

## **Transform Justice 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?**

Transform Justice published a report in 2019 on the quality of criminal defence advice and advocacy. The report is based on a review of existing academic research, and our own primary research with magistrates, defendants and lawyers. It found that the quality of legally aided criminal defence services in England and Wales is variable and the current system presents several barriers and disincentives to lawyers providing a good service to their clients. The report highlights particular issues in two areas of the criminal legal aid system – the police station and the youth court.

#### **Police station**

The current model for police station criminal legal aid assistance is not fit for purpose and research indicates that quality of service in the police station is variable.

The system is designed based on the assumption that lawyers are incentivised to do a good job at the police station in order to retain clients. But since it's difficult for clients to know whether their lawyer has done a good or a bad job, this incentive does not play out in practice. In reality, firms are sometimes sending junior staff, or accredited representatives from agencies, to advise and represent the suspect at interview. Perverse financial incentives mean junior staff can take on the most complex cases – such as for clients with mental health problems – which take a long time and have no corresponding increase in fees.

Dr Anna Pivaty researched the role of criminal defence lawyers in police stations in England & Wales <https://www.routledge.com/Criminal-Defence-at-Police-Stations-A-Comparative-and-Empirical-Study/Pivaty/p/book/9780367178055> . She found a large gap between the ideal role of the lawyer in the police station and the everyday reality of criminal defence, and concluded that lawyers are not equipped to protect the rights of suspects in the police station. Key obstacles included:

- A huge power imbalance between police and defence lawyers. The police make the decisions at the pre-trial stage, unlike at the court stage where the judge is the neutral arbiter. It's therefore questionable whether lawyers can effectively defend their clients at all at the pre-trial stage without large-scale structural reform.
- Financing. Fixed fees for police station legal assistance mean lawyers receive the same fee no matter the amount of time they invest in representing the client at the police station. These fees are low if you compare them to the usual hourly rate for lawyers so lawyers only do bare minimum at the police station.
- The tendency towards managerialism in criminal justice. The direction of travel in criminal justice prioritises cost efficiency in the system. This means that there is less space for lawyers to make counter arguments because the state tries to save money by rendering proceedings less time-consuming.

Dr Vicky Kemp interviewed defence lawyers and policy officers responsible for criminal legal aid in England and Wales in 2018

<http://eprints.nottingham.ac.uk/51145/1/Country%20Report%20England%20and%20Wales%20Final%20.pdf> .She found that the quality of the service provided by police station

lawyers (or the accredited representative they send in their stead) is very variable. Her work reflects concerns that lawyers may not spend enough time preparing for the police interview, or enough time during the interview itself. Some lawyers were passive in the police interview, with some routinely telling clients to say nothing in the interview (“no comment”), even though this may not be in their best interests.

Dr Vicky Kemp also found that firms often send an accredited representative rather than a qualified lawyer to attend the police interview, raising concerns about the impact on quality. Lawyers interviewed by Transform Justice as part of our research agreed that accredited representatives lack oversight and the incentive to take a long-term view of a case beyond the police station but said that sometimes there is no other option.

We tried to obtain data from police forces via FOI on what proportion of suspects receive legal assistance in the police station, but this information was deemed too costly to extract. More research is needed to understand how the current police station legal assistance system is working, what the barriers are to good quality service and how they can be addressed. We suspect that a radical re-design of legally aided police station legal work is required.

### Youth court

The Youth Court has the power to impose up to two years custody – much greater powers than the magistrates’ court. Lawyers don’t currently need special accreditation or training to represent children. But it is very challenging to represent and advocate for under 18-year olds since they are vulnerable, often find it hard to communicate, and are unfamiliar with the criminal justice process. Research by ICPR on the quality of defence advocacy in the youth court found that the quality of advocacy in youth proceedings is highly variable.

- A lack of specialist knowledge amongst some advocates of the legal framework for dealing with child defendants: “Some advocates haven’t got a clue what goes on in the Youth Court.”
- Mixed ability amongst advocates to communicate clearly and appropriately with children whom they are representing: “In my second youth court trial, which...was a far more serious case, neither of my opponents had any idea of how to question children.”
- A lack of specialist training for advocates doing work in the youth court.
- A lack of professionalism and passion: “They see the Youth Court as a sort of production line, factory, depersonalised system...everybody muddles through.”

Under 18-year olds can theoretically choose their own defence representative and advocate, but in reality children don’t make an active choice. So the onus is on ensuring that representation of children is of high quality; the above research indicates that currently it is too variable.

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

Our view is that the current remuneration scheme both rewards some poor practice and punishes diligence. Our research discovered various perverse financial incentives undermining quality including:

1. The fixed police station fee. The fixed fee for police station attendance (between £126.58 and £274.66, depending on geographical location) covers the entire period of detention, no matter how many interviews take place, how long the solicitor

spends in custody, how many times they have to leave and return, how serious the charge is, or the extent of a client's needs. The fixed nature of the fee creates a financial incentive for the most experienced lawyers to do the least complex police station cases because they tend to be quickest, for defence representatives to spend the minimum required time on any case, and for work to be delegated to accredited representatives (not lawyers) who may work freelance for an unregulated company and have insufficient supervision, despite a substantial portion of the fee being retained by the firm. In exceptional circumstances lawyers can apply for a top-up fee but many don't bother, even if they are eligible, due to the bureaucracy involved.

2. Youth court trial fees. Defendants under 18 are all vulnerable and are often extremely challenging to represent. But lawyers get paid no more to deal with a serious assault trial in the youth court than they do for a theft trial in the magistrates' court. If a case is very complex, advocates can petition to get an enhanced fee, but this is not always granted, and the application process is lengthy. So, there is a perverse incentive for under 18 year olds to be represented by less experienced advocates for very serious cases, when they need the most experienced lawyers.
3. Fees for appealing sentences and conviction. The fee for appealing a conviction or sentence given in the magistrates' court is fixed and low – at £155 for an appeal against sentence and £349 for an appeal against conviction. Lawyers complain the fee does not cover the work involved in preparing for, and appearing at, an appeal hearing in the Crown Court. Even though all defendants should be informed of their right to appeal and around half of the appeals to the Crown Court are successful, the number of appeals from the magistrates' court has nosedived. The main cause of this fall is probably the introduction of sentencing guidelines, but low lawyer fees may be another factor.
4. Plea advice. There are perverse financial incentives for a poor lawyer to try to influence whether, when and in which court a defendant pleads guilty or not guilty. If a defendant pleads not guilty to an offence which will be tried in the Crown Court, then changes their plea to guilty after the start of the trial, the solicitors' firm will get a much higher fee than if the defendant pleaded guilty at an early stage. But the defendant will get an increased sentence, because they did not plead not guilty earlier in the process. In the magistrates' court, defence solicitors are likely to make more money from a simple guilty plea case than from a defendant who goes to trial.
5. Case allocation. When fees were reduced, the government argued that it would work on a swings and roundabouts basis – that firms and barristers would make a loss on some cases but make a profit on others. But Dr James Thornton, who investigated how reduced levels of criminal defence legal aid funding is affecting lawyers' behaviour <https://eprints.soton.ac.uk/420763/>, found this swings and roundabouts principle no longer works because so few cases are truly profitable. Financial incentives led lawyers to avoid unprofitable cases such as low-level crime cases (which often get rescheduled and therefore require several visits), and potentially unprofitable clients such as those on the borderline of the legal aid threshold or who are self-employed. Obtaining legal aid for such clients can involve lawyers in hours of dealing with the LAA bureaucracy.
6. Remote vs in person legal assistance. The fee for remote and in person legal assistance at the police station is the same, creating a perverse incentive for lawyers to assist remotely despite concerns about the negative impact on the suspect. We expand on our concerns about remote police station legal advice in a

later section. We consider the current fee system to be in need of overhaul and urge the CLAR to think radically about how a higher quality criminal legal aid service can be

achieved. This should look beyond the current 'payment per case' system and seek to test out alternative models for service provision including the increased use of public defenders (not directly employed by government), salaried staff and payment per duty shift rather than per case.

**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?**

Not Answered

**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?**

Not Answered

**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?**

Not Answered

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

No

Transform Justice's focus is on the quality of defence advice and advocacy provided to suspects and defendants. Our fundamental concern is that the criminal legal aid system is designed as if it is a consumer-driven market, when it is not. The argument goes that criminal legal aid lawyers are incentivised to do a good job in order to retain clients. If their service isn't up to scratch, clients will go elsewhere. But most people pulled into the criminal justice system for the first time do not know what good legal defence is or how to get it. Since it's difficult for clients to know whether their representative has done a good or a bad job, this incentive does not play out in practice.

Clients like having a choice of lawyer, so choice does play a part in building trust. But we advise against relying too heavily on criminal defendants and suspects to understand their rights, navigate the market or judge competence – they rarely have the necessary information at hand to do this. It can also be difficult to switch lawyer if one is unhappy.

Given the limits of market forces in maintaining quality in the criminal defence sector, we feel there is a strong argument for ensuring a base level of quality across the board. However, quality assurance mechanisms are poor. Criminal legal aid quality marks, despite being burdensome for firms, have little focus on the quality of service provided to the client. Peer reviews work better but are conducted only once every five years, look at very few cases per firm and are still based only on paper files, not observations or interviews with clients. Jonathan Black, then chair of the London Criminal Courts Solicitors' Association, wrote in the afterword to our report that the Legal Aid Agency's auditing regime "does not assess quality by outcomes or caseloads but by the ability to jump through compliance hoops.

Firms choosing to focus on outcomes and genuine client retention are penalised." An improved system for ensuring quality is needed.

**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?**

Yes

In response to question 6.2 we outline our serious concerns about the increased use of remote justice during the pandemic, particularly the remote provision of legal assistance to those detained in police custody. However, we recognise that there are certain administrative hearings, such as hearings where the defendant is not present and some PTPHs, that required lawyers pre-pandemic to travel long distances to attend, when their remote input would have been of equal quality.

In the interests of the sustainability of the criminal legal aid sector, we support the opportunity for lawyers to attend such hearings remotely so that they can use the travel time for other work. Exactly which hearings fall into this category should be determined based on research into the impact of remote legal assistance on outcomes and participant experience of the process.

**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?**

Remote legal advice and assistance in the police station.

We continue to be concerned about the current reliance on remote legal assistance at the police station, its impact on access to justice and fair trial rights, and the systemic risks this is creating for the justice system.

Due to the vulnerability of suspects at the initial stages of criminal proceedings and the system-wide benefits of effective early access to a lawyer, people have a right to free legal advice in person in the police station. However, in a departure from PACE, when the UK was dealing with the shock of the first lock-down last year, short-term arrangements were swiftly agreed to allow for police station advice to be provided remotely in some circumstances. Although remote legal assistance is a poor substitute to assistance in-person, it was considered better than no assistance at all.

The Legal Aid Agency agreed to pay legal aid at the same rate for remote advice.

Research (<https://www.transformjustice.org.uk/wp-content/uploads/2021/02/Not-Remotely-Fair-Report-Feb2021.pdf>) by Fair Trials, the National Appropriate Adult Network and Transform Justice highlighted grave concerns about remote legal assistance at the police station including that:

- Remote legal assistance at interview negatively impacted people's ability to understand what was happening and the legal advice they were given.
- Some solicitors were more passive and less likely to intervene during interview when assisting remotely, and were less likely to hold a post-interview debrief with their client.
- Some solicitors refused to attend in person even though their child or mentally vulnerable client was suspected of something as serious as attempted murder or rape.
- Many lawyers have continued to provide in person legal assistance despite the associated health risks, but there are undoubtedly suspects who are not receiving in-person legal advice who need it to understand and exercise their rights. In some

cases, this will mean courts cannot rely on incriminating evidence given in police interviews or draw adverse inferences from their silence. Continued failure to provide the physical presence of a lawyer in the police station risks miscarriages of justice and jeopardises future trials that seek to rely on evidence obtained by police.

At present, lawyers can still attend police station interviews remotely despite the negative impact on suspects and the lifting of lockdown measures in civil life.

Remote legal assistance in the police station appeals to lawyers on several fronts: covid health and safety (it avoids bringing several people together indoors), convenience (because lawyers don't have to travel to or between police custody suites), and financially (because remote attendance means lawyers can attend more cases per shift, each with a fixed fee, meaning greater overall income per shift). The reluctance of lawyers to end this temporary arrangement reflects the unsustainability of the pre-pandemic police station legal services model, and highlights the need to think radically about how police station legal assistance can be delivered in a sustainable manner without significantly compromising the quality of service and suspect fair trial rights.

#### Remote advice and representation in court

During the pandemic, particularly during the lockdown months, many defence lawyers have given advice to and represented clients on video and occasionally on the phone. The government enacted legislation which enabled lawyers to work from home or from their office, linked to the court by a video link. The only hearings where lawyers were forbidden from appearing on video were Crown Court trials. Use of video was always at the discretion of the judiciary but that discretion was very widely used.

We have no data on how often lawyers appeared on video rather than in person as yet, nor research on any potential impact on clients. However previous research (our own research into criminal video hearings <https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf> , the government's own evaluation of a virtual courts pilot in 2010 <https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report> , and the evaluation of the video-enabled justice programme <https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf> ) indicates that if client or lawyer (or both) appear on video in consultations or in hearings, it can have a negative impact. This research indicates a negative impact on trust and openness in the client-lawyer relationship, in the effective participation by clients, in the upholding of their fair trial rights. Research also indicates that when clients appear on video for their first appearance, they are less likely to take up free legal advice.

Lawyers appear to have welcomed the opportunity to appear on video in this last year since it has protected their health and enabled them to save travel time and financial resources. Unfortunately those lawyers who have by choice attended court to defend their client in person, have operated under a financial disincentive to do so.

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

We suggest the following reforms and research to improve the quality of criminal legal aid defence:

- an improved continued professional development system for legal representatives drawing on interventions used in other sectors to improve performance (reflexive and action learning, coaching, seeking informal feedback, 360% appraisal)

- better quality assurance mechanisms, less burdensome and more focused on quality of service. This could include observations of legal representatives in custody suites and court followed by feedback, but also mechanisms for ensuring quality of all interactions and case work done besides court advocacy
- review legal aid fixed fees to remove perverse incentives and incentivise best practice.
- research into how legal advice is provided in the police station – how much is provided by accredited representatives or solicitors? Duty or chosen lawyer?

Legally aided or in-house? (Currently) remote assistance or in-person? How involved are lawyers outside of the interview and how could this involvement be strengthened, given the benefits of good police station legal assistance down the line?

- following on from the above research, a radical re-think of the police station and court criminal legal aid model
- facilitate the expansion of not-for-profit defence companies, public defender models and the operation of freelance practitioners.
- research on the impact of remote legal assistance and representation on the fairness of proceedings, effective participation and case outcomes.
- eliminate the financial incentive for lawyers to represent and give advice to clients remotely

**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.**

No response given

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

We would like to draw the Review's attention to the following reports and blogs, some of which are referenced in this report:

Report: Not remotely fair? Access to a lawyer in the police station during the Covid-19 pandemic

<https://www.transformjustice.org.uk/wp-content/uploads/2021/02/Not-Remotely-Fair-Report-Feb2021.pdf>

Report: The criminal defender in an age of austerity: Zealous advocate or cog in a machine?

<https://www.transformjustice.org.uk/wp-content/uploads/2021/02/TJ-The-Good-Lawyer-2021-1.pdf>

Report: Defendants on video – conveyor belt justice or a revolution in access?

<https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

Report: Justice denied? The experience of unrepresented defendants in the criminal courts

[https://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL\\_Singles.pdf](https://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf)

Blog: Does virtual justice increase discrimination? <https://www.transformjustice.org.uk/does-virtual-justice-increase-discrimination/>

Blog: We need to talk about Keres & Co <https://www.transformjustice.org.uk/we-need-to-talk-about-keres-co/>