



The Bar Council

Bar Council Spending Review Submission September 2020

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales and discharges its regulatory functions through the operationally independent Bar Standards Board (BSB). A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Introduction

The justice system in England & Wales is at a tipping point. Once highly regarded as a vital public service, today's system is widely acknowledged to be suffering from a decade of under-investment. Crime is increasing, yet prosecutions are falling. Too many people are unable to access justice quickly or effectively. The challenges that the sector faces have simply been heightened in the wake of Covid-19; people are having to wait even longer for justice to be delivered, with trials taking months, and in some cases years to be heard. As a result, there is understandable public dissatisfaction with the state of the justice system.

However, the system needs adequate funding in order to function properly. At the moment, it cannot operate effectively, and citizens cannot get swift access to justice - a well-established, fundamental aspect of British society. This longstanding problem can be addressed, and our justice system can get back on its feet.

The value of legal services - both to civil society and the vast contribution it makes to the economy - should be recognised and promoted. Targeted funding is required that will allow the justice system to function more efficiently. Small steps have been made through the welcome announcement of £142m for the parlous court estate to be refurbished and the commitment to 20,000 extra police officers, but investment is needed across the entire system in order for it to operate effectively, help maintain law and order and contribute to the "levelling up" agenda. This Government has an opportunity to do precisely that in this Spending Review and we urge them to do so in the interests of public confidence and law and order.

Summary

Our recommendations to the Treasury:

- 1. Properly invest in the justice budget by £2.48bn - an extra 22p per person per day.**
- 2. Level up to regenerate towns and cities, provide access to early legal advice to support the most vulnerable and help them to succeed in life.**
- 3. Provide a courts and tribunals system fit for the future.**
- 4. Ensure the sustainability of the legal profession to deliver the administration of justice.**
- 5. Protect England and Wales' position as a leading global legal centre.**

Properly invest in the justice budget by £2.48bn - an extra 22p per person per day

Without investment, access to justice fails. England and Wales as a jurisdiction has endured a decade-long series of cuts, resulting in a justice system that, even before the Covid-19 pandemic, was on the brink of collapse. In 2019, annual justice spending in England and Wales (Ministry of Justice (MoJ) budget plus Crown Prosecution Service (CPS) budget) was £144 per person, or 39 pence per person per day. This represents an overall 29% reduction in spending per person in real terms between 2010-2019. Within that, the CPS and the Legal Aid Agency (LAA) were particularly hit. The CPS saw a 39% reduction in spending per person in real terms between 2010-2019 and the LAA a 37% reduction. This is not, however, limited to criminal justice; the entire justice system has suffered - civil, family and criminal alike. The jurisdiction of England and Wales is a European outlier in slashing justice spending to this extent: in the last decade, England and Wales has experienced by far the largest percentage reduction in justice spending compared with other European countries.¹

¹ Chalkley, M and Chalkley, A (2020) "Small Change for Justice: Funding for Justice in England and Wales, 2010-2019"
<https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html>

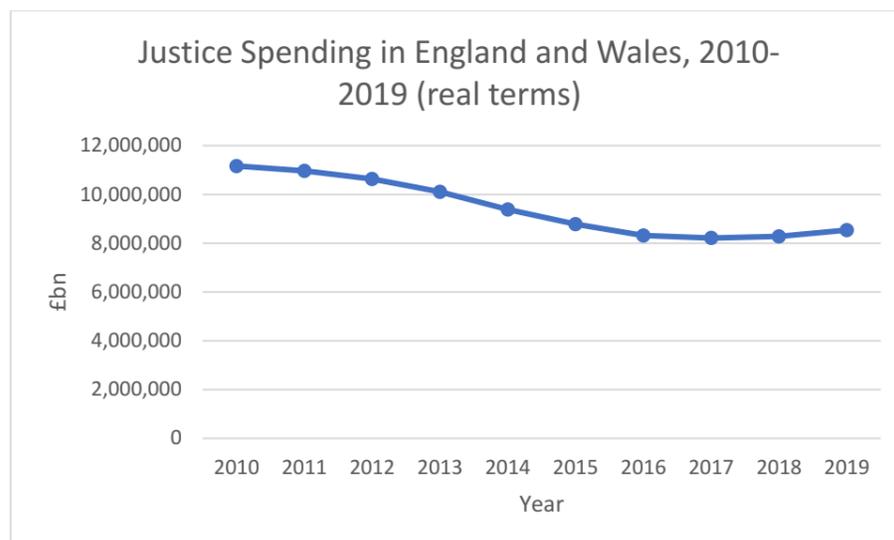


Figure 1. Justice Spending in England and Wales 2010-2019 in real terms (£2019)²

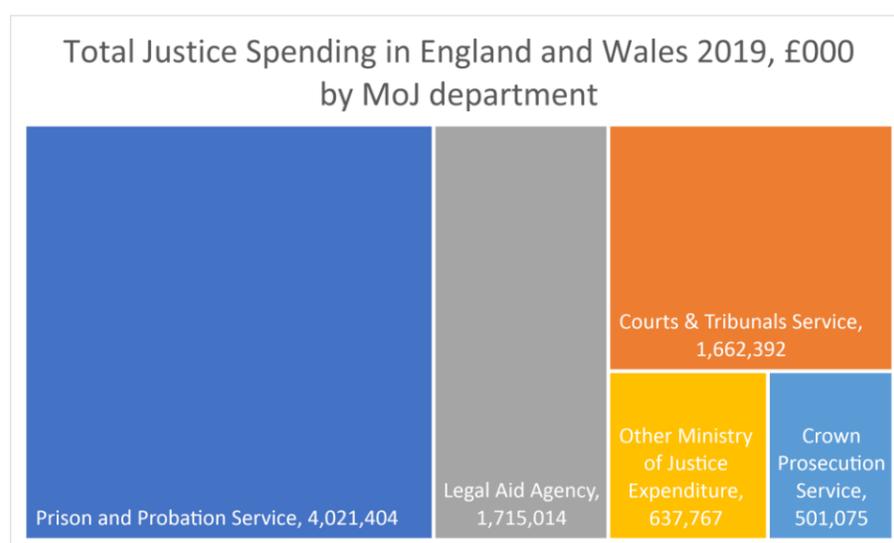


Figure 2. Total Justice Spending in England and Wales 2019 by category of expenditure.³

The justice system in England and Wales is buckling under the pressure of systemic underfunding, under-resourcing and increasingly complex criminal cases. When the Government implements its welcome proposals on police numbers, CPS and sentencing reform, the strain on the courts and legal professionals will be even more pronounced.⁴ Investment needs to be made throughout the system since better resourcing one part will simply push problems elsewhere within the same system. Without restored funding, particularly to legal aid, access to justice will be further threatened. Adjusting for inflation and to simply bring the budget to a level it can efficiently deliver, the Government needs to provide an extra £2.48bn (29%) of annual spending on the justice system.⁵ That equates to an extra 22 pence per person per day.⁶

Level up to regenerate towns and cities, provide access to early legal advice to support the most vulnerable and help them to succeed in life

Levelling up is a key Government commitment to help communities, particularly in the Midlands and the North, and to reduce regional inequalities. There is an opportunity as part of this strategy to regenerate towns and cities by modernising and investing in courts and tribunals, which are often in the centre of these towns and cities such as Blackpool, Carlisle, Preston, Cardiff and York. This would help to attract investment, provide a confidence boost to the local economy and help people access justice locally.

Levelling up should not focus solely on geographical areas but should also focus on people. As part of the Government’s commitment to this agenda, there is an opportunity to help support the most vulnerable in society, through access to early legal advice to help them to resolve issues on topics such as housing, debt or employment. Early resolution saves money in the long run to the Exchequer. Efficient and effective case progression and resolution prevents one problem leading to another. As the graph below shows, the 37% reduction⁷ in spending per person on legal aid means that legal need is now often simply going unmet and we are seeing an associated exponential rise in litigants attempting to

² See Chalkley, M and Chalkley, A (2020) “Small Change for Justice: Funding for Justice in England and Wales, 2010-2019” <https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html>

³ Figures are the relevant department Resource Expenditure Limits which can be found in departmental annual reports (usually labelled core tables). They therefore correspond to expenditure on the provision of services but exclude capital expenditure.

⁴ Johnson, B. (19 December 2019) “The Queen’s Speech” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf

⁵ This figure does not include the police. An additional £2.33 bn would be needed to fund the police according to 2010 levels.

⁶ Chalkley, M and Chalkley, A (2020) “Small Change for Justice: Funding for Justice in England and Wales, 2010-2019” <https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html>

⁷ The LAA budget in 2010 was £2.18 bn and in 2019 it was 1.72 bn. Per person the 2010 annual spend was £43 and in 2019 it was £27 - a 37% reduction in spending per person. These figures are taken from our [Small Change for Justice report](#).

represent themselves in court – known as litigants in person.⁸ This means that bereaved families go unrepresented at inquests and parents are unable to secure access to their children.

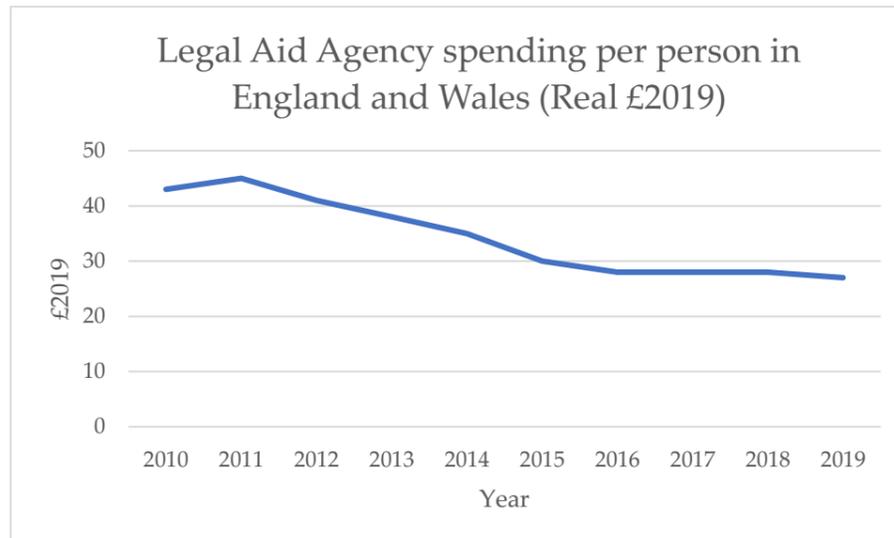


Figure 3. Legal Aid Agency (LAA) expenditure per person in England and Wales 2010-2019.⁹

As part of the levelling up agenda, the Government should make non-means tested legal aid available for all domestic abuse cases and introduce early access to legal advice for social welfare issues. For example:

Make non-means tested legal aid available for all domestic abuse cases

As the Domestic Abuse Bill makes its progress through the House of Lords, we urge the government to go further in ensuring all domestic abuse cases can access the appropriate legal help. Covid-19 has created what Women’s Aid have called “a perfect storm”, that can “threaten to escalate abuse and close down routes to safety for women to escape”.¹⁰

The Government has already committed to making victims of domestic abuse automatically eligible for special measures in the family and civil courts.¹¹ We welcome the recognition of the specific legal needs of victims of domestic abuse, and of children involved in these cases. We urge the government to go further and to reverse the legal aid cuts delivered in LASPO¹² 2012, which took legal aid for victims of domestic abuse out of scope, unless they qualified under the general means testing criteria. The Bar Council endorses the recommendation of the MoJ’s expert panel that alleged perpetrators and alleged victims of domestic abuse should be able to access legal aid, so that lack of legal representation or evidential difficulties do not place barriers in the way of victims seeking redress.¹³

Introduce early access to legal advice for social welfare issues

Individuals and organisations across the legal services sector agree that early legal help for social welfare issues saves considerable hardship and suffering by preventing people’s legal issues from escalating.¹⁴ The Bar Council recognises the crucial function offered by local law centres and advice agencies, and by specialist welfare advisors, particularly for people with disabilities. As the Law Centres Network has argued, late legal advice forces “people and their families [to] endure adversity which affects their health, work, accommodation and social relations.”¹⁵ Since the implementation of LASPO 2012, over half of the not-for-profit law centres or agencies offering free legal advice have been closed.¹⁶ Where law centres remain, much of the specialist advice for social welfare issues (including debt, employment, welfare benefits, housing and immigration) has been removed.¹⁷ As the Equality and Human Rights Commission has reported, legal need is often simply going unmet.¹⁸

Without detracting from the potentially devastating social costs that can result when legal need goes unmet, it is clear that early legal help also results in net financial savings to the Exchequer. In England and Wales, before LASPO took early legal help for social welfare issues out of scope in 2013, the Citizens Advice Bureau established that each £1 spent on early legal advice saved between £2.34-£8.80, depending on the type of legal issue.¹⁹ In Scotland, a 2017 study established that for every £1 spent on housing legal aid, £11 was saved, of which 80% was saved by the recipient of legal aid, and 20% by public services.²⁰ This pattern is replicated globally. The World Bank in 2019 recommended that global cost-benefit analyses of legal aid indicated overwhelmingly that the economic benefits of providing legal help through legal aid significantly

⁸ In the financial year 2012/13, immediately preceding the introduction of the Legal Aid Sentencing and Punishment of Offenders Act which removed legal aid for many types of family and civil cases, a total of 58% of parties were recorded as having legal representation in private law cases that had at least one hearing. In 2017/18, this had reduced to 36% of parties. The reduction of legal representation has been similar (in percentage terms) for both applicants and respondents: in 2012/13, 72% of applicants and 46% of respondents had legal representation, compared to 45% of applicants and 28% of respondents in 2017/18. Letter from The Right Honourable the Lord Burnett of Maldon to Bob Neill MP, 25 January 2019.

⁹ Chalkley, M and Chalkley, A (2020) “Small Change for Justice: Funding for Justice in England and Wales, 2010-2019” <https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html>

¹⁰ Women’s Aid (18 August 2020) “A Perfect Storm – The impact of the Covid-19 pandemic on domestic abuse survivors and the services supporting them.”

¹¹ Ministry of Justice (June 2020) “Assessing Risk of Harm to Children and Parents in Private Law Children Cases Implementation Plan” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895174/implementation-plan-assessing-risk-children.pdf

¹² Legal Aid, Sentencing and Punishment of Offenders Act 2012

¹³ Ministry of Justice (June 2020) “Assessing Risk of Harm to Children and Parents in Private Law Children Cases”

¹⁴ The Law Commission (January 2014) “Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales”; Fabian Policy Report (September 2017) “The Right to Justice: The Final Report of the Bach Commission”

¹⁵ Law Centres Network (September 2018) “LASPO Act 2012 Post-Implementation Review” 4.

¹⁶ The Law Society (2019) “Technology, Access to Justice and the Rule of Law: Is technology the key to unlocking access to justice innovation?”

¹⁷ Law Centres Network (February 2018) “Joint Committee on Human Rights Inquiry: ‘Human Rights: Attitudes to Enforcement’”

¹⁸ Organ and Sigafos (September 2018) “Equality and Human Rights Commission Research Report 118: The impact of LASPO on routes to justice” 35-41.

¹⁹ Citizens Advice (July 2010) “Towards a business case for legal aid Paper to the Legal Services Research Centre’s eighth international research conference”

²⁰ Hammond, Clare, Vermeulen, Inga (2017) “Social Return on Investment in Legal Aid, 2017”

outweighed the costs.²¹ One example is restoring legal aid for early intervention. Someone might be evicted from their home for not paying their rent, due to their benefits having been wrongly stopped. Restoring legal aid for early advice on benefits matters would mean that the eviction stage would never be reached. Legal aid intervention at an early stage is cheaper than only having legal aid when the matter has escalated to crisis point and the matter is more expensive to put right. Given the anticipated likely increase in such matters as a result of Covid-19, now is an opportune time to restore critical aspects of legal aid, to help with the backlog of cases and resolve matters quickly and efficiently.

Another example is litigants in person. A case in the family or civil court, where one or both parties is not legally represented, takes much longer. The costs of increased court time are likely to be greater than the costs of having provided legal representation. Also, in many family or civil cases, early legal advice can mean that a case is settled before court, which again saves money. With our solicitor colleagues at the Law Society, the Bar Council urges government to restore funding for early legal help.

Provide a courts and tribunals system fit for the future

An efficient, effective and respected justice system needs a court estate which is fit for purpose. The current court estate is not fit for purpose, neither in terms of scale nor condition. Since 2010, eight Crown Courts²² (out of 92) and 164 Magistrates' Courts have been closed (out of 320)²³, as well as 90 County Courts (out of 240), 18 tribunal buildings (out of 83) and 17 family courts (out of 185). That is a total of 297 closures, leaving an estate of approximately 350 buildings. There are now backlogs throughout the justice system, particularly in the criminal justice system.

HMCTS is the only department within the Ministry of Justice that appears to have had funding increases in the past decade. The court reform programme had spent £540 million in three years (2016-19), predicated on an expected annual saving of £265 million by 2023.²⁴ This is, however, a short-term increase intended to result in net savings in the medium term. Government spending on HMCTS has in fact fallen by 32% in real terms between 2010/11 and 2018/19; a reduction partly offset by an increase in fees charged to court users.²⁵ The reform programme is running well behind schedule and has been criticised for failure to fully consider access to justice, in such aspects as travel times to court (they assume a two-hour travel time on public transport within an assumed working day of 07:30-19:30), the universal roll-out of video hearings, and adequate maintenance of court buildings.²⁶

The following graph shows that HMCTS' net operating expenditure for day-to-day court and staffing running costs (outside of the 2016 Reform portfolio or the 2010 Court Estate Reform programme) has decreased by 32.7% in real terms in the last decade:

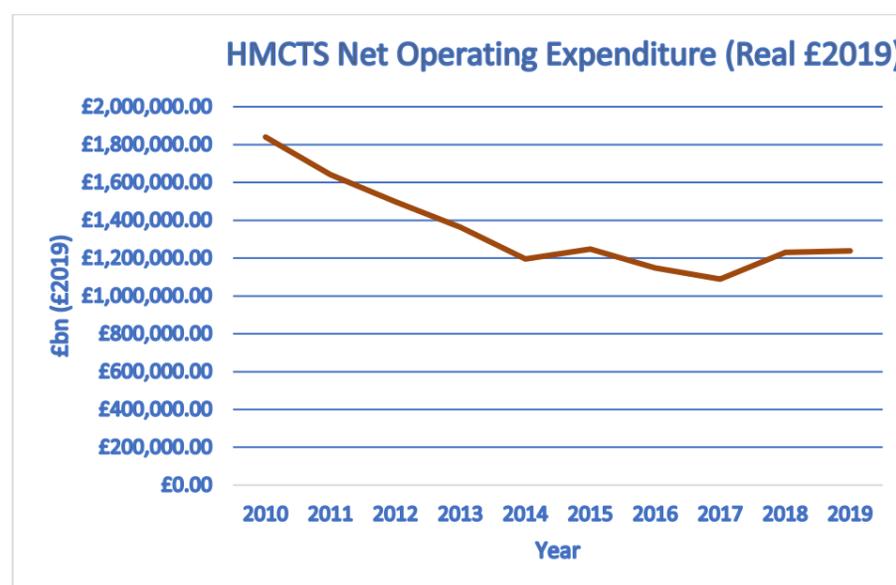


Figure 3. HMCTS Net Operating Expenditure 2010-2019 (Real £2019).²⁷

This has left a court estate that is unfit for purpose and unable to meet the challenges of a changing justice system. HMCTS had an annual budget of £1.9 bn in 2016/17.²⁸ In 2019/20 this had been reduced to under £1.7 bn²⁹ as part of the commitment in the 2015 Spending Review to cut funding for justice by £500m in 5 years.³⁰ The £142m additional funding for court infrastructure that was announced in July 2020 as part of the Covid-19 emergency was welcome in this context.³¹ It represents an increase of more than double the existing budget for improvements to the physical and remote court estate, and will allow over 100 courts to add or enhance remote technologies. There are, however, over 300 courts in England and Wales. For these changes to be meaningful in the present and work for the long-term, the £142m investment will need to be repeated annually

²¹ The World Bank (September 2019) "A tool for Justice: The cost benefit analysis of legal aid"

²² Sturge G, Court Statistics for England and Wales, House of Commons Library, 2018, p. 16, retrieved 12 October 2019, researchbriefings.files.parliament.uk/documents/CBP-8372/CBP-8372.pdf

²³ <https://commonslibrary.parliament.uk/local-data/constituency-data-magistrates-court-closures/>

²⁴ National Audit Office (2018) "Early progress in transforming courts and tribunals"

²⁵ Institute for Government (2019) "Criminal Courts Performance Tracker"

²⁶ Byrom, N (2019) "Developing the detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice"; Byrom, N (2019) "Digital Justice: HMCTS data strategy and delivering access to justice"; HM Courts and Tribunal Service (2019) "Response to 'Fit for the future: transforming the Court and Tribunal Estate' consultation"

²⁷ HM Courts and Tribunal Service (2010/2019) "Annual Report and Accounts" Real terms adjustment made using ONS figures for the GDP deflators based on £2019.

²⁸ HM Courts & Tribunals Service (18 July 2017) "Annual Report and Accounts 2016-17"

²⁹ HM Courts & Tribunals Service (21 July 2020) "Annual Report and Accounts 2019-20"

³⁰ HM Treasury (25 November 2015) "Spending Review and Autumn Statement 2015: key announcements" <https://www.gov.uk/government/news/spending-review-and-autumn-statement-2015-key-announcements>

³¹ MoJ, HMCTS (1 July 2020) "Coronavirus recovery in Her Majesty's Court and Tribunal Service" <https://www.gov.uk/government/news/coronavirus-recovery-in-her-majesty-s-court-and-tribunal-service>

for at least the next three years so that, after years of underinvestment, every courtroom in the country is fit for purpose to clear the backlog and reduce waiting times to below 2019/20 levels.

HMCTS is currently running two concurrent modernisation programmes – the 2010 Court Estate Reform Programme that, between 2010 and 2019, has seen a total of 295 court facilities closed,³² and the 2016 portfolio of reforms that aimed to modernise the justice system, reduce complexity, and provide new ways for people to engage.³³ In 2018/19, HMCTS employed around 16,100 staff, operated 341 courts and tribunals that heard 4.4 million cases, and spent £1.2 billion.³⁴ By 2023, HMCTS expects to employ 5,000 fewer full-time equivalent staff, reduce the number of cases held in physical courtrooms by 2.4 million per year and reduce annual spending by £265 million.³⁵ The additional £142m annually for the next three years could sit within the HMCTS reform portfolio. The Civil Service People Survey 2019 recorded an Employee Engagement Index score of 54% - the lowest in the Ministry of Justice group and well under the benchmark 63% recorded across the civil service.³⁶ The Public and Commercial Services Union, in a submission to the Justice Select Committee said, “[the] Courts and Tribunals Service is creaking under unrelenting pressure caused by years of chronic underfunding and is largely held together by the goodwill of our members.”³⁷

Covid-19 has presented serious challenges for the court system but has also presented an opportunity – to develop a physical and virtual court estate that works in tandem to deliver justice. This will require meaningful and ongoing funding.

The court estate, which was in the middle of a large reform programme when Covid-19 broke out, had already been experiencing increased pressure brought on by closures. These closures amounted to 51% of Magistrates’ courts alone.³⁸ This was done despite the knowledge that backlogs were increasing, with assurances that the money raised from court closures could be reinvested in other parts of the system. Covid-19 has compounded the problem of rising backlogs and lack of sitting days. While remote courts have gone some way to alleviating the pressure, it is not nearly enough. Therefore, the Bar Council recommends the following:

- Reopen courts that were closed and refurbish existing courts to reduce the backlog. The cost of reopening courts in the short term will outweigh the spending required on ways to reduce the backlog in the long term if the issue is not addressed right now. If utilising public buildings as courtrooms is more financially viable, then it should be done. Ensure that all courtrooms that are made available are Covid-secure and have rooms large enough to hear complex cases, which are the most likely to require in-person hearings. This should be a top priority - HMCTS has available statistics³⁹ demonstrating that between June 2019 and June 2020 the backlog has increased across practically all courts and tribunals and disposal times have either continued to rise or remain high. This looks set to continue if we cannot generate more court space, both physically and online.
- Ensure that all courts are fitted with fast and effective broadband, at speeds that allow cases to be heard effectively.
- Expand the ‘virtual’ court estate – not just moving cases online, but a comprehensive online court i.e. tech support on hand, virtual waiting rooms/breakout rooms. Everything that the physical court estate would provide needs to be replicated virtually. This will then allow a two-track system whereby cases can be judicially allotted to be heard either physically or virtually, based on complexity and need. This would allow the backlog to be dealt with more quickly.
- Ensure provision of equipment (i.e. laptops) in publicly funded cases for those that need them, so that they can have their cases heard remotely. If the court estate bought 10,000 laptops (approximately 23 laptops per court not counting appellate courts, based on 2019 figures⁴⁰) at £599 each, that would still only be £5,990,000. They could be kept in the custody of solicitors until such time as parties need to use them.
- Set a goal of Data Support Officers in all courts by 2023. This solves multiple problems: it allows the government to ‘meet’ the coming jobs crisis by expanding the sector and employing skilled IT technicians, and it will reduce the time spent by judges and legal practitioners trying to get their tech working, which takes up valuable court time. Additional to this should be training for the judiciary on how to manage online court proceedings, taking great care over the wellbeing elements of handling vulnerable parties who are uncomfortable with online proceedings.
- Invest in better and more consistent data collection practices across HMCTS. Currently, data is not collected throughout the courts and tribunals estate, but it is vital that robust and reliable data is collected across all jurisdictions and that, insofar as possible, that data is publicly available.
- Recruit more part-time judges and recorders through offering financial incentives to sit. For Magistrates’ courts, this is most acute, and the recruitment of more magistrates should begin immediately (the number of magistrates has halved since 2010⁴¹).
- Following years of squeezing and significant reductions in staff numbers, pay and conditions for remaining HMCTS staff require improving. For a multitude of reasons, staff morale at HMCTS is low and dropping⁴² and pay is in the bottom quartile of civil service remuneration. Everyone working in the justice system should be fairly remunerated for the important work that they do, and this includes civil servants who work to keep our courts and tribunals functioning.

³² House of Commons Library (2019) “Court Closures and Access to Justice” Debate Pack CDP-0156.

³³ National Audit Office (2019) “Transforming Courts and Tribunals: A Progress Update”

³⁴ National Audit Office (2019) “Transforming Courts and Tribunals: A Progress Update”

³⁵ National Audit Office (2018) “Early progress in transforming courts and tribunals”

³⁶ Cabinet Office (26 March 2020) “Civil Service People Survey 2019: All organisation scores”

³⁷ Parliament (31 October 2019) “Justice Select Committee - Court and Tribunal reforms”

³⁸ <https://commonslibrary.parliament.uk/constituency-data-magistrates-court-closures/>

³⁹ <https://www.gov.uk/government/statistical-data-sets/hmcts-management-information-june-2020>

⁴⁰ <http://researchbriefings.files.parliament.uk/documents/CBP-8372/CBP-8372.pdf>

⁴¹ <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts>

⁴² <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts>

- Arguing for a wider court estate *and* more online court capacity is not a contradiction; the court estate needs to be updated so that it can work in tandem with online courts. The main distinction is that online is used where possible, e.g. for short or preliminary hearings and non-complex matters, so that it frees up the court estate for complicated cases or those with vulnerable parties that need to be heard in person. Common Platform, Single Justice Service and Cloud Video Platform are all up and running (or about to be) and these are good examples that demonstrate a two-track system can be done. The funding required to augment these would not be vast, as the initial infrastructure already exists.
- There should be an earmarked ‘troubleshooting’ fund, as there will inevitably be teething problems with whatever tech is installed. The courts should also really be ‘system fit for 2025/2030’, as the idea is to be futureproofing the IT for at least the duration of this Parliament and the next. Taking the previous decade as a study, it is not realistic to believe that in 2030 the legal tech landscape will look anything like it does today, and we should prepare for that as best we can.
- Greater encouragement of and investment in alternative dispute resolution (ADR), particularly online. There are precedents for this both at home and abroad, like British Columbia’s [Civil Resolution Tribunal \(CRT\)](#)⁴³, for example. These tools can do much to reduce the cost to the court, as cases are more likely to be resolved faster and with less or no judicial time expended. The [Traffic Penalty Tribunal](#)⁴⁴ is a good example of something that already exists in England & Wales, which takes pressure off the courts. Expansion of the small claims mediation service to include medium-sized claims should also be adopted, as this would take pressure off the courts and save money.

Sustainability of the profession to deliver the administration of justice

Barristers carry out a vital public service. Without barristers, justice cannot be delivered. Largely because of a shut-down in court work, Covid-19 has, in particular, pushed the already fragile publicly funded Bar right to the brink. During the pandemic, publicly funded barristers have typically seen a 55% fall in hours worked, and a 69% drop in fee income. 29% of all publicly funded barristers are uncertain whether they’ll renew their practising certificate next year, rising to 36% of immigration practitioners and 38% of criminal practitioners.⁴⁵ 20% of publicly funded barristers now actively want to leave the profession.⁴⁶ Without urgent and targeted Government support for practitioners and chambers, we fear that there may not be practitioners willing or able to do this work in the future.

Women, BAME and state-educated barristers are all more likely to work in publicly funded areas of law, so an exodus from the publicly funded Bar will have a disproportionate impact on diversity in our profession and significantly impact sustainability. The need for the judiciary to reflect society has never been more important. As the Bar is the main feeder for the judiciary, any impact on diversity at the Bar will have an inevitable knock-on effect on judicial diversity. This presents a significant risk, particularly given that 40% of court and tribunal judges are aged 60 or over and the current (2019) judiciary is already only 12% BAME.⁴⁷

The publicly funded Bar, particularly the criminal Bar, has been under immense existential pressure in recent years, and increasingly since the implementation of LASPO 2012. The Justice Committee concluded in its July 2018 *Criminal Legal Aid* report that, “there is compelling evidence of the fragility of the criminal Bar and criminal defence solicitors’ firms.”⁴⁸ Our data shows that, even before the Covid-19 pandemic, a career at the criminal Bar was becoming unviable for all but those with independent means. Publicly funded criminal barristers in the first two years of practice were, in 2019/20, typically earning less than £13,000 pre-tax profit after they had paid essential expenses and memberships.⁴⁹ Many take second or third jobs, despite working more than full-time hours at the Bar, just to pay living costs and service student debt. This is more pronounced at the criminal Bar than the civil or family Bar at present, but it is fair to say that the whole publicly funded Bar is, after a decade of government cuts, in a rolling crisis of sustainability and reverse social mobility. This has been partly recognised by the government through the Criminal Legal Aid Review (CLAR), though much of the broader work remains outstanding. The Review began with addressing some ‘accelerated areas’ on criminal legal aid, and in August 2020 the MoJ announced some increases to Crown Court legal aid fees for solicitors and barristers, which they calculated will inject an additional £35m-£51m funding per year.⁵⁰ The MoJ are soon to announce the details of the rest of their review, ‘CLAR 2’ which will look more broadly at criminal legal aid funding. From 2010 to 2019, funding for the Legal Aid Agency fell by 21% in cash terms.⁵¹ Focussing on criminal legal aid, by the 2019-20 financial year, criminal legal aid spending had fallen to £821m (down from £1,072m in 2011-12 and £906m in 2015-16).⁵² This is despite population growth of 7% in England and Wales.⁵³ Therefore, criminal legal aid fee increases of an additional £251m per year would bring funding up to a fairer level.

A frequent review of advocates fees

The politics needs to be taken out of legal aid; it exists to protect some of the most vulnerable people in society or those whose liberty is at risk. For a long time, justice funding has been unpredictable, unplanned and stop-start in nature. For example, in criminal legal aid, the fees paid to barristers and solicitor advocates for defence advocacy in the Crown Court are governed by Remuneration Regulations in a Statutory Instrument which has no mechanism to keep fees at a real-terms level by making increases for inflation. The result is a stop-start system of energy-sapping reviews (not least for the government) every few years and the stagnation of fee levels. The fee scheme was introduced in 1997; there were some increases in 2004 which were below the rate of inflation. Fee cuts were introduced in 2005, then after a review by Lord Carter

⁴³ <https://civilresolutionbc.ca/>

⁴⁴ <https://www.trafficpenaltytribunal.gov.uk/about-the-traffic-penalty-tribunal/>

⁴⁵ Bar Council (2020) “*Whole Bar Survey Summary Findings*” <https://www.barcouncil.org.uk/resource/bar-survey-summary-findings-july-2020-pdf.html>

⁴⁶ 20% of all self-employed barristers who receive more than 50% of their income from publicly funded work. Bar Council (2020) Analysis of Bar Survey July 2020. Unpublished.

⁴⁷ Courts and Tribunals Judiciary (11 July 2019) “Judicial Diversity Statistics 2019”

⁴⁸ Justice Committee, Twelfth Report of Session 2017–19, *Criminal Legal Aid*, HC 1069, p 2

⁴⁹ Bar Council (2020) Analysis of CLAR dataset. Unpublished.

⁵⁰ <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/results/clar-impact-assessment.pdf>

⁵¹ Chalkley, M and Chalkley, A (2020) “*Small Change for Justice: Funding for Justice in England and Wales, 2010-2019*” <https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html>

⁵² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895030/legal-aid-statistics-tables-jan-mar-2020.ods

⁵³ Office for National Statistics (2020) “Population Estimates”

in 2007 there were fee increases of roughly 18%, though this was less than the 26% rate of inflation from 1997-2006. Fees cuts of 4.5% were introduced each year from 2010-2012, with additional cuts in certain types of cases in 2011. Following a 2018 review, there were some fee increases in 2019 and some further limited increases announced in August 2020 for certain case features in the first stage of the Criminal Legal Aid Review. These instances of cuts and increases over the last 20 years have not been based on evidence but on whether the MoJ has been required by the Treasury to make cuts or has been able to put a little of the money back. This results in strained relations with the legal profession, who are in a never-ending position of uncertainty and possible tension with the Government. Other professions have efficient mechanisms by which their public funding is reviewed, so we recommend that a long-term and robust system of reviewing fees paid to barristers and solicitors be introduced, so that fee levels can keep pace with market forces and inflation. An independent fee review body could be an option that could look at the evidence and set a figure. We ask that CLAR2 addresses this issue directly and the solution is mirrored for the CPS fee scheme.

Ensuring England and Wales remains a leading global legal centre

Legal services contributed £26.8 billion to the UK economy in 2017 and produced a trade surplus of £4.4bn in 2017. Legal services generate 1.4% of UK Gross Value Added and employ over 338,000 people across the country.

The UK is the largest legal services market in Europe (valued at approximately £35bn in 2018) and is second only to the US globally. It accounts for a third of Western European legal services fee revenue and around 5-6% of global legal services fee revenue (which totalled between \$680bn and \$886bn in 2018, and is expected by some to grow to above \$1trn by 2021). The UK's broader professional services sector is key to the success of the legal sector. Over 25% of the world's 320 legal jurisdictions are founded on English common law principles, and 40% of governing law in global corporate arbitrations is English law.

London is the biggest legal centre in the UK, but cities such as Manchester, Leeds, Newcastle, Bristol, Birmingham, Liverpool, Cardiff and Nottingham also have significant legal sectors. With increasing competition from other leading global centres, such as New York, Dubai, Paris and Singapore, the UK must work to ensure that London and the UK more broadly retains its position as a world-class global dispute resolution centre. Without concerted action the UK's position will be under threat.

The Government should establish a Professional Services Promotion Fund for the professional services sector to secure funding to promote the UK's world-leading services abroad. The Fund would be based on the Government's Brexit Readiness Fund but could be piloted for two years initially and allow sectors such as legal and accounting to promote professional services overseas with Government support.

The Fund would be used for projects including business missions, promotional materials and exchange schemes with overseas jurisdictions of interest to the Government. As is standard with other forms of governmental support, there would be a requirement for matched funding from successful applicants, which would take the form of direct financial support or organisational support and resources. The Fund would be fully contestable and linked to clear performance and outcome metrics.

The enhanced international promotion of UK legal services will help the sector continue to contribute to increased UK productivity growth. Income from international legal services continues to grow, but further investment and support from the Government through a Professional Services Promotion Fund could help that productivity to grow much more quickly.

Conclusion

The lack of investment in our justice system has become a prominent issue and one of press and public concern. The case has been made by many groups, from charities, the professions and think-tanks, to the Justice Select Committee, on the need for long overdue investment in the justice system. The prolonged lack of resources is having an undeniable impact on access to swift justice and on the users of the system, including victims, witnesses and defendants in criminal cases and parties in a broad range of civil and family matters. Failure to invest in the Ministry of Justice and HMCTS budget, as well as the CPS and Home Office in the next Spending Review will hinder the Government's commitment to law and order and simply entrench systemic problems. Without proper funding the justice system will fail, and it will happen during this Parliament.