Criminal justice system in crisis

Parliamentary briefing

The Law Society of England and Wales is the independent professional body that works globally to support and represent 180,000 solicitors, promoting the highest professional standards and the rule of law.

- Our criminal justice system is facing a crisis following years of underinvestment and neglect.

- The system is facing an avalanche of problems. These include growing shortages of duty solicitors, increasing court closures, barriers to accessing legal aid, and crucial evidence not being available until the last minute.

- Taken together, all of these problems represent a criminal justice system at breaking point – and without urgent action the system will fall apart.

- Justice is a key export for the UK. The legal services sector contributed over £26 billion to the economy in 2017. The integrity of our justice system depends on the whole system working effectively – a poorly functioning criminal justice system impacts on our international reputation.

- In the year of the spending review, we are calling on the Government to address the problems that impact on all areas of our criminal justice system by taking up the Law Society’s recommendations, in particular on duty solicitors, criminal legal aid fees and the legal aid means test.

- We welcome the Ministry of Justice’s review of criminal legal aid fees. However, this review is not expected to be published until late 2020, and we call on Government to now make the urgent changes to fees needed to ensure the sustainability of the criminal justice system.

1. Introduction

Justice and the rule of law are core British values and are among our greatest exports. Since the days of Magna Carta our justice system has led the way in ensuring that all of our rights are protected. Today, our justice system is respected around the world, thanks to the strengths of English and Welsh law, our world-renowned judges, our high-quality legal profession and our commitment to the rule of law.

Crime will affect nearly everyone at some point in their lives, and can affect people of all backgrounds, locations and ages. Indeed, studies suggest that last year one in five people were
impacted by crime.\textsuperscript{1} For these people, a fully functioning criminal justice system is essential to ensuring an efficient, orderly and just experience.

**However, there are serious problems at nearly every step of the way through our criminal justice system.** Due to years of neglect, the system is facing an avalanche of problems, such as growing shortages of duty solicitors and independent experts; court closures; barriers to accessing legal aid; and crucial evidence not being disclosed in court until the last minute.

Taken together, all of these problems represent a criminal justice system at breaking point – and without urgent action from the Government the system will fall apart.

That is why, in the year of the spending review, we are calling on the Government to address these problems.

2. **Criminal defence solicitors and legal aid fees – a looming crisis**

2.1. **The issue**

Being suspected of a criminal offence and being questioned in a police station can be an unfamiliar and scary experience. There are many situations in which individuals from all walks of life could find themselves being interviewed by the police. These include being:

- involved in a road traffic accident which results in injury;
- in a situation where you have acted in self-defence;
- present at the scene of a crime and treated as a suspect.

Everyone has a legal right to be represented by a solicitor free of charge while under arrest or when voluntarily attending a police station, and when being interviewed by the police as a suspect. This can be arranged through a duty solicitor scheme.

*However, data published by the Law Society highlights that in 5 to 10 years’ time there will be insufficient criminal duty solicitors in many regions,* leaving people in need of urgent legal advice unable to access their rights.

Criminal duty solicitors are part of an ageing profession; the average age of a criminal duty solicitor is now 47 and in many regions this figure is even higher.

- In Dorset, Somerset, Wiltshire, Worcestershire, West Wales and Mid Wales, more than 60 per cent of duty solicitors are aged over 50.
- In Norfolk, Suffolk, Cornwall and Worcestershire there are no criminal duty solicitors under the age of 35, with only one in West Wales and Mid Wales, and only two in Devon.
- In a significant number of regions fewer than 10 per cent of the duty solicitors in the area are under the age of 35.

\textsuperscript{1} Victim Support. *What is a crime?*, [https://www.victimsupport.org.uk/crime-info/what-crime]
This trend could have a significant effect on the criminal justice system, as members of the profession retire and leave behind a shortage of experienced practitioners.

We have produced a heat map which illustrates the areas most heavily affected by this issue, which can be found here.

Case study

“I am fifty-five years old and I’m the youngest duty solicitor on the Isle of Wight.

“This heatmap provides a stark illustration that defence solicitors on the Isle of Wight are nearing retirement and young solicitors do not see a future in this work. It graphically illustrates the problem we have here, that there will be a dearth of experienced criminal defence solicitors on the island in a few years’ time.

“I’m very concerned that it won’t be long before anyone in need of legal advice at a police station on the Isle of Wight will be unable to access their rights.”

Elizabeth Miller, Solicitor

Shortages caused by an ageing profession could leave police having to wait longer to question and process individuals, as once a solicitor has been requested, an individual cannot be questioned by the police without their lawyer, unless with their permission. This leaves open the possibility of the police having to release suspects without questioning due to the strict time they are allowed to hold an individual without charge, or of suspects deciding to go ahead without legal representation.

Criminal duty solicitors provide a crucial public service. A criminal duty solicitor will explain to their client what is happening, ensure that their rights are protected, provide advice and attend police interviews, all free of charge. Access to free, independent and expert legal advice when detained by the police is an integral part of the rule of law and an historic British right. The Government must therefore urgently tackle the growing duty solicitor shortage.

2.2. The causes

One of the prime reasons for the growing shortage is the low fees paid to criminal duty solicitors.

Criminal legal aid fees for solicitors have not been increased since the 1990s. Over the past year, changes by the Government to criminal legal aid fees for solicitors and barristers have led the Criminal Bar out on strike, and criminal solicitors and the Law Society into the high court to successfully challenge the Government on criminal legal aid funding.

The low fee level is having an adverse impact on the number of new, younger lawyers entering the duty solicitor profession, and on retention levels. Many young people pursuing a legal career are drawn to criminal law, yet once qualified, many turn instead to corporate or regulatory law. In March 2018, the Young Legal Aid Lawyers group published a report, ‘Social mobility in a time of austerity’, which found that low salaries coupled with high debt levels were a “significant barrier” to pursuing a
career in legal aided areas of law.\(^2\) This is being felt deeply by young criminal lawyers and deterring them from criminal duty work.

2.3. Our recommendations

The Law Society has long called for an independent and wide-ranging review of criminal legal aid fees and the sustainability of the criminal justice system.

- We welcome the Government’s review of criminal legal aid fees – this needs to be wide-reaching and must look at the sustainability of the system.

- However, this review is not expected to be published until late 2020. We recommend an urgent fee increase as an interim measure to help address the recruitment and retention crisis.

3. Legal aid means test

3.1. The issue

The legal aid means test is preventing many people on low incomes and some families in poverty from accessing justice. Many working people on low incomes facing criminal charges are being denied the right to a fair trial as they are unable to afford the legal aid contributions and cannot afford to pay privately for legal representation. For example:

- Individuals earning more than £12,475 a year may be deemed ineligible for fully funded legal aid and may have to pay contributions towards their legal cost;

- Individuals earning more than £22,325 may receive no legal aid funding at all.

3.2. The causes

The requirement to contribute financially at each stage of Crown Court proceedings is pushing people below the Minimum Income Standard – a standard set by the Joseph Rowntree Foundation which indicates the income needed to reach a socially acceptable standard of living.\(^3\)

In 2017, the Supreme Court declared that employment tribunal fees were unlawful because households on low incomes were expected to sacrifice an acceptable living standard to afford legal costs, with the Judge citing the Minimum Income Standard in determining an acceptable living standard. The same impact can be seen in the formula that determines whether someone is entitled to criminal legal aid, where individuals not able to meet the Minimum Income Standard are deemed ineligible for legal aid through the means test.

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\(^3\) The research on the Minimum Income Standard is carried out regularly by Loughborough University in partnership with the Joseph Rowntree Foundation and is based on what households require as a minimum in order to meet key material needs and to participate in society - Joseph Rowntree Foundation, ‘The Minimum Income Standard’, [https://www.jrf.org.uk/report/minimum-income-standard-uk-2017]
3.3. Our recommendations

- The upper limit for the means test should be set at the level at which higher rate income tax is paid. This would ensure that those who need it most are not excluded from legal aid, and it would also reduce administrative costs for the Legal Aid Agency, or the Government should restore the means test to its 2010 real-terms level and conduct a further review to consider what changes to the means test criteria are required.

4. Disclosure of evidence

4.1. The issue

The disclosure of unused evidence by the prosecution to the defence is an essential process in a criminal case.

When someone is charged with a crime there is a duty to disclose, which means that the accused’s legal team is provided with copies of, or access to, material from the investigation. This material could undermine the prosecution’s case or assist in the accused’s defence. Evidence can include, for example, CCTV footage or witness statements.

However there have been a number of high-profile cases in recent years in which disclosure has not operated effectively, such as the Liam Allan case. 4

4.2. The causes

Failures in disclosure of evidence are partly due to:

- Increased digital evidence: There has been a seismic change in the volume and character of the material collected in investigations since the disclosure regime was set out in legislation over 20 years ago due to the enormous increase in electronic evidence such as social media and other digital communication. Police investigations now routinely collect large amounts of digital evidence including social media and other communications. Due to the vast quantities of evidence, this can result in some being missed by overworked and under resourced police services and the CPS.

- Inadequate expertise and resource: There is insufficient understanding on the part of some disclosure officers of what is, or may be, relevant to a case, and there is a lack of adequate resources within the system. The present disclosure system provides a one-size-fits-all process for disclosure, and often relies on the defence being aware of material in order to ask for it.

Not only do disclosure failings have an impact on justice, but the cost of delayed and collapsed trials resulting from disclosure errors adds to the pressures on the criminal justice sector, which is already operating under tight resources. This affects not only those accused of crimes, but also victims of crime, many of whom want a smooth and speedy criminal justice process.

The joint Crown Prosecution Service and Police ‘National Disclosure Improvement Plan’, and the Attorney General’s review of disclosure, are positive developments which we hope will begin to pave the way to fixing the issues at the heart of these concerns.

4.3. Our recommendations

- There should be different disclosure regimes for the Magistrates’ Court and the Crown Court, because the volume of unused evidence is significantly different.

- A great deal of time, effort and resources could be saved through more effective early engagement and collaborative working between the prosecution and the defence at the pre-charge stage. The legal aid payment structure needs to be changed to pay solicitors for this work, which is currently not provided for.

5. Release under investigation

5.1. The issue

Following changes to police bail proceedings, since 1 April 2017 many individuals suspected of committing a crime are being ‘released under investigation’. This allows the police to release a suspect under investigation while they gather more evidence, as opposed to releasing a suspect on bail as was common in the past.

For individuals suspected of a crime, it can feel as if their case has been effectively left in limbo. They are often unaware of what is happening with their case, unaware of whether they remain a suspect or unaware of whether the police are even actively investigating their case. This inevitably creates a situation where those released under investigation are placed under enormous stress which can impact on their personal and family lives and their employment.

Throughout this time, those released under investigation require ongoing legal advice and support. The criminal legal aid fee schemes never anticipated solicitors having to provide advice for those released under investigation in these circumstances, and law firms cannot receive legal aid payments as the case is effectively still open. This makes their work even more uneconomic than it already is, and acts as a further disincentive for firms to provide legal aided services.

5.2. Our recommendations

- The Legal Aid Agency’s billing procedures should be amended to allow firms to submit a bill at the point the client is released under investigation.
6. Court closures and court listings

6.1. The issue

a) Court closures

258 courts were closed between 2010 and December 2017. Since 2010, 162 of the 323 magistrates’ courts in England and Wales have shut – a loss of 50.2% of the magistrates’ court estate. We are concerned that some of the court closures have severely restricted defendants, victims and witnesses from accessing justice.\(^5\)

The effect of closing courts means that many people have concerns about distance, cost and safety in having to travel further to access justice, including those who live in rural communities with limited travel options. A lack of travel options in such areas, furthermore, means there is a possibility for witnesses, victims and defendants to all travel via the same method to court, which opens the possibility for intimidation.

The Government are investing £1bn in modernising our court and tribunal system, and the Law Society understands the need to manage the pressures on courts and tribunals by taking advantage of the opportunities that technology can provide in delivering a just, proportionate, accessible system that provides value for money. However, we have seen examples of IT failings across our justice system, which has delayed and frustrated court processes. The prolonged outage of key systems in January 2019 was widely reported,\(^6\) and where new technology is utilised in our court system, effective contingency arrangements must be in place should similar failures occur.

Accessibility, however, will be integral to the success of these reforms; a system which precludes users from engaging effectively with the courts cannot be considered as a process that delivers justice.

b) Court listings

Court cases are also often allocated on a ‘floating’ or ‘warned’ list system. Both of these systems mean that several cases are listed at the same time, on the assumption that not all will go ahead. However, this means that everyone involved in the case – the defence, victim, witnesses, the prosecution etc – all have to attend court for a hearing that may not even go ahead because others take priority.

These deferrals delay justice, can cause emotional stress for victims, witnesses and defendants, and prove costly and disruptive for those who attend including defence solicitors. The cancellation of hearings directly leads to defendants paying additional legal aid contributions that they should not have had to pay if their case had gone ahead and been dealt with on time.


6.2. Our recommendations

- The Government must immediately halt its court closure programme until all new technologies are fully tested and implemented.

- The Government should act to ensure that court listings work for all involved in a case, particularly for victims.

7. Experts reports

7.1. The issue

Many criminal cases are reliant on evidence from experts, for example psychiatrists, psychologists and forensic science experts. Their contribution can help juries and magistrates to understand complex issues, build a picture of what took place, and to inform their judgments.

The Legal Aid Agency places a limit on what can be paid for experts' reports sought by the defence. This means that solicitors often find difficulty in obtaining an expert report of sufficient quality, or indeed to obtain any expert report at all.

Sometimes the Legal Aid Agency pays a lower rate to a poor-quality expert, but they end up taking longer than a better qualified expert would, so the Legal Aid Agency ends up paying out more than they would have done for the expert the firm wanted to instruct.

7.2. Our recommendations

- The Government must amend the limit on what can be paid for experts' reports, to ensure that quality reports are able to be presented to the courts.

8. Wasted costs

8.1. The issue

A wasted costs order is when the prosecution, or a third party such as an interpreter or prison delivery service, is ordered by the court to pay the cost of a defendant’s representation due to the prosecution being found to have acted unreasonably.

Under the current legal aid contract, where a defendant is legally aided the defence firm is required to report where a wasted costs order is made.

This sum is then deducted from the fee paid to the firm by the Legal Aid Agency to that amount. The firm therefore not only does not receive compensation for the waste they have been caused, it is then faced with the additional administration of trying to actually recover even their ordinary costs from the party against whom the order was made, or to try and justify to the Legal Aid Agency why they should be allowed to keep them. Solicitor firms will also have to undergo additional work in order to apply for the order, therefore a wasted costs order is seen as being punitive to the defence and are not often sought as a result.
8.2. Our recommendations

- The 2017 Contract and Criminal Bills Assessment Manual should be amended to allow defence firms to benefit from any wasted costs orders made against the prosecution, and to keep those fees without impacting on the fee paid by the Legal Aid Agency or incurring any additional administration costs.

9. The ‘innocence tax’

9.1. The issue

Many individuals found not guilty of a crime but who were deemed ineligible for legal aid are subject to an ‘innocence tax’ as they are unable to recover legal costs beyond legal aid rates, despite having to pay for private legal representation. This is manifestly unjust and can result in innocent people losing their life savings or their home.

9.2. The causes

Before 2012 an acquitted defendant was entitled to recover their reasonable legal costs from the state, in accordance with the principle that the unsuccessful party to litigation reimburses their opponent.

Changes made in 2012 and 2014 now mean that if a defendant is not eligible for legal aid and pays private fees to their legal team, if acquitted they are only entitled to recover their costs limited to legal aid rates, which are much less than the private fees they paid.

For example, if an individual was accused of a serious criminal offence, but was deemed ineligible for legal aid, they would require private legal advice and representation. Often people assume that they will be able to recover their costs from the prosecution at the conclusion of a case if they were found not guilty. Unfortunately, the costs that are recoverable are capped at legal aid rates, which are not in line with private fees. An individual who was found not guilty after being accused of a serious criminal offence could be left out of pocket if they were deemed ineligible for legal aid as they will not be able to recover their full costs.

9.3. Our recommendations

- The Government should reverse these changes and restore the previous law to allow an acquitted defendant to recover the reasonable costs of their defence.

10. Prison visits

10.1. The issue

Each prison has its own system for booking a visit by a lawyer to their client, which can create unnecessary and frustrating delays for legal practitioners and their clients as prisoners are moved around the country. For example, some prisons still insist on bookings being made by fax; some insist on bookings being made by phone; and others by e-mail. Some prevent practitioners from bringing in their laptop (which can be crucial when discussing a case with a client) whilst others allow them.
These inconsistencies can result in legal practitioners being turned away, with potentially significant consequences when an urgent visit is needed to take vital instructions.

10.2. Our recommendations

- A centralised, uniform IT system is needed for booking prison visits, with clear rules as to what equipment solicitors can bring in to these visits.

11. How can you help?

There are three things that you can do to help us raise awareness of our campaign:

1. Write to the Lord Chancellor and the Chancellor of the Exchequer, highlighting your concerns regarding the criminal justice system ahead of the spending review.

2. Table Parliamentary Questions to bring the issue to the Government's attention and to gather further evidence of the growing crisis in our criminal justice system. Please get in touch if you need more information to assist you with this.

3. Promote our campaign online by sharing our campaign outputs or by retweeting us using the #criminaljustice.

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