmental budget. Ultimately, the Lord Chancellor was able to make a series of budget choices which permitted an increase in funds to the level of 80% of the Central Recommendation.

221. The Lord Chancellor was also concerned not to perpetuate what Lord Bellamy had described as the “central weakness” in elements of the LGFS fee structure (sc. PPE and Trial Length Uplift) and so decided that the appropriate course was to make a substantial increase in fees, to be introduced immediately, but to defer any increase in elements requiring reform so as to reduce the risk of embedding perverse incentives. Alongside this, as Sir James Eadie pressed in oral argument, the Lord Chancellor committed to reforming the LGFS scheme on an urgent basis and to revisit the recommendation to increase LGFS fees to 15% following reform to the scheme. The impact of allocating a further 2%, or £21 million, with the majority to fund police station work, would be to benefit solicitors’ firms more quickly.

222. Given the need to balance the sustainability of the legal aid market against funding constraints and the public interest in limiting perverse incentives, the Lord Chancellor submits that the Remuneration decision fell within the margin of discretion available to him.

223. As for the Recommendation 3(i) issue, the Lord Chancellor submits that Lord Bellamy did not recommend any particular course of action. The recommendation was that the Lord Chancellor should consider the extent of unmet need and how those needs should be met. In this regard the following steps were taken. The Final Response explained that, in addition to continued data gathering and considering the extent of unmet need, the Lord Chancellor would explore each of the measures the CLAIR report identified to address potential gaps in the market, including: (1) what role non-traditional forms

of provider may play and how not-for-profit providers may contribute; (2) restructuring the Standard Crime Contract to reduce administrative costs and facilitate non-traditional forms of provider and new ways of working; (3) taking forward the recommendation to make it easier for CILEX professionals to become duty solicitors; and (4) the use of remote technology.

224. As for the work of the CLAAB, the Lord Chancellor points out that since its first meeting on 28 October 2022 it has considered data gathering in relation to a number of issues, including LGFS and police station reform. As Mr Phillips' second witness statement explains, the CLAAB has also considered data relevant to the sustainability of the CLA market using information provided by the LAA and the MoJ. This includes: (1) a paper on CLA data presented on 23 January 2023 (this paper included data on numbers of firms of duty solicitors, and at the CLAAB meeting there was discussion about the possibility of gathering additional data, including by reference to a paper prepared by the Law Society); (2) a further paper on CLA data presented on 25 April 2023 (containing updated figures, and examining the situation in Barnstaple and Skegness); (3) a further paper on CLA data presented on 29 July 2023); and (4) a further paper on CLA data presented on 19 October 2023 (noting that police station and court duty solicitor schemes have remained fully covered, and that there had been an overall increase in solicitors' firms since April 2023 reflecting the introduction of the new crime contract in October 2022).

225. In oral argument Sir James Eadie submitted that if the Law Society lost on Ground 1 it would be "in big trouble" on Ground 2 because Ground 1 raised an issue for the court, whereas Ground 2 requires that it be demonstrated that the Lord Chancellor's decision was not reasonably open to him.

Discussion and Conclusions on Ground 2

226. We remind ourselves of the way in which the Divisional Court expressed the principle of irrationality or unreasonableness in *Law Society (No 2)*, at para 98:

> "The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1999] 2 AC 143, 175 per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to

> support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. …"

227. As the Divisional Court made clear in that passage, the classic formulation of unreasonableness as a ground for judicial review has always had two aspects which were to be found in the seminal judgment of Lord Greene MR in the *Wednesbury* case. The first is concerned with the *process* by which a decision is reached and not with the substantive *outcome*. To some extent this aspect of unreasonableness may well overlap with other familiar grounds of judicial review, for example that all relevant considerations must be taken into account and irrelevant considerations must not be taken into account. The second aspect is that, even if the process cannot be legally impugned in any way, the resulting decision may be so unreasonable that no reasonable decision maker could have arrived at it. As the Divisional Court put it in *Law Society (No 2)*, a better formulation of this test, which avoids tautology, is to ask whether the decision is outside the range of reasonable decisions open to the decision-maker.

228. There are two points which warrant emphasis in the context of the present proceedings. The first, which relates to Ground 2, is that, when the Court is considering the reasonableness of the substantive outcome itself, it must be very careful not (even subconsciously) to trespass on the proper province of the public authority to which Parliament has entrusted the relevant functions. This is particularly true in a context such as the present, where the decision concerns the allocation of limited resources.

229. We do not think that the mere fact that the Law Society has failed on Ground 1 should draw us to the conclusion that it must also fail on Ground 2. That would be the case inasmuch as the Law Society's irrationality case is allied to the Lord Chancellor's section 1 LASPO duty, but the Law Society's main, and more compelling, formulation is that in failing to implement the Central Recommendation in full the Lord Chancellor has achieved a substantive outcome which is irrational in terms of the sustainability of criminal legal aid.

230. However, this formulation of Ground 2 – unreasonableness of the substantive outcome - ultimately fails for reasons which are similar to those which compelled us to the conclusion that Ground 1 must fail. The section 1 duty is not co-extensive with the issue of sustainability although there is clearly a degree of overlap. In this regard, the burden is on the Law Society to demonstrate that the series of measures and uplifts that the Lord Chancellor did implement, some not to be effectuated for a considerable period of time, would fail to achieve the objectives of CLAIR. In our judgment, the existing evidence base does not enable that issue to be determined in the Law Society's favour. Although the Lord Chancellor has not put in issue the reasoning and conclusions of Lord Bellamy's report, it does not follow that a failure fully to implement what the latter describes as the minimum uplift necessary to achieve sustainability must mean that the outcome will be unsustainability.

231. We have not lost sight of Mr de la Mare's high-level arguments directed to the economic realities. In particular, there is some force in the argument that the Final Response does little more than to reverse the 8.75% cuts introduced in 2014 and since then there has been inflation (admittedly at historically low levels for most of the relevant period). There is also force in the argument, based on the conclusions of the Otterburn report

(see para 18 above) that firms were operating on 5% profit margins at a time before the 2014 cuts were introduced, and that on the face of things there appears to be little room for manoeuvre. However, these remain arguments at a high-level of generality, and we do not consider that they compel us to the conclusion that the Final Response was irrational in terms of its outcome because it failed to achieve sustainability.

232. The final point to be made in connection with this part of the Law Society's irrationality case is that the Lord Chancellor's decision was made in an area involving economic policy, state resources and fiscal implications, and when the merits of the decision at issue are being assessed (and this aspect of the Law Society's irrationality challenge does entail an evaluation of the merits), the Court accords the decision-maker a considerable measure of latitude.

233. Persuasively though Mr de la Mare's submissions were advanced under this sub-heading, we are unable to conclude that the Final Response was irrational in terms of its outcome.

234. The Law Society's alternative formulation of Ground 2 has considerably more force. Our review of the decision-making process reveals that the Lord Chancellor never asked himself whether fee increases at levels lower than the Central Recommendation would or might still deliver the aims and objectives of CLAIR. The principal drivers for the decision were the amount of money HM Treasury had made available in the current spending review to address CLAIR and the extent to which savings might be achieved elsewhere in the MoJ budget. It is quite true that these were important practical factors to be borne in mind, but they could never have been overriding. HM Treasury may have refused to make more money available but there is no evidence that it was ever asked. Applying the *Wednesbury* standard, this was a question which in our judgment had to be asked.

235. At this stage of the analysis, there is a clear link or bridge between Ground 2 and Ground 4. The paucity of information that, in part, has driven us to conclude that Ground 2 has not been made out in relation to outcome irrationality cannot avail the Lord Chancellor when process or methodology is being considered. Thus, the failure to ask the right question is conjoined with the issue of whether the Lord Chancellor undertook due enquiry. With further modelling etc. not merely would the Lord Chancellor have been in a better position to assess whether the aims and objectives of CLAIR could be fulfilled on the basis of a 4% shortfall (more, if one factors in the delay in bringing home the additional 2%, and the further delay consequent on LGFS reform), he would have been in a better position vis-à-vis HM Treasury in making the case for enhanced funding.

236. The issue also arises whether the Lord Chancellor was irrational in wishing to implement LGFS reforms before considering whether to implement CLAIR in full. Lord Bellamy had in mind that the Central Recommendation should be implemented in parallel with and/or accompanied by LGFS reforms, but how that might work in practice is unclear. It seems obvious that reforming the LGFS fee structure could well impact on the decision to apply a 15% increase to all aspects of the LGFS. However, Lord Bellamy's concern was to ensure that a minimum £100 million per annum would be injected into criminal legal aid, and he was not prescriptive as to how that could be achieved. The critical point is not the mechanism but the simple fact that less than the Central Recommendation was being delivered. The Lord Chancellor never sought to

address the ramifications of that shortfall and ask the obvious question whether the central objective of Lord Bellamy's report (sustainability) would be achieved.

237. It follows that the Law Society's case succeeds on this aspect of Ground 2.

238. We cannot begin to accept that the Law Society has demonstrated irrationality in relation to Recommendation 3(i). Lord Bellamy's recommendation was that the Lord Chancellor consider the extent of unmet need and, as appropriate, how that need may be met. Lord Bellamy was not recommending any specific course of action. It is clear that the Lord Chancellor has not ignored this recommendation. He has considered the extent of unmet need and is undertaking certain admittedly limited steps to address it. The Law Society falls a long way short of showing that the Lord Chancellor's response to this aspect of Lord Bellamy's report is irrational.

Ground 3

239. By this Ground the Law Society contends that the Lord Chancellor was under a duty to give adequate reasons for rejecting the Central Recommendation and Recommendation 3(i). The Law Society draws attention to well-known authority in support of the proposition that there was a duty to give reasons in these circumstances and, given that issues of real importance to individuals are involved, including the statutory right to free legal advice at a police station, the Court should examine with greater care the reasoning behind the challenged decision: see *Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169; [2017] 2 All ER 86 and *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010; [2021] 1 WLR 472, at para 153 in particular.

240. We consider that this Ground may be addressed very briefly. Either it raises a point which is moot, or it overlaps with the second limb of Ground 2.

241. This is not a case where the Lord Chancellor has failed or refused to give reasons for his decisions. The Interim and Final Responses certainly contain *some* reasons for the decision not to implement the Central Recommendation in full, albeit not particularly comprehensive ones, and the Lord Chancellor's witness statements expand on these in considerable detail. The Law Society does not take the point that post-decision evidence of this sort is inadmissible, nor does it contend that we should be circumspect about it for that reason. Accordingly, whether as a matter of principle there is a duty on the decision-maker to give reasons in a case such as the present does not arise. Reasons exist and have been considered.

242. The Law Society's real complaint is directed to the process or methodology by which the decisions were reached, which is the second aspect of irrationality/unreasonableness identified by the Divisional Court at para 98 of its judgment in *Law Society (No 2)*. This complaint requires an examination of the reasons and reasoning that the Lord Chancellor *has* provided and whether he has addressed all relevant matters. We have already addressed that issue under the rubric of Ground 2, and Ground 3 is incapable of improving the Law Society's case in this regard. In this context, for what it is worth we do not accept Mr de la Mare's submission that the heightened test set out in *Horada* or

Hoareau applies: the former was a case about the standard of reasons required of local planning authorities and the latter was a case about Convention rights.

243. It follows that it is unnecessary to say anything further about Ground 3.

Remedy

244. Since we have found in favour of the Law Society on limited aspects of its claim for judicial review, under Grounds 4 and 2, we must consider what remedy should be granted. Although remedies are always discretionary in judicial review proceedings, we have already set out above why we consider that it is impossible to say that it is highly likely that the outcome for the Law Society would not have been substantially different if the errors of methodology which we have found had not occurred. Accordingly, it is right in principle that a remedy should be granted to mark those errors, so that the process can be undertaken again properly and in a lawful manner.

245. We do not consider that a quashing order is required or appropriate. We do, however, think that a suitably worded declaration should be granted.

Overall Conclusion

246. For the above reasons, this claim for judicial review is granted in part under Grounds 4 and 2.

247. A declaration will be granted in the following terms:

> "It is declared that:
>
> (1) The Lord Chancellor's failure, during the decision-making process, to ask whether fee increases at lower levels than the 15% recommended in the CLAIR Report would, or might, still deliver the aims and objectives of the CLAIR Report, was irrational and breached his *Wednesbury* duty.
>
> (2) The Lord Chancellor's failure to undertake any modelling to ascertain whether the aims and objectives of the CLAIR Report, in particular ensuring the sustainability of criminal legal aid, would be furthered if fee uplifts lower than the 15% recommended by the CLAIR Report were implemented, was irrational and breached his *Tameside* duty of sufficient enquiry."