

Criminal Bar Association – Parliamentary Briefing

Overview

Criminal barristers have been engaged in escalating action to draw attention to the plight of the criminal justice system since April 2022.

As of 5th September criminal barristers will refuse to attend the Crown court, for all types of hearings including trials, indefinitely, in a final effort to save criminal justice.

Criminal barristers in England and Wales have suffered an average decrease of 28% in real earnings since 2006 and due to a combination of poor earnings and falling real incomes, a quarter of specialist criminal barristers have been lost over the last 5 years. In 2021 alone, 300 were forced to leave criminal practice, including 40% of the most junior criminal barristers. The median annual income for criminal barristers in their first three years is just £12,200.

Along with an insufficient pool of Judges, the huge attrition in the numbers of criminal barristers has been identified by the Lord Chief Justice as the most serious obstacle to delivering justice in our criminal courts. The substantial decline in our real earnings is the single biggest reason why we are facing an unprecedented exodus of colleagues from criminal work. It follows that, without immediate action to restore our real incomes, there is no prospect of reducing the inordinate delays that have already caused so much damage to the lives of those caught up in the criminal justice system. The current court case backlog stands at almost 60,000 cases.

Criminal barristers are self-employed. The majority of our defence work is funded by legal aid through the Advocates Graduated Fee Scheme (AGFS). In July 2022, the Government laid a Statutory Instrument to implement a 15% increase in legal aid fees for criminal barristers in England and Wales. But the increase in fees only applies to new cases from 30th September 2022 and not the almost 60,000 existing cases. Given the years it will take to clear the backlog, this means criminal barristers will not see the benefit of the 15% increase until the end of 2023 and beyond. The majority cannot

afford to wait that long and hundreds more will leave in the meantime, resulting in even longer delays for victims.

As it currently stands, and notwithstanding the additional number of criminal barristers that will leave the profession in the coming weeks and months, the current backlog of cases will only be reduced to 53,000 by 2025. This was a prediction made by the Secretary of State in March 2022 and illustrates the sheer scale of the problem. Sadly, many of the cases waiting for trial involve sexual and violent offences. It has become increasingly common for victims in serious sex cases to wait up to 1500 days for the case to conclude.

Scale of the Backlog

- The backlog currently stands at over 59,000. This equates to hundreds of thousands of victims, defendants and witnesses who have been left in limbo.
- The backlog was not caused by criminal barristers, who have been working hard to try to reduce it.
- Even before the pandemic struck, it had already rocketed 23% to 41,000 by March 2020. This was caused by deliberate Government cuts from 2019 to the number of days that Judges could sit.
- Since 2020, there's been a 340% increase in cases waiting more than one year.
- The pandemic added another 46% to the size of the backlog taking it to over 60,000 by June 2021. That is the highest in history. It has barely reduced since then.
- According to the Public Accounts Committee, the Government's "*meagre ambition*" to reduce the backlog to 53,000 cases by 2025 is "*unconvincing*". There is no persuasive plan to increase human capacity (judges and

- barristers) to deal with the scale of the crisis that is engulfing criminal justice.

Effect of Backlog on Victims, Witnesses and Defendants

- In the year to March 2022 there were over 1,000 trials across all criminal courts in England and Wales postponed at the last moment because there was no prosecuting or defence advocate available to deal with the case.
- In the first quarter of 2022 more than 370 trials were postponed for the same reason.
- Of those 370 trials, over 100 were cases of sexual offences and violence in the Crown Court.
- These delays, due to shortages of barristers, and before we started taking action, impact the lives of thousands of victims, defendants and witnesses. These people are told on the day they turn up to court that their trial has had to be delayed by months and sometimes for over a year just because there wasn't a barrister available to help.
- Shortages of barristers are therefore contributing to the longest delays we have ever seen to trials. It now takes an average of 700 days to get cases to trial in our Crown Courts. And if it's a rape case, that delay more than doubles to 1500 days.
- Nearly half of rape complainants walk away from prosecutions in despair because of delays.

Why aren't there enough Criminal Barristers?

- Legal aid rates have been cut by nearly 40% over the last 15 years.
- Criminal Barristers have suffered an average decrease of 28% in their real incomes over the last 2 decades.
- During the height of the pandemic, in a single year, our incomes collapsed by 23%.
- 83% of us were forced into personal debt or to use up our savings to keep ourselves going. And there was next to no Government support provided to help us.
- Specialist criminal barristers in their first 3 years of practice can expect to earn a median income of £12,200. That's below minimum wage and unsustainable.
- £47,000 is the average annual income (after expenses of 29% but before tax) for all full-time criminal barristers.
- Junior barristers can expect to earn no more than £126 (before expenses (29%) + tax) for hearings that can involve 10 hours of work, attending court for a full day and paying for their own travel.

Exodus from Criminal Practice

- A quarter of specialist criminal barristers have left over the last 5 years.
- Fewer than 2,400 prosecutors and defenders are left.
- Nearly 300 walked away from criminal practice last year alone.

- Nearly 40% of our most junior criminal barristers left in one year.
- The rate of attrition is speeding up. In 2020/21, the loss was 4 times faster than the previous year.
- Every single day we hear reports of more and more of our colleagues giving up to look for alternative work to pay their bills.
- Criminal barristers are exhausted and demoralised.
- 1 in 4 of us are working more than 60 hours a week.
- To keep the system going, criminal barristers typically work over weekends, evenings and even overnight undertaking crucially important work that exposes us to high levels of vicarious trauma and burnout.
- Work is often allocated, or becomes necessary, at very short notice (for example late in the afternoon for the following day) resulting in very unsocial hours and the inability to commit to or maintain family and social commitments. Much of this work ends up being unpaid.
- The low remuneration means it is proving extremely difficult to recruit to the profession and retain those presently undertaking criminal work, because the gruelling and punishing workloads are chronically underpaid. Consequently more and more barristers are leaving criminal practice altogether.

Action being taken by Criminal Barristers

- Criminal Barristers have been engaged in action since April 2022.
- Initially we refused to accept 'return' cases (covering the work of our colleagues). In June we moved to escalating days of action, followed by

alternate weeks of action (days and weeks during which we refused to attend at court).

- By ballot announcement on 22nd August 2002, 80% of Criminal Bar Association members voted in favour of indefinite action (2273 voted out of approximately 2400 specialist criminal barristers in this jurisdiction).
- Consequently, from 5th September we will refuse to attend at court, indefinitely, in all cases funded by the AGFS fee scheme (legal aid).
- This ballot follows 9 months of efforts made to persuade the MoJ to fully implement the recommendations of the independent Criminal Legal Aid Review, led by Sir Christopher Bellamy, and which the Secretary of State has had since 30.11.21.
- Ministry of Justice figures suggest that for every full working week that criminal barristers take action, around 1300 cases, including 300 trials, will be disrupted.
- However the true figures may be significantly higher because many cases are being adjourned by judges in advance of action (causing significant delay to those cases) in order to prevent disruption on the day.

Independent Review of Criminal Legal Aid [CLAR]

- Commissioned by Government the review took 2½ years to report in December 2021.
- It recommended an immediate increase of 15% to AGFS fees (criminal legal aid for barristers fees) as the “*minimum necessary*”, with “*no scope for further delay*” and said “*further sums may be necessary*”.

- Unfortunately, CLAR did not take into account the 23% collapse in earnings during the pandemic, or the further loss of 10% of our barristers.
- However it did include recommendations for payment for written work (currently unpaid) and an Advisory Board.

Government Response to CLAR

- The Government response has been no immediate increase in fees and no timetable for implementation of the further recommendations. In the meantime barristers continue to leave criminal practice making it more and more difficult for the criminal justice system to continue to function.
- The MoJ claimed for months that it wasn't able to apply the recommended 15% increase to the current cases in the 58,000 backlog for "legal reasons".
- The CBA challenged that claim in a letter before action (dated 05.07.22) through a team of leading QCs and Mishcon de Reya.
- On 11.07.22 the MoJ conceded that they had been wrong in law.
- There is therefore now no legal reason why Government cannot apply the 15% to the current backlog cases. By doing so, they would be implementing the CLAR recommendation that the increase should be introduced with "*no scope for further delay*".
- The cost of applying any 15% increase to current AGFS representation orders over the period of 30 months from 30.09.22 to 31.03.25 (Spending Review period) is approximately £35m.

- That equates to an additional monthly expenditure on AGFS of only £1.16m (or £3.5m per quarter).
- However, if Government continues to insist that the 15% increase will only be applied to new cases from 30.09.22, criminal barristers will not see any financial benefit for years to come because the backlog (paid on existing low fee rates) will take years to clear first before the new cases are dealt with and paid.
- In the meantime, hundreds more junior barristers will have left in despair.
- 15% is too little, too late. Most of it will have been eaten up by escalating inflation (which may reach 18%) by the time it is implemented, and it barely makes up for the 23% collapse in our incomes last year.
- There has been no agreement from Government to pay us for written work.
- There is no recommendation or commitment from Government for a pay review body, equivalent to other areas of the public sector, to make pay recommendations on an annual basis and counter the effects of annual inflation.

What is the Criminal Bar Association asking for?

- **The CBA are asking the Government to commit to applying the 15% increase in legal aid fees to existing cases, as well as new cases starting from 30th September 2022, in order to give effect to the CLAR recommendation of an urgent uplift.**
- **Further, the CBA are asking for swift implementation of further reforms, to stem the exodus from criminal practice, including those recommended by the Government's Independent Review of Criminal Legal Aid.**

Those further reforms are:

1. **An overall increase of 25% to fees claimed under AGFS – the CBA has informed the MoJ that 15%, described by the Independent Review in 2021 as the '*minimum necessary*', with '*no scope for further delay*' and with the caveat that '*further sums may be necessary*' will not suffice to stem the exodus. A further 10% is needed swiftly.**
2. **An effective pay review body and index linking of future fee increases.**
3. **Payment for written work – this is currently unpaid but was a recommendation made by the Independent Review into Criminal Legal Aid.**
4. **Payment of a second brief fee for section 28 cases (serious sexual offences).**
5. **A clear timetable for implementing the further reforms recommended by the Independent Review.**

- We maintain that 25% is the bare minimum amount necessary at this juncture, to stabilise the crisis in retention and recruitment.
- The 25% can easily be paid for from the £240m saved by Government in Crown Court legal aid spending during the pandemic in 2020/21.
- In fact, the £240m would pay for the next 4 years of a 25% increase without any recourse to the taxpayer.
- Further, Government has profited £264m since 2010 by selling off 164 court buildings. That money should have been reinvested in the criminal justice system.

The solution to this problem lies in the hands of Government.

We continue to ask the Lord Chancellor, and Under Secretary of State for Justice, to meet with us, urgently, to resolve the crisis.

31st August 2022

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