

Roxanna Dehaghani Call for Evidence Response

Submitted Online via Consult Justice Questionnaire

Question 1: What do you consider are the main issues in the functioning of the Criminal Legal Aid System?

There are numerous problems that have been caused by years of disinvestment, in addition to problematic policies pursued in the name of managerialism (e.g., efficiency), securitisation, marketisation, and privatisation. I will focus on the main issues here:

1. Restrictions on legal aid and the payment of fees - the thresholds are far too low (meaning that some defendants are costed out) and the fees payable for various types of work are variable, but mostly meagre (meaning that lawyers cannot adequately prepare the case).
2. Disclosure - this links with the above problem - if disclosure is delivered late, it may be difficult to make the case to the Legal Aid Agency and if payment is not ensured then lawyers may be unwilling to conduct preparatory work in advance.
3. Lack of support for vulnerable suspects and defendants - lawyers are under increasing strain, although one could query whether they are equipped to identify and address their client(s) vulnerabilities. It is a scandal that special measures are not available for the defendant in the same manner as the victim/witness (i.e., only at the judge's discretion). Of course, vulnerabilities are then further exacerbated by issues with legal advice and representation caused in part by 1 above. Suspects are also being routinely failed at the police station owing, in part, to very low implementation rates for the appropriate adult safeguard (which, I should add, is the only adjustment made to the process, at least in law, for vulnerable suspects) for adult suspects. Given that so few cases get to court, it is imperative that the individual is adequately protected at the first stage of the criminal process.
4. The position of the defence - the defence have, in essence, been co-opted to work for the prosecution owing to defence disclosure obligations. There have also been various policies and practices pursued in the name of efficiency that simply increase the bureaucratic burden on lawyers.
5. Guilty pleas - this is a disastrous area, particularly owing to some of the issues outlined above; defendants often feel pressure to plead despite not understanding the implications (the same could be said for police cautions). As lawyers do not have the full case before them and often are not preparing until the last minute, they may not have the time to fully explore the case before giving a client advice on plea. Further, it seems that some lawyers are being incentivised towards guilty pleas owing to the issues with fees (above)

Question 2: Do the incentives created by the current fee schemes and payments encourage sustainability, quality and efficiency?

No

None of the schemes or payment encourage sustainability, quality, and efficiency. On the point of efficiency, it is patently clear that government initiatives to make the criminal justice system 'more efficient' simply does not work. You cannot apply private sector values to a public service and expect it to work out fine; it won't. I think that the language of 'efficiency'

needs to be dismantled - 'efficiency' for efficiency sake should neither be the goal of criminal defence nor of the criminal justice system.

Question 3: Are there any interactions between different participants within the Criminal Justice System, or ways of working between participants (for example, the Police, the CPS, and the Courts), that impact the efficiency or quality of criminal legal aid services?

Yes.

There are numerous and so I will focus on the most obvious: that of prosecution disclosure. The prosecution simply are not providing disclosure to the defence in an adequate and/or timely manner. This affects both efficiency and quality. Again, I do not think you should be asking questions about 'efficiency' unless you are very careful about what you mean by it. Yes, justice delayed is justice denied, but speeding a case through the system without due process (which is what is happening routinely in our criminal justice system now) is counter to the rights and entitlements of citizens in a democratic society. Finally, I think that the push for greater justice for victims is detrimental to the functioning of the criminal justice system. This also frustrates the purpose of the prosecution, which is to act as a representative of the state (i.e., not the victim). Victim (or victim-survivors) should be provided with support, but the criminal justice system is not intended to provide justice for victims; this must be provided through another mechanism.

Question 4.1: Do you consider that Criminal Legal Aid work, as currently funded, represents a sustainable career path for barristers, solicitors or legal executives?

No.

In my recent study (with my colleague Dr Dan Newman), we interviewed lawyers across south Wales. We found that many would actively discourage younger people from entering the criminal defence profession, owing to the mounting workloads, absence of a work-life balance, and ridiculous poor payment. We also find ourselves, as teachers of criminal law and criminal process, having to be honest with students about their prospects in criminal defence - it is not a career with great promise as the situation currently stands. One must also consider the viability of the profession in line with student debt (at least £27,000 across 3 years, rising to £56,000 including living costs, with an additional £9-17,000 for the Legal Practice Course, for example, plus an additional sum for living expenses).

Question 4.2: Are there any particular impacts on young lawyers, lawyers from particular socio-economic backgrounds, or on the ethnic or gender diversity of the profession, to which you would wish to draw attention?

Yes.

Again, in my recent study with Dr Dan Newman, we found that many talented women lawyers were leaving the profession owing to bullying (usually by members of the judiciary) and a poor work-life balance. Some of these talented women entered academia instead. Given that academia has its own issues with workloads, poor work-life balance, and often inadequate remuneration, this may seem surprising. But for all the problems with academia, it must therefore be better than a career in criminal defence, which is in itself a further indictment of how dire the situation is in criminal defence.

Question 5: Does the present structure of Criminal Legal Aid meet the needs of suspects, defendants, victims and witnesses?

No

Lawyers do not have enough time to spend with their clients and to adequately prepare and defend a case. I'm not sure why you're asking about victims and witnesses given that the defence lawyer has a duty to his/her client, the court, and the public, but not to specific victims and witnesses. Again, there is a need to think about what the criminal justice system is for (see my comments above).

Question: 6.1 Some working practices within the Criminal Justice System have changed due to the Coronavirus pandemic, are there any new working practices you would want to retain, and why?

No

Lawyers seem to have taken well to the remote interview at police stations: it saves costs in terms of time and money as it cuts out travel. It is therefore an attractive option when the fees are so paltry. However, there are serious risks posed by remote attendance. If lawyers were adequately remunerated and incentivised to attend the police station, then they would. It also seems bizarre that England and Wales is heralded as a jurisdiction that has long had lawyers involved at the police station (at least in law, if not always in practice), but now the role of the lawyer at the police station is diminishing.

Question 6.2: Is there anything you wish to highlight regarding the impact of the pandemic on the Criminal Legal Aid System, and in particular whether there are any lessons to be learned?

There simply needs to be less throughput into the criminal justice system. There are many offences that have been added to the statute book that simply do not need to be there. There are alternatives to the criminal process that are not being considered. The entire system is on its knees and has been for years, but it has taken until 2020-21 to assess the issues.

Question 7: What reforms would you suggest to remedy any of the issues you have identified?

Better remuneration for defence and a revising of fee structures - to accurately reflect the work conducted and the work that needs to be conducted to mount an effective criminal defence. Removal of disclosure and case management obligations on the defence. Improved prosecution disclosure. A review of the guilty plea system to ensure that defendants are making the plea decision with all the available information, i.e. the incentives to plead at the earliest available opportunity should commence when all the available information is provided to the defence and the defendant has had time to consider this. Greater support for suspects and defendants, particularly those who are vulnerable.

Question 8: The Review will be conducting other exercises to gather data on the profitability of firms undertaking Criminal Legal Aid work and the remuneration of criminal defence practitioners. However, we would also welcome submissions on this subject as part of this call for evidence.

Within our study, we found that lawyers have to bank on one large case a year to keep their practices viable. Without these big earning cases (around £10-15,000) the lawyers explained that they would have to close their practices as they lose money on most other cases.

Question 9: Is there anything else you wish to submit to the Review for consideration? Please provide any supporting details you feel appropriate.

N/A