



**Commission on Justice in Wales**

**JUSTICE submission for evidence**

**July 2018**

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## **Introduction**

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. JUSTICE has been invited to give evidence before the Commission, and while noting the invitation for participants to address pre-defined questions, our submissions are constrained to the following topics, which fall within our expertise:
  - Court closures
  - Digital exclusion
  - Legal advice shortages
  - Criminal law advice and representation

## **Court closures**

3. In February 2016, the Lord Chancellor made the decision to close 10 courts and tribunals in Wales:<sup>1</sup>
  - Dolgellau Crown and Magistrates' Court
  - Holyhead Magistrates' Court
  - Llangefni Civil and Family Court
  - Carmarthen Law Courts (The Guildhall)
  - Prestatyn Magistrates' Court
  - Brecon Law Courts
  - Bridgend Law Courts
  - Neath and Port Talbot Civil and Family Court
  - Pontypridd Magistrates' Court
  - Wrexham Tribunal and Hearing Centre (Rhyd Broughton)

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<sup>1</sup> 'Response to the proposal on the provision of court and tribunal services in Wales' (Ministry of Justice, HM Courts & Tribunal Services, 11 February 2016), available online at <https://consult.justice.gov.uk/digital-communications/proposal-on-the-provision-of-court-and-tribunal-es/results/wales-consultation-response.pdf>.

4. It was conceded by HMCTS at the time the decision was made, that the closures would cause increased travel times for court and tribunal participants needing to attend alternative court locations,<sup>2</sup> but that digitisation of courts would eventually reduce the general need for participants in the justice system to attend court in person.<sup>3</sup>
5. Access to the courts is a fundamental feature of the common law of England & Wales<sup>4</sup> and the right to a fair trial under Article 6 of the European Convention on Human Rights ('ECHR'),<sup>5</sup> which economic rationalisation cannot derogate from.
6. It is important that in light of court closures in Wales, HMCTS and the Commission think innovatively about how the court and tribunal estate can be designed to promote access to justice for all Welsh court users.
7. The court and tribunal estate should be designed and deployed flexibly, to account for the Welsh context.
8. In particular, regard should be given to servicing remote areas with transport infrastructure shortages and socio-economic deprivation, as participants in those areas are likely to experience difficulty in accessing courts.
9. In JUSTICE's Working Party report *What is a Court?*, we recommended reforms to the court and tribunal estate in England & Wales that would make the estate flexible in its use of hearing rooms.
10. Reforms should place court users at the heart of the reforms, with a balance between the needs of parties, judicial officers, security, court staff and the value

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<sup>2</sup> For instance, the closure of the Dolgellau Crown and Magistrate's Court in North-West Wales will see court participants face a minimum two-and-a-half hour round trip by car to attend the alternative court site in Caernarfon, and those forced to rely on public transport on the T2 Bangor-Aberstwyth bus route face a three hour round trip using a service that departs at two hour intervals.

<sup>3</sup> HMCTS, *Response to the proposal on the provision of court and tribunal services in Wales* (11 February 2016) p. 11, available online at <https://consult.justice.gov.uk/digital-communications/proposal-on-the-provision-of-court-and-tribunal-es/results/wales-consultation-response.pdf>.

<sup>4</sup> 'Inherent in the rule of law'; *R (UNISON) v Lord Chancellor* [2017] UKSC 51 para 66.

<sup>5</sup> See *Airey v Ireland* [1979] ECHR 3, (1980) 2 EHRR 305 para 27.

and nature of the claim.<sup>6</sup>

11. We recommended the use of non-traditional spaces to hold certain court and tribunal proceedings, guided by security concerns, the value of the claim, and the level of formality demanded by the specific proceedings.<sup>7</sup>

12. We would commend to the Commission innovative thinking in the use of 'justice spaces' in Wales.

13. For instance, in those communities impacted by court closures, there may be other civic spaces suitable for use as by visiting judicial officers, whether on the basis of:

(a) A peripatetic system, where judges travel throughout the country for hearings, servicing areas that do not have a 'traditional' judicial presence; or

(b) Courts and tribunals hold hearings on a 'pop-up' basis in towns on a rotational basis dictated by demand.

14. Spaces such as local council offices, libraries, community centres and schools would be suitable for 'pop-up' court hearings for matters needing little recourse to formal security arrangements.

15. While these spaces may not be appropriate for indictable criminal matters, there is potential for their use in parts of Wales impacted by court closures for certain kinds of civil claims and summary criminal matters where the defendant is on bail.<sup>8</sup>

16. We note that a 'pop-up' court has previously been tested in Aberystwyth in February 2016, a community in a region of Wales impacted by court closures.

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<sup>6</sup> JUSTICE, *What is a Court?* (May 2016) para 2.14 - 2.15, available online at <https://justice.org.uk/what-is-a-court/>.

<sup>7</sup> *ibid* para 3.12.

<sup>8</sup> *ibid* para 4.10 - 4.17.

17. Communities such as Dolgellau, where court closures and remoteness may have frustrated access to courts, could be serviced by 'pop-up' courts, either on an as needs or peripatetic basis.

## Digital exclusion

18. The reduction in the size of 'bricks and mortar' court estate in England & Wales through court and tribunal closures has been met by a concomitant investment in 'Online Justice Services',<sup>9</sup> as much of the court estate moves into the digital realm.

19. Examples of the digitisation of court processes include:

- (a) The pilot of an Online Court for England & Wales for low value money claims falling below a soft-launch jurisdictional threshold of £10,000;<sup>10</sup>
- (b) The pilot-testing of virtual hearings for case management purposes and for electronic evidence exchange in the immigration tribunal;<sup>11</sup>
- (c) The nation-wide implementation of a fully online divorce application process;<sup>12</sup> and,
- (d) Online pleas for traffic offences.

20. While there is much to commend in the use of Online Justice Services to promote economy, efficiency and access to justice for some, digitisation also runs the risk

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<sup>9</sup> Online Justice Services is a portmanteau term we used describing any court service that has been placed online; JUSTICE, *Preventing Digital Exclusion* (June 2018) p. 4, available online at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf>.

<sup>10</sup> With the intention that the jurisdictional threshold will be lifted, and that it is to become the compulsory jurisdiction for low value claims in England and Wales, see Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016) available online at <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf%20118>.

<sup>11</sup> J. Aitken, President of the First-tier Tribunal (Social Entitlement Chamber) in Senior President of Tribunals' Annual Report (2017) 15.

<sup>12</sup> 'Fully digital divorce application open to the public' (HMCTS Online, 6 May 2018) available online at <https://www.gov.uk/government/news/fully-digital-divorce-application-launched-to-the-public>.

of marginalising many of the most vulnerable members of society.

21. This risk is amplified in parts of England & Wales where there are infrastructure barriers to Online Justice Services.
22. For instance, Welsh participants may face challenges in accessing 'online justice', whether through shortages in infrastructure related to mobile access,<sup>13</sup> broadband internet, or the general scarcity of services that might be apt to provide assistance to the 'digitally excluded'.
23. People in remote parts of Wales may be impacted by a convergence of no mobile coverage, a lack of support services to assist in the use of digital services and poor transport infrastructure to commute to services in neighbouring communities.<sup>14</sup>
24. HMCTS' 'Assisted Digital' project is a plan to provide technical assistance for participants using all new Online Justice Services, and remains in its infancy.
25. The efficacy of Assisted Digital is essential to guarantee the uptake of Online Justice Services and access to justice generally. Without an effective Assisted Digital service, many potential court users may be left behind.
26. In our Working Party report *Preventing Digital Exclusion*, we recommended that HMCTS test Assisted Digital in more remote parts of the United Kingdom.
27. Assisted Digital is being provided by the Good Things Foundation in over 5,000 'Online Centres' located across England & Wales. Notwithstanding the number of locations serviced, there are gaps and shortages in services for South West, Mid and North-West Wales.<sup>15</sup>

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<sup>13</sup> While mobile access across Wales is improving, coverage for mobile data services remains very low, at 29%, Ofcom, 'Connected Nations 2017 Report' 15 December 2017 available online at [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0024/108843/summary-report-connected-nations-2017.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0024/108843/summary-report-connected-nations-2017.pdf).

<sup>14</sup> *Supra* note 9 p. 27.

<sup>15</sup> For instance, there are no services between Pembrokeshire and Aberystwyth and none within the communities of Snowdonia; 'Find a centre' Online Centres Network, available online at <https://www.onlinecentresnetwork.org/ournetwork/find-centre>.

28. In the absence of Online Centres, Welsh justice participants in more remote parts of the country who face infrastructure barriers need to be able to access Assisted Digital from outside this network through ‘trusted places’<sup>16</sup> with the digital capability and support to enable users to contact Assisted Digital services online or by telephone.
29. To promote uptake, both Online Centres and ‘trusted places’ with digital capability need to be adequately signposted within communities.
30. In order to assess the impact of the digitisation of court processes upon access to justice in Wales, HMCTS should consider testing Assisted Digital in parts of North West, South West and Mid-Wales, with emphasis on those areas beset by a convergence of the following factors:
- (a) Court closures;
  - (b) Chronic shortages of legal aid advice and representation; and
  - (c) Poor infrastructure relating to mobile or internet connectivity.
31. JUSTICE also considers it necessary that the digitisation of court services be met by an HMCTS undertaking to provide those services on the basis of Welsh language parity.
32. We note the recommendations made in the *Civil Courts Structure Review* with respect to future provision of the Online Court (‘OC’) in Wales, and the need to build Welsh language into the OC to abide by the statutory requirements set out in the Welsh Language Act 1993.<sup>17</sup>
33. In particular, we note Lord Justice Briggs’ (as he then was) undertaking that Case Officers conducting ‘stage 2’ functions in the OC would be bi-lingual, as would

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<sup>16</sup> In *supra* note 14 at p. 23 we suggested that the statutory duty on local authorities to ‘provide a comprehensive and efficient library service’ made local libraries outside the ‘Online Centres’ network an appropriate location for users to gain access to ‘Assisted Digital’ services.

<sup>17</sup> *Supra* note 10 p. 62.

'stage 3' judges.

34. As the civil justice system moves to normalise alternative dispute resolution mechanisms, it is important that HMCTS staff carrying out those functions, whether Court Officers in the OC conducting mediation over the phone from a remote site, or judicial staff resolving disputes online, are able to facilitate resolution of claims in both English and Welsh swiftly.

35. Online interfaces and HMCTS websites should be available in Welsh, with the capability to readily convert user's input in online forms and processes from Welsh to English and vice versa.

36. More generally, recourse to Welsh language should not be a source of delay in proceedings.

### **Legal advice shortages**

37. Wales has been disproportionately affected by the changes to legal aid brought about by the Legal Aid Sentencing and Punishment of Offenders Act 2012 ('LASPO').

38. As of last year, there had been a 29% reduction in legal providers in Wales from pre-LASPO levels, as against 20% for the whole of England & Wales and 13% for London.<sup>18</sup>

39. Regional parts of Wales have been particularly impacted by the LASPO cuts; North West Wales has a population of over 300,000 yet only one legal aid provider for housing matters.<sup>19</sup>

40. In recognition of the impact of the LASPO cuts, our 2018 report, *Innovations in personally-delivered advice: surveying the landscape* ('Innovative Advice Report')

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<sup>18</sup> A. Asthana, 'Number of legal aid providers falls 20% in five years, figures show' (Guardian Online, 19 September 2017) available online at <https://www.theguardian.com/law/2017/sep/19/number-of-legal-aid-providers-falls-20-in-five-years-figures-show>.

<sup>19</sup> M. Fouzder, 'Housing legal aid 'protected' for those most in need, MoJ insists' (Law Society Gazette, 17 May 2018), available at online at <https://www.lawgazette.co.uk/law/housing-legal-aid-protected-for-those-most-in-need-moj-insists/5066148.article>.



considered the importance of outreach legal services at some length.

41. For remote and rural parts of Wales, with legal advice shortages, public transport difficulties and infrastructure barriers to 'online justice', bringing legal advice to the user may be the only possible means of providing a legal service.<sup>20</sup>
42. 'Pop up' legal clinics may represent a partial solution to legal advice shortfalls in such areas, but need to be able to gain access to 'trusted places'; i.e., areas frequently used by the target population, whether welfare agencies, community centres, doctor's surgeries, etc.<sup>21</sup>
43. This may be difficult in parts of Wales where there is, more generally, a shortage of services being provided to the community, such that the prospect of identification and co-opting these services for 'pop-up' advice may be limited.<sup>22</sup>
44. For parts of Wales impacted by both court closures and shortages in advice services, there may be merit in 'pop-up' legal services from, for instance, Cardiff or Swansea, following 'pop-up' or 'peripatetic' court services to more remote parts of Wales.
45. These 'pop-up' legal services should be digitally capable and able to assist in the use of Online Justice Services where there are obstacles for the client to do so.
46. There should be advanced notice given to communities of pop-up legal services, through adequate signposting of independent, authoritative legal advice and information on HMCTS's Online Justice Services.<sup>23</sup>
47. A 'pop-up' or 'outreach' lawyer visiting a smaller community should be able to access Online Justice Services, for instance, by use of Wi-Fi dongle, and should

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<sup>20</sup> Innovative Advice Report p. 5.

<sup>21</sup> *ibid*, see also S. Forell and A. Gray, 'Outreach legal services to people with complex needs: what works?' Justice Issues, Law and Justice Foundation of New South Wales (October 2009) pp. 7-9.

<sup>22</sup> Co-located 'pop up' clinics may provide the answer, but may suffer from difficulties in developing the necessary rapport with medical staff to promote referrals to legal advice staff co-located on site.

<sup>23</sup> *Supra* note 9 p. 73.

be able to scan and upload relevant client documents to a centralised database or cloud.

48. Further, JUSTICE acknowledges the importance of the National Advice Network in providing strategic direction for the advice sector in Wales.<sup>24</sup>

49. Advice services delivered remotely from urban centres in Wales are essential to address on the ground service shortfalls and supplement outreach services.

50. Reiterating recommendations from JUSTICE's Working Party report *Delivering Justice in an Age of Austerity*, we consider that an effective online and telephone platform provided by the legal aid sector is necessary<sup>25</sup> to address the emergence of 'advice deserts' in Wales.

## **Criminal law advice and representation**

### *Service shortfalls*

51. JUSTICE has had the benefit of seeing the evidence submitted to the Commission by the Wales & Chester Circuit and notes its evidence that the per capita spend on criminal legal aid in Wales is only 74% of the figure for England and that the main chambers of the Welsh and Chester Circuit have declared that their members have individually decided to no longer undertake criminal legal aid work.

52. JUSTICE has concern that the lower per-capita spend on criminal justice in Wales will have consequences for both the quality of representation and judicial outcomes for accused in the jurisdiction.

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<sup>24</sup> 'National Advice Network' (Welsh Government Online, 17 August 2017) available online at [https://gov.wales/topics/people-and-communities/communities/advice-services/national-advice-network/?lang=en\\_](https://gov.wales/topics/people-and-communities/communities/advice-services/national-advice-network/?lang=en_)

<sup>25</sup> See reiteration of this point by the Low Commission which recommends a 'second tier internet/telephone specialist advice service for the whole of Wales', 'Wales manifesto for advice' March 2016 p. 2, available online at [https://www.lowcommission.org.uk/dyn/1459955052268/WalesManifesto\\_English\\_web.pdf](https://www.lowcommission.org.uk/dyn/1459955052268/WalesManifesto_English_web.pdf).

53. Further, across Mid and West Wales, in excess of 60% of criminal duty solicitors are over 50 years of age.<sup>26</sup>

54. This inevitably gives rise to concerns of a 'generational cliff' and the prospect of chronic shortfalls in criminal law expertise in Wales in the not so distant future, particularly in light of funding shortages for criminal legal aid creating a disincentive for prospective practitioners pursuing a career in criminal law.

55. There can be no remedy for this problem, other than a significantly greater investment in criminal legal aid for Wales.

56. At a minimum, we would recommend:

- (a) an investment in criminal legal aid to put Wales at parity with England;
- (b) a review of funding for travel costs for the criminal defence profession, with particular regard to servicing rural parts of Wales; and
- (c) consideration within Stage 1 of the LASPO review of the viability of the criminal justice system in Wales under the current funding regime and whether the system at present is a disincentive to the pursuit of a criminal law career in Wales.

#### *Police station advice*

57. A suspect's access to legal advice, prior to police interview, is fundamental to the guarantee of the right to a fair trial set out in Article 6 ECHR,<sup>27</sup> and codified in section 58 of the Police and Criminal Evidence Act 1984 ('PACE').<sup>28</sup>

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<sup>26</sup> Law Society of England and Wales, 'Criminal duty solicitors: a looming crisis' (data derived from Law Society's Criminal Litigator Accreditation Scheme membership data from 2017-18) available online at <http://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-lawyers/>.

<sup>27</sup> *Salduz v Turkey* (2009) 49 EHRR 19; for the UK context, see *Cadder v HM Advocate* [2010] UKSC 43; 2011 SC (UKSC) 13, which JUSTICE intervened in.

<sup>28</sup> Code C of PACE also requires that detainees be informed that they can at any time consult and communicate privately with a solicitor, whether in person, over the phone or in writing.

58. Early legal advice and attendance at the police station is essential. Attendance in person guarantees an evaluation of whether a suspect is in a physical state to be interviewed, shields a client against improper police pressure or coercion during interview and guarantees that evidence procured during the interview process is admissible should the matter proceed to trial.<sup>29</sup>

59. However uptake of legal advice once a suspect is in police custody remains low.<sup>30</sup> Reasons for waiver of the PACE right to a solicitor's advice are varied, but may include:

(a) the suspect's belief that there was no need for a solicitor;

(b) a belief that they had done nothing wrong;

(c) concession that they were guilty or;

(d) waiving on the basis of concern that the time for a solicitor to get to the station would be a source of delay.<sup>31</sup>

60. Code C of PACE requires that if a detainee declines legal advice, a police officer should point out that the advice includes the right to speak to a solicitor over the phone, though there are concerns as to whether this obligation is being routinely abided by.<sup>32</sup>

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<sup>29</sup> See JUSTICE Scotland working party report, *Legal assistance in the police station* (June 2018), p. 57 available online at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/JUSTICE-Scotland-Legal-Assistance-in-the-Police-Station.pdf>.

<sup>30</sup> Research suggests the percentage of requests for police station advice in England & Wales has increased to somewhere between 45% (Pleasance) to 60% (Skinns); P. Pleasance et al. 'The justice lottery? Police station advice 25 years on from PACE' *Crim LR* [2011] 3; L. Skinns, 'The right to legal advice in the police station: past present and future' *Crim LR* [2011] 19. English & Welsh studies are somewhat constrained, by typically deriving data from a discrete number of stations but nevertheless, the uptake is lower than might be expected.

<sup>31</sup> *ibid* Skinns 22; see also V. Kemp (2018) *Digital Legal Rights: Users' Perspectives on PACE Safeguards* (forthcoming).

<sup>32</sup> *ibid* Kemp, see also V. Kemp, 'No Time for a Solicitor: Implications for Delays on the Take-up of Legal Advice', *Criminal Law Review* (2013a): available online at <http://eprints.nottingham.ac.uk/51257/1/Kemp%20No%20time%20for%20a%20solicitor.pdf>.

61. To promote the uptake of advice, emphasis should be placed on community legal education in Wales.
62. As per the recommendations in our Working Party report for Scotland, *Legal assistance in the police station* ('Legal Assistance report'), Wales would benefit from a greater array of publicly accessible information on the value of legal representation in the police station.
63. This information should be explicable to lay users, and available in plain English and Welsh.
64. For example, we would suggest this information be made readily available on the following websites:
- (a) The Welsh government 'Justice' page;
  - (b) Law Wales;
  - (c) The Bar Council for England & Wales;
  - (d) The Equality and Human Rights Commission for Wales.
65. In the Legal Assistance report, we also recommended the Scottish Government give urgent consideration to the production of a video to be played to arrested suspects during or after the booking process, which would explain their rights in custody, including the right to a solicitor.
66. We would recommend the production of a similar video in Wales, produced in both English and Welsh, with a suspect afforded the opportunity to choose the language version most suitable for them.
67. England and Wales has Legal Aid Agency Contract specifications which require legal advisers to contact their client within 45 minutes of receiving a referral,<sup>33</sup> though there are doubts as to whether this obligation is consistently upheld, as

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<sup>33</sup> There is also the statutory obligation under s 58 of PACE that suspects should receive advice 'as soon as practicable'. The LAA Contract Specifications may go some way to answering why Scotland has a higher rate of waiver than that Kemp's research reveals in two unnamed E & W jurisdictions.

there is evidence of practitioners only attending a client in person at the station some hours after they first receive a referral, in response to indications from the police as to when they will be ready to interview.<sup>34</sup>

68. Understanding the provision of police station advice in Wales requires a strong evidence base and regard to the provision of advice to remote areas.

69. Wales may benefit from qualitative and quantitative research assessing the following:

- (a) The number of accredited police station representatives and solicitors per capita in Wales, with a particular regional specific break down;
- (b) The average wait time for PACE advice in a given Welsh police station, with the ability to contrast urban centres against more remote areas;
- (c) The reasoning of participants in waiving or engagement of advice through section 58 of PACE.

## **Conclusion**

70. Our submissions are modest, but address matters the Commission can pragmatically consider and recommend;

- (a) a realistic assessment of obstacles to the uptake of Online Justice Services in Wales;
- (b) a realistic assessment of the capability of the legal profession in Wales as currently constituted to effectively respond to digitisation and to effectively provide representation to the Welsh population (in particular those in remote areas);
- (c) innovative thinking with respect to the deployment of the court estate in Wales;

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<sup>34</sup> *Supra* note 31; *supra* note 32 p. 190-191.

- (d) the need for qualitative and quantitative research that is Welsh-specific;
- (e) signposting of available services; and
- (f) emphasis on community legal education.

JUSTICE

11 July 2018