



BIRMINGHAM LAW SOCIETY
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**Response to the Justice Committee inquiry into the
Future of Legal Aid**

October 2020

Written evidence submitted by the Criminal Law Committee of The Birmingham Law Society

The Criminal Law Committee consists of members drawn from throughout Birmingham and surrounding areas. Its co-opted members include representatives of the judiciary and the Legal Aid Agency, as well as HMCTS staff, probation officers, prosecutors and others.

The Committee liaises with prisons, police and the courts about issues affecting all of our members. It also responds to consultations and lobbies on behalf of both members and clients.

Introduction

In the Autumn of 2020, criminal legal aid is in nothing short of an existential crisis. It will need ingenuity and considerable will from those in government to preserve a functioning market for criminal legal services in the coming years. This is a crisis that has been exacerbated by, but pre-exists, the COVID-19 pandemic. There are three interrelated drivers of the crisis:

1. Remuneration for criminal legal aid services;
2. Recruitment and retention;
3. Regulation & technology costs.

1. Remuneration

Background

The principal cause of this crisis, and the parent of a number of other factors exacerbating it, are the extremely poor rates of remuneration for legal aid practitioners. This is not a new phenomenon. There have been successive reductions in criminal legal aid for several decades. The often-cited criticism is that there has been no increase to headline hourly rates since the 1980s, but this is to miss the crucial point that there has been a move to fixed fees for nearly all criminal legal aid work. Those fixed fees are based not only on the outdated hourly rates, but also on outdated data on the time required to do the work, and estimated case volumes. The result is that nearly all police station work is loss-making, the vast majority of magistrates' court work is unprofitable, and only a small number of Crown Court cases offer any real opportunity for providers to profit.

Review of LASPO

The most significant and recent reductions in criminal legal aid payments were introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), which slashed remuneration for criminal legal aid by 8.75% across the board and made many other reductions in remuneration, eligibility and scope. The original intention was to reduce remuneration by 17.5%, but that cut was universally recognised as fatal to the market and was eventually successfully challenged by practitioner groups.

The Government's 2019 post-implementation review of LASPO confirms that the legislation achieved its aim of 'economy', by which is meant a reduction in overall legal aid spend. The review records the concerns raised by practitioners over sustainability of the market, recruitment and retention.

The review exposes the inherent weaknesses in the arguments used to justify the ‘economy’ sought: the Government concedes it is unable to determine the extent to which the legal aid spend has been reduced by the reforms themselves, or by the general reduction in volumes of criminal work of all types. The review concedes that the simultaneous implementation of a number of cost-cutting reforms means that it is impossible to determine which reforms, if any, have been effective. When considering the sustainability of the market, the review conflates solicitors and barristers without appearing to recognise that the current system cannot function without solicitors as the layperson’s entry point into the criminal justice system. The sustainability of both professions needs to be considered separately. The review answers the question of sustainability by saying that there are enough providers now (in most areas) – the question of whether there will be enough practitioners in a few years’ time is not addressed.

The threat to the sustainability of practice was highlighted by The Law Society in its review of the age demographic of practitioners qualified to act as Duty Solicitors in England and Wales. The impact of the real terms cuts to funding has resulted in an ageing demographic where in some areas over 70% of Duty Solicitors are over the age of 50. Even in the large metropolitan areas 40 to 42% of Duty Solicitors are over that age. The position reflects the unattractive nature of the work and difficulty firms have in funding training contracts, recruiting and retaining young solicitors. Unless a further review results in an improvement of the funding of firms prepared to undertake criminal defence work firms will continue to leave the area while those who survive will continue to experience difficulty in retaining staff. There is every likelihood that in five to ten years there will be many areas of the country where prospective clients will be unable to retain a solicitor to represent them on a publicly funded basis.

Criminal legal aid review/ accelerated areas of reform

For many years, Birmingham Law Society, in common with other practitioner groups including The Law Society, has been expressing its concern that criminal legal aid work is significantly underfunded, to the extent that the market for it is not sustainable.

In 2019, in light of these concerns, the Government announced a comprehensive review of legal aid, including criminal legal aid, and including a package of accelerated reforms for urgent implementation.

In August 2020, the Government announced the outcome of its accelerated areas of the criminal law review. While welcome, these small increases in the amounts paid for certain cases will make little difference to the overall sustainability of criminal legal services and, in particular, take no account of the devastating effect of the events of the 2020 pandemic, to which we now turn.

COVID-19 pandemic

In March 2020, during the consultation period for the accelerated reforms, the COVID-19 pandemic struck the UK and resulted in national lockdown. This had, and continues to have, far-reaching consequences for the criminal justice system and, in particular, the provision of criminal legal services. The pandemic could well prove to be a fatal blow to a criminal legal aid market already unsustainable and in crisis. The assaults on the market are multifarious:

- Most criminal cases could not be dealt with effectively for a period of weeks and months from March to (at least) June 2020. All but the most urgent cases were adjourned. The courts have struggled to deal with the additional backlog of cases, which added to an already unsustainable backlog caused by chronic underfunding over a period of years. The

effect on providers is that cases are taking significantly longer to conclude and therefore providers must wait for longer to be paid.

- It is apparent that there has been an increase in the volume of cases under investigation where clients have been released under investigation, without charge, or where following attendance for voluntary interview they await a decision on whether they will face charges. Practitioners report an increase in the number of cases in which clients although initially bailed to return have had bail cancelled without resolution of the investigation. This has obvious implications in terms of the likelihood of a successful prosecution being brought when further delayed in due course due to the backlog of cases pending trial. In these cases firms are not remunerated as there has been no decision following the initial investigative stage;
- As a result of changes in arrest and charge policies, there has been a significant further reduction in the volume of new criminal work of most types, in particular Crown Court cases where the profit margins were more sustainable for providers;
- Those trial matters that are within the Crown Court - again, the more profitable cases and those which offset the losses in other work types – are unlikely to conclude within a reasonable time, which means that firms will experience a delay in payment for those cases.
- The reduction in crime volume work has already been reflected by significant reductions in the standard monthly payment from the Legal Aid Agency.
- The end of the furlough scheme, coupled with the huge decrease in fee income and case volume, means that solicitors' firms will be forced to make significant savings, principally through redundancies, thus hindering firms' capacity to do work if there is a return to more 'normal' volumes in the future. We express a concern raised in response to previous consultations that once damaged the supplier base cannot readily be repaired. Solicitors leaving practice in this area will not be won back to criminal defence work without significant reassurances regarding job security;
- The changes to the criminal justice system brought about by the pandemic require a significant investment by firms in technology (discussed further below).

The combination of these factors causes an immediate drop in cashflow; an increased demand for cash outlay; a medium-term loss of income over the next several years due to the reduction in profitable Crown Court trial matters; and when combined with the existing crisis in sustainability, creates a perfect storm that may well be fatal to the provision of criminal legal aid services.

2. Recruitment & retention

Recruitment

Pre-COVID, there were already significant concerns about the lack of new entrants to criminal practice, for both solicitors and barristers. One does not have to probe very deeply to find out why that is:

- Poor rates of remuneration compared to nearly any other area of law;
- Frequent unsocial hours;
- Often mentally and emotionally damaging work, for which there is little support;

- Poor work/life balance;
- High demands of regulatory compliance;
- The low standing of criminal defence lawyers in public discourse.

In the West Midlands, as in other regions, this is reflected in the ageing profession: The Law Society's 2018 research showed 42% of duty solicitors in the West Midlands were aged over 50, while only 9% were aged under 35. The average age of a Duty Solicitor nationally was 47. We strongly suspect those depressing figures have only worsened since 2018. The figures themselves present a bleak outlook for sustainability in the profession.

At the Bar, there are similar recruitment issues, with entire cohorts of pupil barristers at some local chambers electing not to practise in crime after completing a common law pupillage – despite in some cases having been drawn to the profession to do criminal work. In both professions, the best and brightest are being drawn elsewhere.

Retention

What of those already in the profession? It is our experience that more solicitors than ever are seeking to exit criminal practice early. The routes vary, but include:

- Early applications for judicial roles;
- CPS;
- Other areas of law, e.g. regulatory law;
- Leaving the law entirely. This appears to be a particular factor affecting female solicitors who are disproportionately affected by the impact of the issues under discussion.

The first three of these routes have factors in common – better pay, better conditions, better job security.

At the Bar, increasingly only those who are financially independent can afford to practise in crime. This has an obvious detrimental effect on diversity within the profession. The Criminal Bar Association Young Bar committee is inundated with concerns from its members that if things continue as they are, they will not be able to remain in criminal practice in the New Year. Many barristers at the beginning of their career did not qualify for the Government's pandemic support package for the self-employed.

A further factor influencing sustainability is that the traditional firm model requires junior solicitors to buy equity in their firm. In crime, junior lawyers have little incentive to buy into their firm:

- The capital cost and financial risk of buying into the firm may not be offset by the increased profits of equity partnership;
- There is a significant risk, laid bare by LASPO in particular, that unilateral changes in legal aid contracting could make the investment in equity worthless;
- The opportunity for profit is decreased still further by the increased costs and burden of regulation and technology, discussed below.

The upshot of this disincentive to equity partnership is that there are a growing number of ageing solicitors here within the West Midlands whose firms will simply cease to exist without a proper succession plan. According to research by The Law Society, the number of crime firms has fallen nationally by 10% within the last year alone and this trend is likely to continue as the full effects of the pandemic are felt.

3. Regulation and technology

Regulation

Criminal legal aid is, quite properly, a highly regulated area of law. The nature of the legal services provided means that practitioners must be highly specialised and the stakes for their clients are often high. In addition to regulation by the SRA, providers of legal services are subject to regular audit by the Legal Aid Agency, must comply with peer review, and must hold a recognised quality mark, e.g. Lexcel. Further, Duty Solicitors must comply with an additional accreditation regime administered by the Legal Aid Agency, which imposes a further onerous, unpaid administrative and regulatory burden. The demands of GDPR on crime firms are also significant, due to the often highly sensitive nature of the client data processed.

The increased costs of regulation in criminal law is not reflected in the remuneration rates for contract work. If the current level of regulation is to be maintained, payments to contract providers must increase accordingly. At various stages in the reform of funding, solicitors have been told that simplification of funding for work would reduce the administrative burden not only on firms but on the Legal Aid Agency - the premise being that all parties would benefit from a reduction in regulation brought about by a simpler, clearer, more certain form of reporting. In reality this has not materialised. Although in many instances fixed fees are paid for the work undertaken firms remain required to closely record time engaged, to justify the time engaged in all instances and to submit themselves to close scrutiny on peer review, monthly internal review and on costs appeal. The burden on firms has increased concurrent with a reduction in remuneration.

Technology

The Select Committee may recall that Birmingham Law Society expressed concerns to its recent enquiry on HMCTS reform, about the wider adoption of video link hearings in criminal cases. The concerns primarily focussed on the anecdotal evidence and (admittedly limited) academic research that suggests defendants and witnesses feel less engaged in their cases when appearing over the video link, and that sentencers are more likely to impose custodial sentences on those so appearing.

While those concerns remain, as a result of the pandemic we have had to recognise that as a matter of practical reality, video hearings have been necessary to ensure the courts have continued to function. Pragmatism has won out over principle when trying to sustain the criminal justice system during a national pandemic.

Another technological change that practitioners have had to grapple with as a result of the pandemic is the widespread adoption of remote working. As many have found since March, this offers some benefits over what went before: principally, a better work/life balance and an increased understanding that there are viable alternatives to the traditional office or Chambers based model. However, it also throws down some challenges to practitioners – the investment in technology necessary to implement home working, and increased GDPR compliance risks, to name but two.

It follows that due to both the pre-pandemic court reforms and the changes wrought by the pandemic, all crime firms must now invest in technology, to bring it to a level where employees

can work remotely, can attend video link hearings and see clients remotely, and can access sensitive case papers securely away from the office. For most crime firms, this will represent a significant change to their previous way of working, and will require the purchase of new devices, new case management software, and the training required to use them. As will quickly be identified from the Committee's commentary above, most crime firms simply do not have the resources to commit to that sort of investment and are being asked to make it without knowing if their firm will still exist in a year's time.

In many instances gains were made in the early stages of the response to the pandemic as a result of the meeting of minds of all agencies engaged in the criminal justice system. Defence practitioners willingly gave up significant time to attend a vast number of meetings held with other agencies with a view to drafting and disseminating protocols to enable remote working, safer practices and to protect all engaged at courts and police stations.

In the West Midlands, as in other areas, that resulted in the creation of virtual courts in which defendants could be produced to appear using the Cloud Video Platform (CVP). The centralisation of that work in the East and West Midlands to two court centres was intended to free other court buildings to be used for cases involving defendant's attending to answer bail. This was on the premise that this would reduce the backlog of cases awaiting first hearing and increase the number of trials which could be listed.

However, on 8 October 2020 West Midlands Police announced that due to shortage of resources it could no longer support the use of CVP with the result that future hearings would require the production of prisoners to the courts in person. If the threatened withdrawal of the use of CVP goes ahead as indicated it will exacerbate the current backlog of cases and undo the work undertaken by all concerned. Those attending the multi-agency meetings to represent the defence community of course do so unfunded. Firms who have invested in Information Technology resources to meet the demands of the pandemic have done so in the expectation that the use of technology would revolutionise the listing of cases in the criminal justice system. If in the short term that is proved to have been a wasted investment due to the underfunding of other agencies, firms will be dissuaded from making medium to long term commitments.

We are also concerned by the mixed messages received by the defence and prosecution community regarding the use of technology to facilitate safe hearings in courts. Initially, the hearings appeared to have the support of the judiciary. That support has been eroded in many court centres, such that appearance in person has become the norm. In many instances, when technology was introduced to facilitate remote attendance at hearings, it appeared to be considered that avoidance of infection and reduction of the spread of Covid19 were sufficient to satisfy the interests of justice. Advocates report that, in some court centres, that is no longer the case and that they are required, without apparent cause, to attend hearings in person in courts perfectly well equipped to provide remote hearings. Practitioners require certainty in advance regarding the listing of hearings and what is required of them. Having equipped courts to deal with cases making the best use of technology we would welcome a commitment by the Ministry of Justice to broaden access to all parties.

15th October 2020

Birmingham Law Society