

Evidence to the Commission on Justice in Wales from Transform Justice

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Transform Justice

Transform Justice is a small charity set up six years ago to advocate for a more effective, fair, open and humane justice system in the UK. We have focussed our work mainly on England and Wales and on criminal justice. We have published a number of reports, many encompassing original research including on diversity in, and the training of, the magistracy, on unrepresented defendants, on the Sentencing Council and on digital court reform. We will respond to some, though not all of the issues this Commission is addressing.

Access to justice in the criminal courts in Wales

The criminal law of England and Wales and the processes surrounding it are very complex. The system is designed to work efficiently and effectively when people have professional legal advice and professional advocates at court. It is not designed for unrepresented defendants and suspects, and fails to meet their needs.

All those who are arrested by the police and detained for interview have an automatic right to free legal advice in the police station. However there is evidence that many suspects do not use a lawyer at this stage. This means that legal rights may be compromised. We need to understand why suspects do not access legal advice, and devise a strategy to minimise this problem.

Those who have been charged with an offence do not have an automatic right to free professional legal advice. In the magistrates' court, legal aid is not available for many offences and, where available, is restricted to those whose household income is above £22,325. In the Crown Court, all those with a disposable household income of over £37,000 are not eligible at all for legal aid while many of those with incomes below this must contribute to the cost of their defence.

There is no data on the number of unrepresented defendants in the magistrates' courts and minimal data on those in the Crown Court. Anecdotal evidence and surveys done by the Magistrates' Association suggest that 20-30% of defendants in the magistrates' courts are unrepresented, and MoJ figures suggest that 7% of defendants are unrepresented at their first appearance in the Crown Court. The number of unrepresented defendants in all courts appears to have risen in the last five years, despite no significant change in the criteria for eligibility for criminal legal aid.

There is no research on the motivation for those who represent themselves, but evidence from research by Transform Justice and by the Ministry of Justice suggests that most of those in the magistrates' courts and many of those in the Crown Court do not choose to appear unrepresented. They are not eligible (or cannot prove they are eligible) for legal aid and can't afford legal advice.

Both the MoJ <http://www.transformjustice.org.uk/wp-content/uploads/2018/04/Exploratory-research-into-unrepresented-defendants-FOI-release-04-2018-1-1.pdf> and Transform Justice http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf research projects were qualitative and neither featured interviews with defendants. Both however suggest that unrepresented defendants struggle to effectively participate and that their rights to a fair hearing may be compromised. Often

- They don't understand the nature of the charge nor how, if relevant, to challenge the particular charge with the CPS

- They don't understand how they should plead – they struggle to understand the discounts available and what constitutes a viable defence.
- If they go to trial, they hardly ever get advance disclosure and don't know what to ask for. When they do receive it, they don't know how to analyse it.
- They struggle to cross examine and, if convicted, don't know how to mitigate.

There is collateral damage. Witnesses may be called unnecessarily by unrepresented defendants and also may be subject to aggressive and/or inappropriate questioning.

There is no easy solution to the challenges posed by unrepresented defendants but some suggestions are

1. Examine whether it would be more cost effective (given the extra costs involved in dealing with unrepresented defendants) to offer free legal advice to all Crown Court defendants and all those in the magistrates' court charged with imprisonable offences.
2. Expand the scope of work of the duty solicitor in the magistrates' courts so they can represent those charged with imprisonable offences at any stage.
3. Improve public legal education and information available to unrepresented defendants to help them better understand the process.
4. Mainstream the needs of unrepresented defendants into all policy making and into the training of judges, legal advisers and prosecutors.

Virtual and digital courts

The Lord Chancellor said in a recent interview that digital justice will “increase access to justice phenomenally because it's going to make it really easy for people to vindicate their rights”. In the criminal sphere the digital court reform programme involves

1. Increased use of video and telephone links for all court proceedings apart from trials, with proposals for hearings where no one will be in the court-room itself and all parties will be on the telephone or on a video screen.
2. Introduction of a system whereby pleas can be entered online. Initially this will only be available to solicitors but there are plans to extend the facility to defendants.
3. An online criminal court where those pleading guilty are dealt with end to end online.
4. An expansion of the single justice procedure (where cases are dealt with in a closed court by one magistrate) to more cases, with the “paperwork” done by defendants/lawyers online.

Since many of these proposals have not been implemented, it is hard to say what impact they will have on access to justice. In this submission we will focus on defendants – the issues affecting witnesses are very different.

Video links

It is said that video links increase access to justice through making courts more convenient. They have been in use from prisons since 1999 and from police stations since 2010. Defendants who appear in court from prison do not have to spend all day travelling to and from court in an uncomfortable van for a short court hearing. If they come to court, they also risk losing their prison place. This convenience make video links popular with most (not all) prisoners but there is evidence that use of such links may negatively impact access to legal advice and effective participation, particularly for some vulnerable groups.

The Transform Justice research study http://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March2018report.pdf suggested several ways in which access to justice is impaired

- Video links in court force lawyers and their clients to have most of their consultations on video. The relationship between lawyer and defendant is impaired by the disconnect. It is difficult for the advocate to develop a rapport and maintain trust. The video consultation slots are maximum fifteen minutes, but this is frequently reduced to less than ten.
- In court it is difficult for the defendant to communicate with those in the court, including their lawyer
- Some defendants appear to get frustrated by their enforced distance from the proceedings, and become visibly frustrated or angry. Others zone out, stop listening and probably don't understand what has happened in their case.

We are particularly concerned by evidence of children appearing on video links in their court cases <http://scyj.org.uk/2018/04/scyj-releases-report-and-open-letter-on-video-links-and-child-defendants/>. There is good evidence that most child defendants struggle to participate when they are in a courtroom, and that they struggle even more on video screens.

Online justice

There is no published research on the engagement of defendants with online court proceedings. Clearly doing something online can be more convenient and easier for those who are digitally proficient. But there are risks to access to justice in online criminal proceedings

Entering information online can be easier than on a paper form, but the legal concepts are complicated and the ramifications in terms of criminal records are difficult to understand. There are some concerns that, in the case of the online criminal court, online pleas and online forms, defendants (many of whom may have English as a second language) may enter guilty pleas without understanding whether they have a viable defence and the implications of their plea. An educated middle class man pleaded guilty to fare evasion when he was innocent of the crime <http://www.transformjustice.org.uk/no-conviction-is-trivial-the-flaw-in-online-guilty-pleas/>. The risk is that many such mistakes will be made by vulnerable people.

We recommend that research be undertaken to ascertain how existing video links and any new digital developments impact on access to justice, particularly on effective participation.

Justice reinvestment

Transform Justice has published two reports on justice reinvestment <http://www.transformjustice.org.uk/wp-content/uploads/2015/12/TRANSFORM-JUSTICE-REHABILITATION-DEVOLUTION.pdf> http://transformjustice.org.uk/main/wp-content/uploads/2014/02/Transform-Justice_Justice-reinvestment_Feb14.pdf. We are convinced that devolving budgets to local areas offers enhanced opportunities for co-operation and to incentivise criminal justice agencies to use the most efficient and effective sanctions, rather than resorting to the inappropriate use of prison and prosecution.

In England and Wales there have been some experiments with the devolution of custody budgets. The most successful was the Youth Justice Board led "pathfinder" pilot project whereby the custody budget for the children imprisoned from particular local authorities was delegated to consortia of them. If the consortia reduced the use of custody, they were able to use the money saved however they chose. This project incentivised co-operation and practice to reduce the unnecessary use of

custody. Use of custody reduced considerably in the pilot areas but the pilot was abandoned when a new administration came in.

The YJB also led the move to delegate the remand budget to local authorities. Legislation to delegate the remand budget to all local authorities in England and Wales was implemented in April 2013. Since then the numbers of children on remand has reduced in line with the child custody population. It is slightly surprising that the proportion of children on remand has not reduced, and this issue should be subject to analysis and research.

Wales offers significant opportunities for justice reinvestment, to the whole of Wales and/or to local areas within Wales. We would advocate any of the following

1. The delegation of the custody budget for Welsh remand and sentenced prisoners to Wales. This would enable Wales to put into place strategies and practices to reduce the unnecessary use of custody and, if successful, to invest the money saved in prevention and rehabilitation services.
2. The delegation of the whole of the budget for custody and criminal justice disposals to Wales. A bigger “pot” would give the Welsh assembly more flexibility to take a different approach to the whole of the tariff, including incentivising out of court disposals.
3. The delegation of the budget for courts administration (in addition to the above) to Wales. At the moment the Welsh administration has little control or influence over courts administration, including which courts are closed. Yet courts used to be owned by local authorities. The whole of the budget for courts administration could be delegated to Wales. Wales could then either manage courts across the nation, or delegate management responsibilities to local areas. Judges and magistrates should be fully engaged in management oversight, as they were when magistrates’ courts committees existed or, as now, on the board of HMCTS.

Wales should explore the advantages of delegating budgets to local areas, should any financial authority be granted to Wales as a whole. Budgets could be delegated to PCCs or to local authorities – or maybe both. Youth justice budgets could be delegated to local authorities while adult custody and the probation budget be delegated to PCCs.

Over-use of imprisonment

Transform Justice has long been concerned about custodial sentence inflation and the inappropriate use of short prison sentences and remand. It is hard to see how the Welsh government can exercise influence over these trends, given that they are driven by primary legislation, sentencing guidelines and Court of Appeal judgments. However, there are probably some actions it could endeavour to implement to prevent unnecessary use of custody

1. Take over responsibility for probation in Wales, both NPS and CRCs. This would enable Wales to run probation in a different way. One of the key reasons why magistrates use short custodial sentences is lack of trust in, and knowledge of, the alternatives. A Welsh run probation service could address that need.
2. Overuse of remand could be addressed through investment in bail accommodation and in support services to help vulnerable defendants get to court.
http://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March2018report.pdf
3. Delegation of budgets could incentivise a reduction in the unnecessary use of custody, through offering enhanced support to those at risk. The decision to imprison would still be made independently by the judiciary, and there would be no interference in that decision.

Out of court disposals

Use of out of court disposals has fallen more steeply than that of community sentences. Yet out of court disposals have a good record in reducing reoffending and in achieving victim satisfaction. They are considerably cheaper than court prosecutions. We believe that there is considerable scope for Wales to increase the number of out of court disposals and thus decrease court disposals. We would of course not wish to “net widen” by increasing the number of out of court disposals at the expense of offences diverted from the formal criminal justice system. There are a number of ways Wales could increase the use of out of court disposals, including using the deferred prosecution model as piloted in West Midlands. http://www.transformjustice.org.uk/wp-content/uploads/2017/12/November2017_Less-is-more.pdf

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