

LSB draft strategy consultation – Transform Justice response

[Transform Justice](#) is a national charity working for a fair, humane, open and effective justice system. We have published reports on issues such as digital court reform, the use of police custody and the quality of criminal defence advice and advocacy.

Our consultation response relates to the criminal defence sector. In 2019 we published a report ([Criminal defence in an age of austerity, zealous advocate or cog in a machine?](#)) on the quality of criminal defence advice and advocacy for defendants and suspects. The report points to a number of issues which affect the health of the defence market and the quality of service provided to clients.

This response does not follow the questionnaire format but we have tried to draw out where comments relate to particular themes, challenges, work streams and outcomes from the draft strategy.

Challenge: reforming the justice system and redrawing the regulatory landscape

Re the LSB strategy outcome: “Citizens know their rights and duties, understand legal services better and easily navigate the market to choose legal services providers with confidence.”

We urge LSB to recognise in its strategy that criminal defence is not a consumer-driven market. 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. The government argues that criminal legal aid lawyers are incentivised to do a good job in order to retain clients. But 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 “know their rights and duties”, “navigate the market” or judge competence – they rarely have the necessary legal education or information at hand to do this. It’s also difficult to switch lawyer if you’re 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 in this field. 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 and look at very few cases per firm.

In our report we make suggestions for how to improve quality which the LSB could use its position to promote, including:

- 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)
- 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

Challenge: Closing gaps in consumer protection

The feedback and complaints system in the criminal legal sector does not function well – our research found that defendants and suspects did not know a mechanism for complaints existed, did not trust it, or were put off using it in case it slowed their own case down. We see the existing

complaints system to present a gap in consumer protection, particularly for defendants in the magistrates' court who could be facing up to one year in prison and a criminal record. We support the development of an improved and better publicised client feedback and complaints mechanism in the criminal legal sector.

Challenge: Supporting responsible use of technology that commands public trust

In terms of technology, we would like to draw attention to the increasing use of video justice in criminal settings. Research into the [impact of video hearings](#) conducted by Transform Justice, and separate studies commissioned by the PCC for [Sussex](#) and the [government](#), finds video links impede effective participation and may prejudice justice outcomes. The collateral damage of video justice includes the harm to the lawyer-client relationship. Lawyers find it harder to develop a rapport with clients who appear over video and struggle to assess whether they have disabilities and conduct consultations before hearings. Research by the [Equality and Human Rights Commission](#) indicates that people with cognitive impairments and mental health conditions - often called "hidden disabilities" - particularly struggle to participate in virtual hearings. It seems very likely that the issues with virtual hearings apply to remote (phone or video) police station interviews. The charity Fair Trials [surveyed](#) defence lawyers and others in May 2020 to understand the impact of the increase in remote legal provision during lockdown on justice outcomes. They found that suspects in police custody are getting poorer quality legal advice and assistance, as a result of solicitors' reduced contact with their clients and limited attendance at police interviews.

We urge the LSB to ensure the quality of legal services for clients is put at the forefront of discussions about "supporting responsible use of technology" in criminal justice settings.

Challenge: lowering unmet legal need across large parts of society

The number of people prosecuted in court has been dropping steadily since 2009 and with it the amount of work available to criminal defence law firms and barristers. This fall in the volume of work, combined with reduced legal aid fees, makes it harder for criminal law firms and criminal barristers to make ends meet. The long-term trajectory is that large solicitors' firms will stop doing criminal work, and smaller criminal firms will close entirely.

This risks the creation of "legal aid deserts", particularly in rural areas which rely on a few small firms. Data from the Law Society shows that in Dorset and Mid Wales, over 60% of criminal law solicitors are over fifty years old, and in Norfolk and Cornwall, there are no criminal law solicitors under 35. As older lawyers retire and firms close, people in these areas may have to travel up to one hundred miles to see a defence solicitor, meaning many may not be able to access their right to a solicitor and free advice.

In its efforts to lower unmet legal need, we encourage the LSB to encourage regulators to make changes that will help defence practitioners survive. Some good work is already going on - for example those offering legal advice can now set up as a not-for-profit company which means they can access charitable income streams. The Solicitors Regulation Authority (SRA) has also proposed that freelance solicitors should be able to access legal aid funding in their own right rather than, as now, funding having to be channelled via an existing firm.

Work stream: Market intelligence work

The draft strategy acknowledges that the legal services market is not working as well as it should be and that the basic legal needs of many citizens are not being met. As we have outlined, we believe the criminal legal aid market in particular is not providing services of an acceptable quality to clients.

Alternative models for state-funded criminal defence may be part of the solution, such as the holistic defence approach taken by the Bronx Defenders in New York. Their client-centred approach connects defendants with an interdisciplinary team of advocates including *“criminal defense attorneys, family defense attorneys, civil attorneys, immigration attorneys, social workers, civil legal advocates, parent advocates, benefits specialists, investigators, and community organizers”*, to meet other legal and welfare needs. Client choice doesn’t come into it – the Bronx Defenders are one of two organisations delivering all public defence work in the area – but the approach has proved effective. A study found that holistic defence reduced both the likelihood and length of a custodial sentence. We encourage the LSB to include such models in its market intelligence work.