

**Neoliberal Austerity: The Impact of Political Injustice on the Universal Right to Legal Aid Advocacy for Defendants Facing Indictment Within the Crown Court. A Precursor Towards a Miscarriage of Justice**

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*Denying defendants access to legal aid places a detrimental infringement on the right to due process. Post-2010 in England and Wales it is evidenced that such rights are impacted by political fiscal policy. This contribution therefore considers how political interference through the implementation of neoliberal austerity may impact the due process of legal aid for defendants facing trial within the Crown Court. Concerning such a query, advocacy aspects of criminal legal aid will be considered and how funding of advocacy may impact the very foundations of due process. Furthermore, the research agenda narrows focus specifically on the Crown Court due to the potential severity indictable offences pose, especially if defendants face the possibility of being wrongfully convicted. Similarly, legal aid issues surrounding the causation of the barrister strikes are considered and how these may have helped or hindered the defendant's access to due process. In the advent of the creation of neoliberal legislation, an investigation will be further carried out within the remit of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA) which has possessed a detrimental grounding within the causation of creating a chain reaction towards a wrongful conviction within defendant's facing an indictable based sentence.*

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## **I. Introduction**

During the last decade, the adversarial justice system of England and Wales has been placed under significant financial pressure from austerity in the form of budget cuts. The ostensible purpose of such a politically enforced austerity policy is to reduce government spending while restoring balance in fiscal budgets.<sup>1</sup> However, this article presents the argument that these measures have gravely damaged the ability of the criminal justice system to provide due process to defendants, in particular due to restrictions to legal aid and the need to provide adequate representation. According to the United Nations (UN), defendants should be permitted the fundamental right to due process by receiving sufficient criminal legal aid to

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<sup>1</sup> Florian Schui, *Austerity: The Great Failure* (London: Yale University Press, 2014) at 2.

obtain an adequate defence.<sup>2</sup> The purpose of due process is to provide all individuals fair and equal treatment while facing criminal charges.<sup>3</sup> Article 6(3) of the European Convention of Human Rights (ECHR) further guarantees the right to a fair trial, and is enshrined in UK law by the Human Rights Act 1998 in article 6(3)(c), which states that everyone charged with a criminal offence has the minimum right to:

... defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.<sup>4</sup>

Not only is it argued that austerity measures limit due process, this paper further argues, by applying a critique of neoliberalism, that the justice system has become class-based where divisions are created between the wealthy who can achieve adequate legal representation against the less wealthy who cannot.<sup>5</sup> It is argued that neoliberal and managerialist agendas promoted by the state increase such likelihood of a miscarriage of justice occurring when access to criminal legal aid becomes restricted,<sup>6</sup> particularly given that one of the most accepted definitions of a miscarriage of justice is when defendant's rights to due process are breached.<sup>7</sup>

Obtaining criminal legal aid has become fundamental in providing defendants access to justice and the right to a fair trial through effective legal assistance.<sup>8</sup> A previous coalition government made up of conservatives and liberal democrats applied financial constraints to criminal legal aid through the implementation of austerity-based legislation. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA) cut legal aid spending by 28% post-2010.<sup>9</sup> These cuts to legal aid have further created an inadequacy in the availability of representation where defence teams are less likely to possess the resources required to form a competent defence.<sup>10</sup> On consideration of possible incompetence applied through the deprivation of resources, LASPOA enforced cuts to legal aid further created a detrimental impact pressuring solicitors to take on as many cases as possible.<sup>11</sup> Possessing excessive caseloads within an already under resourced law firm only seeks to exacerbate an unworkable

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<sup>2</sup> *European Convention on Human Rights*, Council of Europe, 3 September 1953, art 6(3)(c).

<sup>3</sup> Lucia Zedner & Carl-Friedrich Stuckenberg, "Due Process" in Kai Ambos et al, eds, *Core concepts in criminal law and criminal justice: Volume 1* (Cambridge: Cambridge University Press, 2020) 304 at 304.

<sup>4</sup> *The Human Rights Act 1998* (UK), 1998, art 6(3)(c).

<sup>5</sup> Sam Fowles, *Overruled: Confronting Our Vanishing Democracy in 8 Cases* (London: Oneworld Publications, 2022) at 192.

<sup>6</sup> Roxanna Dehaghani & Daniel Newman, "Criminal legal aid and access to justice: an empirical account of a reduction in resilience" (2022) 29:1 Intl J of the Leg Profession 33 at 48.

<sup>7</sup> Clive Walker, "Miscarriages of Justice in Principle and Practice" in Clive Walker & Keir Starmer, eds, *Miscarriages of Justice: A Review of Justice in Error* (Oxford: Oxford University Press) 31 at 34.

<sup>8</sup> Olubunmi Onafuwa, "LASPO 2012: ten years and beyond – a socio-legal a study of the impact of legal aid cuts on service providers in England and Wales" (2024) 27:1 Leg Ethics 45 at 01.

<sup>9</sup> Jonathan Ames, "Barristers back strike that 'will bring wheels of justice to a halt'", *The Times* (22 August 2022), online: <[thetimes.com](https://www.thetimes.com)>.

<sup>10</sup> Carolyn Hoyle & Mai Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (Oxford: Oxford University Press, 2019) at 309.

<sup>11</sup> James Thornton, *Criminal Justice in Austerity: Legal Aid, Prosecution and the Future of Criminal Legal Practice* (Oxford: Hart Publishing, 2023) at 58.

situation embedded in the representation process. Being under resourced as well as not being paid adequately as a result of LASPOA forced The Law Society to take the Ministry of Justice (MOJ) to the High Court over legal aid payments not being increased to the recommended 15% in line with the barristers' pay rise.<sup>12</sup> In this context, this article aims to address the gap in literature regarding the extent to which neoliberal austerity restricts fair access to justice which may lead to a miscarriage of justice occurring by critically examining how measures such as means testing limit representation and impact on the justice system's ability to provide essential rights.

## II. How Has Legislative Change Impacted Fundamental Rights?

Since the commencement of neoliberal austerity within the year 2010, legal aid spending had been cut from 2.2 billion to 1.6 billion in 2018, with only 20% of citizens now entitled to funding.<sup>13</sup> The Legal Aid Agency (LAA) of England and Wales was set up in 2013 with the goal of expanding access to representation for those without the means to hire legal counsel. However, under austerity-driven LASPOA legislation, this agency has progressively been brought under MOJ control and access to counsel further restricted as a result.

Due to such cuts, it is argued, e.g., by Robins and Newman (2022), that a divide has been created where access to legal aid is described as a "two nation justice system" where the wealthy elite settle cases with a "gold standard of British justice" and everyone else has to deal with an outdated, fractured justice system due to monetary issues.<sup>14</sup> Such a divide contradicts ECHR rights by failing to provide access to justice for the poor, the marginalised and the disadvantaged.<sup>15</sup>

The Independent Review of Criminal Legal Aid in 2021 stated that there has been a 28% decline in firms specialising in criminal legal aid over seven years.<sup>16</sup> While reasons for this may vary, an argument can be made that LASPOA-related austerity measures contributed to this pattern. Since 2007 the number of law firms specialising in criminal legal aid has declined by half.<sup>17</sup> Criminal defence solicitors have also not received a pay increase for criminal legal aid fees since 1998 and the fees which they are paid are worth less today than back in 1998 due to the rise in cost of living and inflation.<sup>18</sup> Based on the information provided,

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<sup>12</sup> The Law Society, Press Release, "New duty solicitor rota illustrates decline of criminal legal aid" (18 August 2022), online: <[lawsociety.org.uk](https://www.lawsociety.org.uk)>.

<sup>13</sup> Owen Bowcott, "Covid has undermined chronically under-funded justice system", *The Guardian* (10 January 2021), online: <[guardian.com](https://www.guardian.com)>.

<sup>14</sup> Jon Robins & Daniel Newman, *Justice in a Time of Austerity: Stories from a System in Crisis* (Bristol, Bristol University Press, 2021) at 05.

<sup>15</sup> *Transforming our world: the 2030 Agenda for Sustainable Development*, UNGA, 70th Sess, UN Doc A/RES/70/1 (2015) GA Res 70/1.

<sup>16</sup> Christopher Bellamy, *Independent Review of Criminal Legal Aid* (England and Wales: UK Parliament, 2021).

<sup>17</sup> The Law Society, Feature, "Defending the future of criminal legal aid: what we're doing for members" (09 June 2022), online: <[lawsociety.org.uk](https://www.lawsociety.org.uk)>.

<sup>18</sup> Daniel Newman, "Why the government lost in court on criminal legal aid", *Transforming Society* (07 February 2024), online: <[transformingsociety.co.uk](https://www.transformingsociety.co.uk)>.

it grows increasingly obvious that the criminal defence role is not a lucrative one, which may deter future solicitors from entering the criminal side of the law profession.

Additionally, barristers were also impacted when neoliberal injustice emerged relating to advocates being capped on the amount of unused material they would be paid to read, which was reduced from 10,000 to 6,000 pages.<sup>19</sup> The cap on payment for reading unused material meant that barristers were not paid for anything analysed over the threshold. This questions whether defence counsel will have upheld integrity while representing the defendant under due process guidelines. Since 2020, however, in regard to the assessment of unused disclosure schedules, both solicitors and barristers can now claim a basic rate for the first 3 hours of work, then additional payments can be claimed for any further work required.<sup>20</sup> The addition of extra payments for reading unused material introduced positive engagement by the LAA and MOJ, which further indicates that government agencies are now attempting to understand the complexities of criminal disclosure required when defending a client. Despite such improvement, neoliberal processes are still evident in the obtainment of defence counsel and seem to contradict UN procedures presenting a detrimental impact towards due process. This is based on elitist agendas which inflict neglect on those who require access to legal aid. However, further analysis of the legal aid agency is required to establish the true monetary impact which defendants face.

### III. Means Testing Access to Justice

Having established the erosion of availability and standard of representation which can be attributed to LASPOA, the MOJ stated there will be a £2.2 billion investment into civil and criminal legal aid over three years.<sup>21</sup> However, according to former Justice Secretary Dominic Raab, Westminster planned to provide £135 million alongside £20 million per annum for the purpose of providing 3.5 million more people access to criminal legal aid.<sup>22</sup> Further in 2022, the MOJ introduced the CLAIR report ‘Government’s Response to the Criminal Legal Aid Independent Review.’ The report suggested that since September 2020 an extra £35-51 million per annum has been injected into criminal legal aid with an estimation of £27m increase in 2022/23 leading to a further £36m in 2023/24.<sup>23</sup> These injections of cash are promising and may be deemed as an improvement; however, such monetary influxes are nowhere near previous funding levels which are required to protect due process.

Post-LASPOA 2012 the government has significantly chipped away at funding the defendants right to access due process which consequently impacts criminal legal aid access. On observation of statistics produced by the MOJ, the criminal legal aid expenditure when the coalition government came into power was £1.47 billion, however, when compared to pre-

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<sup>19</sup> Katie McFadden & Oliver Carter McFadden, “MoJ face another challenge to ‘catastrophic’ legal aid cuts for defence firms”, *The Justice Gap* (29 January 2018), online: <[thejusticegap.com](http://thejusticegap.com)>.

<sup>20</sup> UK, Legal Aid Agency. *Claim for criminal legal aid work under graduated fee schemes*. (London: Ministry of Justice, 2021).

<sup>21</sup> (Catherine Baksi, “Social welfare claims struggle in legal ‘advice deserts’”, *The Times* (03 November 2022), online: <[thetimes.co.uk](http://thetimes.co.uk)>.

<sup>22</sup> UK, Parliament, *UK Hansard*, 710 (15 March 2022) online <[hansard.parliament.uk](http://hansard.parliament.uk)>.

<sup>23</sup> UK, Ministry of Justice, *Government’s full response to the Criminal Legal Aid Independent Review and consultation on policy proposals* (CP 645, 2022) para 19

covid in the financial year ending 2020 the government had reduced expenditure significantly to £918 million further falling to £599 million in 2021.<sup>24</sup>

Since the MOJ possesses monetary control over the criminal legal aid budget, the neoliberal agenda has severely restricted defendants from accessing free legal representation. Under the creation of LASPOA, legal aid has become a means-tested process restricting access to hiring a solicitor or barrister of choice. Based on the means-testing process created under LASPOA, only the wealthy can fund a defence team of choice and only the very low-income possess the means to access a fully funded legal aid lawyer.<sup>25</sup> Having to pay heavy contributions towards legal fees contradicts due process while further placing a price on fair access to justice.

For a defendant to receive a fully funded legal aid representation, an adjusted annual income is considered which must not exceed £12,475. However, if the defendant's adjusted income ranges between £12,475 - £37,500 partial contributions are required, which would now be assessed through implementing the full means test. However, defendants with adjusted incomes over £37,500 are automatically disqualified from accessing any criminal legal aid.<sup>26</sup> To illustrate the means-testing process which defendants face when applying for criminal legal aid an example has been provided within (Table 1) presenting how the adjusted annual income is worked out under the initial means test.

Table 1: Example of Initial Means Testing

Defendant gross income	Partner gross income	Dependants (Age)	Defendants adjusted income %
£32,600	£24,000	Child 1: 6 years old	Applicant – 1.0
		Child 2: 4 years old	Partner – 0.64
		Child 3: 15 years old	Child 1 – 0.34
			Child 2 – 0.30
			Child 3 – 0.44

(Note: \* Data presents an example of initial means testing of a defendant's income and dependants. A single adult = 1.00, a couple = 1.64, and children's weighting is based on the following age 6 years = 0.34, 4 years = 0.30 and 15 years = 0.44. [Age ranges: 0-1 = 0.15, 2-4 = 0.30, 5-7 = 0.34, 8-10 = 0.38, 11-12 = 0.41, 13-15 = 0.44, 16-18 = 0.59 (GOV.UK, 2022a)].

Source: Prepared by authors.

The above table presents a defendant and partner who have three dependants aged 4, 6 and 15 equating to a total percentage factor of 2.72 which is divided by the joint gross annual income (£56,600 ÷ 2.72 = £20,588 adjusted annual income). For a defendant to receive any legal aid assistance in the Crown Court, the full means test assessment is now applied as the adjusted annual income is above the full entitlement threshold of £12,475.

<sup>24</sup> UK, Ministry of Justice, *Legal aid statistics England and Wales bulletin Jan to Mar 2022* (London: Secretary of State for Justice, 2022) at Table 1.0.

<sup>25</sup> Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford: Oxford University Press, 2023) at 13.

<sup>26</sup> UK, Legal Aid Agency, *Guidance – Criminal legal aid: means testing* (London: Ministry of Justice, 2025).

Eligibility for full legal aid entitlement under the full means test assessment requires an adjusted income of £3,398 and under. However, an adjusted income ranging between £3,398 - £37,500 would require the defendant to make monetary contributions of 90% towards legal fees.<sup>27</sup> Payment of such fees, however, is dependent on calculations of the individual defendants' incomes and expenditures. The LAA further provides an automatic allowance of £5,676 known as the adjusted living allowance which is multiplied by the factor percentage (£5,676 x 2.72 = £15,438) creating an Adjusted Living Allowance. This is then added to the defendant's annual disposable income (living expenses) which in this example is £26,600 including outgoings such as mortgage, council tax, childcare and national insurance (£26,600 + £15,438 = £42,038). A subtraction is then carried out from the original joint gross annual income (£56,600 - £42,038 = £14,562) presenting a disposable income which the defendant must pay (90% of £14,562 = £13,105) equating to payments of £2,184 a month over a six-month period.

Furthermore, it is concerning that defendants are forced to pay significant amounts of money to fund a legal aid-assisted defence which could place a defendant in possible financial jeopardy. Neoliberal austerity constraints are evident based on LASPOA enforcing the means-testing process. However, once funding is obtained, challenges may surface regarding the premise that solicitors and barristers may not receive sufficient payment from the LAA for work carried out to represent a defendant.

#### IV. Consequences of Neoliberal Austerity on Representation

Having discussed the constricting implications, the means-testing process has on defendants facing indictment in the Crown Court, the article ventures further into how neoliberal austerity within the remits of LASPOA impacts legal representation. Within the adversarial criminal justice system of England and Wales the advocate's role is to act as protection for the defendant against the power of the governing state.<sup>28</sup> Advocates provide a voice for the defendant when faced against accusations of the ever-powerful adversarial system.<sup>29</sup> Furthermore, every defendant facing an indictable sentence within the Crown Court deserves a defence under the protection of due process. However, there is also the prospect that neoliberal austerity may hinder the defendant from receiving adequate advocacy or even any advocacy at all. This is evident when defendants are now representing themselves in the Crown Court.<sup>30</sup> Self-representation is concerning and retracts from the foundations of due process causing an unbalanced fairness against the state while also breaching the 'equality of arms' principle. The equality of arms principle is important to establish adequate and fair balance between both the defence and prosecution.<sup>31</sup> A defendant fighting against accusations from the state would require fairness at trial proceedings, however, when the power of the prosecution

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<sup>27</sup> Allisdair Gillespie & Siobhan Weare, *The English Legal System* (Oxford: Oxford University Press, 2021) at 382.

<sup>28</sup> Ed Johnston, "The Adversarial defence lawyer: Myths, disclosure and efficiency – A contemporary analysis of the role in the era of the Criminal Procedure Rules" (2020) 24:1 Intl J of Evidence & Proof 35 at 42.

<sup>29</sup> Ed Johnston, "The Adversarial Lawyer and the Client's Best Interest: Failures with Pre-Charge Engagement" (2024) 88:1 The J Crim L 3 at 5 [Johnston, "Pre-Charge Engagement"].

<sup>30</sup> Fowles, *supra* note 5 at 84.

<sup>31</sup> Jonathan Law, ed, *Oxford Dictionary of Law* (Oxford: Oxford University Press, 2022) sub verbo 262.

possesses unlimited resources and the defendant is unable to obtain a sufficient defence, a notion of imbalance of fairness emerges.

A study conducted by the MOJ suggested that one of the prominent factors established with unrepresented defendants was caused by an inability to gain access to legal aid.<sup>32</sup> On consideration of unrepresented defendants there is a requirement to investigate further into why neoliberal austerity's impact on legal aid causes an individual to be unrepresented, while further discrediting the foundations of due process. This was evident when recently The Law Society produced predictions that the number of law firms providing criminal legal aid representation by 2025 will decrease by 16% in which 150 firms are predicted to collapse due to the previous Justice Secretary Dominic Raab rejecting the advice of the independent review into legal aid.<sup>33</sup> This premise is concerning for defendants if firms are collapsing and are not taking on any criminal legal aid work, the process will become restrictive impacting defendants' access to representation of choice. However, these statistics are based on predictions and cannot be taken as sufficient proof which prompts further investigation into the root cause of such erosion of criminal legal aid representation.

While it has been established that advocates are the voice, protecting the rights of the defendant, legal aid advocates have also been branded by the public and media as 'Fat Cat's' who earn too much money.<sup>34</sup> The All-Party Parliamentary Group report counteracted such presumption stating that labelling was established by the tabloids ignoring the fact that legal aid fees have not increased within 20 years.<sup>35</sup> A minimal increase in payments for legal teams is possibly a contributing factor as to why solicitors or barristers are less likely to take on such work. Furthermore, the prospect of inflation over the years may have also played a significant part. Based on the 'Fat Cat' premise, the public may question whether legal counsel in the past may have abused the system by forcing neoliberal restrictions. However, this is unlikely, due to no evidence in the literature suggesting abuse of the legal aid process. Evidence more sufficiently points towards a neoliberal money-saving agenda where the erosion of legal representation emerges through inadequate payments forcing solicitors and barristers to leave the profession.

Retention of criminal defence lawyers has become a prominent issue of late based on a lack of lucrateness within the criminal area of law. A lack of retention stems from fixed fees creating an unethical work process where casework cannot be prepared to a high-quality standard.<sup>36</sup> Defence teams are overworked and underfunded which has led to a defence driven

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<sup>32</sup> UK, Ministry of Justice Analytical Series, *Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspectives* (London: Ministry of Justice, 2019) at 01.

<sup>33</sup> The Law Society, News Release, "Real-terms cut to legal aid leaves no viable future for criminal defence" (30 November 2022), online: <[lawsociety.org.uk](https://lawsociety.org.uk)>.

<sup>34</sup> Amy Clarke & Lucy Welsh, "F\*\*k this game ... I'm off": financial and emotional factors in declining legal representation in miscarriage of justice cases" (2022) 49:3 J of L & Society 518 at 536; Catrina Denvir et al, *We are Legal Aid: Findings from the 2021 Legal Aid Census* (UK: Legal Aid Practitioners Group, 2022) at 10; Carina Rebecca Oliva, "An appraisal of the Criminal Justice System's Fairness and Ability to Promote Effective Participation in Light of Society's Wealth Disparities" (2022) 9:1 North East L Rev 56 at 64.

<sup>35</sup> UK, Westminster Commission on Legal Aid, *Inquiry into The Sustainability and Recovery of The Legal Aid Sector* (London: The All-Party Parliamentary Group on Legal Aid, 2021).

<sup>36</sup> Oliva, *supra* note 34 at 65.

by managerial processes resulting in minimal effort and lacking attention to detail.<sup>37</sup> A lack of attention within the defendant's case will impact the right to a fair trial as the defendant requires advocacy of the highest standard to proceed against the accusations of the state. However, understanding why legal counsel may not represent clients adequately can be justifiable if not compensated for duties carried out. Furthermore, criminal legal aid work is not lucrative; a large caseload must be taken on to match what would be paid for private consultation which has forced solicitors to avoid complex time-consuming cases restricting defendants from accessing a sufficient defence of choice.<sup>38</sup>

Money seems to be a key concern for criminal defence solicitors if cases are to be investigated thoroughly. This is based on the fact that workloads have become excessive impacting the quality of work produced which further impedes on the due process rights of the defendant receiving a fair trial. The reluctance to carry out legal aid work for clients in need can be observed as fallout from an age of austerity under LASPOA, however, the government is now attempting to address such monetary issues for solicitors. An injection of £85 million for solicitors will be provided bringing reform forward in 2024 under the Litigators Graduated Fee Scheme (LGFS) so that solicitors are paid for the work they carry out in the Crown Court.<sup>39</sup> The government proposals are evidence that attempts are being made to improve retention rates, however, these changes may have come a little too late and at the cost of losing many skilful criminal defence solicitors. A further consideration must be acknowledged that less legal counsel means a minimal quality defence for defendants leaving room for a possible miscarriage of justice to occur.

Retention rates have also impacted barristers, where at least 300 barristers have left the job since the cuts commenced. There are now 70-hour work weeks, cases keep piling up creating a backlog and the accused are informed that their cases may not be dealt with for years.<sup>40</sup> Working excessive hours presents the burden of conducting criminal legal aid work, which also further suggests that legal aid advocates are not being paid for the hours they work. This questions if representation will continue to uphold due process for defendants within the Crown Court.

When defendants rely on criminal legal aid to fund their case, and the advocate who represents them becomes overworked alongside not being paid adequately, there may be questions raised as to whether advocates will work to their full potential. This becomes a significant concern, especially if the neoliberal-influenced LAA does not provide sufficient funding. Similarly, restrictions to adequate legal advice are increasing where the demand for managerialism efficiency pressures legal representation to conduct a basic job compared to striving for excellence.<sup>41</sup> Legal aid cuts have similarly been known to push advocates to force a guilty plea on their clients due to monetary self-interest further linking to an age of managerialism.

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<sup>37</sup> Johnston, "Pre-Charge Engagement", *supra* note 29 at 15.

<sup>38</sup> Oliva, *supra* note 34 at 62.

<sup>39</sup> Ministry of Justice, Press Release, "Second major investment boosts fees for legal aid lawyers" (30 November 2022), online: <[gov.uk](https://www.gov.uk)>.

<sup>40</sup> Joanna Hardy-Susskind, "Attrition" (21 July 2022), online: <[thesecretbarrister.com](https://thesecretbarrister.com)>.

<sup>41</sup> Fionnuala Ratcliffe & Penelope Gibbs, "The criminal defender in an age of austerity: Zealous advocate or cog in a machine?" (23 July 2019), online: <[transformjustice.org.uk](https://transformjustice.org.uk)>.

At the height of austerity and slightly pre-covid, 29 advocates were interviewed who presented mixed views regarding inadequate plea advice. Advocates were found to be only spending minimal time on legal aid cases as they are unprofitable, one advocate stated; ‘The tighter you cut the funding, the more pressure there is to cut corners and put your interests first’.<sup>42</sup> Based on such responses by advocates, further remnants of neoliberal austerity can be observed, however, it is concerning that some advocates are willing to cut corners and in the interest of money show disregard towards the due process of the defendant.

With the premise that the advocate will not work to their best ability, this creates a miscarriage of justice going against the foundations of due process resulting in a high chance that the legal aid-funded defendant may be wrongly convicted. If this is the case a sense of pointlessness occurs when being represented within the Crown Court by advocates who are unable to make the effort to fulfil their obligation. However, consideration must be made that neoliberal austerity is at play here backing advocates into a corner with low fees and financial instability.

A further neoliberal agenda which negatively impacts due process can be observed concerning criminal defence lawyers, who have now accepted that their role has been compromised hindering the quality of defence due to the constant cuts to funds.<sup>43</sup> It may be plausible that not all advocates will carry out such diligence within the work role and read extra, as payment may be still deemed insufficient. Austerity impacts towards due process can be observed which has spanned from the neoliberal ideology of cutting legal aid to the bare necessities. Negativity also emerges from perceptions of advocacy staff, however, there is a further requirement for a root cause analysis of why such incidents are occurring. This can be understood by analysing how legal aid is paid to advocates.

## **V. Funding representation within the Crown Court, paying for due process**

Within the previous section monetary issues were discussed, however, this section investigates further into how advocacy is paid under the legal aid process with a more intricate observation of schemes between differential defence counsel. Advocates, normally solicitors are funded by the Litigator Graduated Fee Scheme (LGFS) which covers the cost of instructing counsel, note-taking, conducting witness statements, and providing legal advice. In comparison, the barrister is funded by the Advocate Graduated Fee Scheme (AGFS) which pays the cost of representing during trial within the Crown Court.<sup>44</sup>

To further understand the funding of such defence counsel it would be purposeful to search within data how neoliberal austerity has impacted the LAA spending over the years, especially on funding barristers under the AGFS scheme at the trial stage. A lack of expenditure could indicate that defendants are not receiving legal aid for their defence, however, according to published MOJ statistics, this was not the case. LAA expenditure on AGFS post-LASPOA

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<sup>42</sup> James Thornton, “The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study” (2019) 46:4 J of L & Society 559 at 581.

<sup>43</sup> Daniel Newman & Lucy Welsh, “The practices of modern criminal defence lawyers: Alienation and its implications for access to justice” (2019) 48:1-2 Common L World Rev 64 at 65; Emma Cooke “The Working Culture of Legal Aid Lawyers: Developing a ‘Shared Orientation Model’” (2022) 31:5 Soc & Leg Studies 704 at 579.

<sup>44</sup> UK, Legal Aid Agency, *Criminal Legal Aid Manual Applying for legal aid in criminal cases in the magistrates’ and Crown Court* (Guidance) at 43.

increased from (£107,120,000) in 2011/12 to (£149,550,000) pre-pandemic in 2019/20 then decreased to (£78,540,000) during the pandemic rising to (£142,640,000) between 2023/24.<sup>45</sup> Emerging out of the pandemic, expenditure increased dramatically for AGFS pointing towards the notion that the LAA is funding AGFS to fund barrister-represented cases which means that defendants facing trial in the Crown Court are being represented. This notion should not be taken for granted though, as the volume data presents a large influx of representation post-pandemic which could be increasing due to courts reopening and further attempting to reduce the backlog. On analysis of data, it is observable that the LAA are spending money to fund representation, however, these may only be a handful of defendants seeking representation or defendants who meet the LAA criteria for representation under the means testing mentioned previously. The increase in expenditure has only occurred due to courts reopening post-pandemic and the requirement for managerialism to push cases through. Reasoning behind this notion is that austerity has placed enhanced pressure on the courts to economise through court closures and change the use of legal aid applications.<sup>46</sup> This indicates that there is a possible pressure of managerialism mixed with neoliberal austerity which may impact the defendant's due process as the Crown Court and the defendant's representation has become compromised.

Defendants accused of serious offences were already held within the Crown Court backlog of 40,000 cases pre-pandemic before March 2020 which the government blamed later on COVID-19 as the cause for the current backlog.<sup>47</sup> This is contestable; however, as post-covid statistics provided by the Crown Prosecution Service (CPS) present that the backlog in the Crown Court increased 6.9% from the first quarter (69,786) 2022/23 to (74,587) in 2022/23 second quarter.<sup>48</sup> Most recent statistics further acknowledged that the backlog is not decreasing with the Crown Court backlog standing at (76,957) 2024/25 which is an 11% increase from the previous year.<sup>49</sup> On consideration of backlog issues, there are also other relatable factors to consider such as the impact of the recent barrister strikes on the defendant's access to due process in the Crown Court.

The defendant relies on the representation of the barrister to protect their rights to due process. However, if there are no barristers to provide representation, defendants are left defenceless if a decision is made by the defendant to proceed without their striking representation which could lead to a miscarriage of justice. However, it could be argued that the barrister strikes are for the benefit of upholding the due process of defendants they represent within the Crown Court.

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<sup>45</sup> UK, Ministry of Justice, *Legal Aid Statistics – Crime Summary – Workload and Expenditure* (Legal Aid Statistics Dashboard), Criminal Legal Aid (London: Legal Aid Agency, 2024-2025) online: <[powerbi.com](https://powerbi.com)>.

<sup>46</sup> Richard Garside & Roger Grimshaw, *Criminal justice systems in the UK: Governance, inspection, complaints and accountability* (London: Centre for Crime and Justice Studies, 2022) at 35.

<sup>47</sup> Mark George KC, “The State We Are In: The Crisis of Criminal Justice and How We Got Here” (2022) 11 *Manchester Rev of L, Crime and Ethics* 164 at 174.

<sup>48</sup> Crown Prosecution Service, CPS data summary Quarter 2 2022-2023 (London, Crown Prosecution Service, 2023), online: <[cps.gov.uk](https://cps.gov.uk)>.

<sup>49</sup> The Law Society, News Release, “Court waiting times undermine justice” (26 June 2025), online: <[lawsociety.org.uk](https://lawsociety.org.uk)>.

## VI. The striking barrister, fighting back at neoliberal austerity

On the premise of the literature analysed so far, an observation can be established into why the criminal defence sector has become disgruntled due to neoliberal austerity and the offspring of LASPOA which caused a chain reaction to the inevitability of the barrister strikes. The recent barrister strikes commenced in April 2022 due to the Criminal Bar Association (CBA) informing the government that barristers do not receive adequate financial restitution for criminal legal aid work.

Based on such a requirement for more pay 'The Independent Review of Criminal Legal Aid' was conducted in 2021 which suggested that legal aid barristers and solicitor advocates should receive a 15% increase.<sup>50</sup> There was a further recommendation that firms specialising in criminal legal aid should receive an extra £100 million per annum to match equality with the CPS while also investing such money to retain and recruit quality staff.<sup>51</sup> The CBA, however, did not accept the government's proposed 15% and proceeded to carry out regular strikes with a requirement of a 25% pay rise. These strikes placed defendants in a sort of limbo waiting for conviction or acquittal due to relying on a legal aid-funded barrister for representation.<sup>52</sup>

Barrister's striking may have held off all Crown Court trials; however, it was not just about the period the barristers were striking which will have impacted the defendant. An observation is required into the fact that if being a barrister as a career is not lucrative enough, not paying for the amount of work carried out to defend the accused facing an indictable offence then there will be minimal legal aid barristers to conduct such work, which could cause a chain reaction towards a miscarriage of justice. Such a prospect dismantles the foundations of the right to due process and a right to a fair trial which could cause an innocent person to be wrongly convicted. Therefore, this is why the barrister strikes are relevant due to the neoliberal austerity agenda which has created a shortfall in funding post-2010.

Barristers who are junior or self-employed may only earn a salary of £12,200 within the first three years and without a 25% pay rise there would be a vast number of barristers leaving criminal legal aid work, as the goodwill of criminal barristers has been exhausted.<sup>53</sup> Considering such neoliberal cuts to funding legal aid representation, concerningly there will be minimal barristers to challenge witnesses and complainants' credibility at trial which is essential for due process to be upheld. Challenges by defence counsel are essential as the police operate under the College of Policing model of 'believe the victim' not considering the fact that the complainant may be untruthful.<sup>54</sup> This prompts the essentiality of barristers to challenge and fight accusations against clients, however, concerns arise here as the defendant may not be able to afford an adequate defence to challenge if they are not entitled to legal aid. In addition, there is also the issue that there are no criminal legal aid barristers readily available to defend them, as many barristers have exited the profession.

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<sup>50</sup> Haroon Siddique, "Criminal barristers vote for industrial action over legal aid funding", *The Guardian* (15 March 2022), online: <[theguardian.com](https://www.theguardian.com)>.

<sup>51</sup> Bellamy, *supra* note 16 at 64.

<sup>52</sup> Aoife Walsh & Oliver Slow, "Criminal barristers in England and Wales vote to go on all-out strike", *BBC News* (22 August 2022).

<sup>53</sup> Jane Croft, "Barristers end strike after accepting improved legal aid deal in England", *Financial Times* (10 October 2022).

<sup>54</sup> George KC, *supra* note 47 at 192.

The importance of barrister representation can be observed in the case of Liam Allan, this case involved failures by police investigators and prosecution not disclosing vital evidence that the complainant was lying which nearly led to a wrongful conviction. It was the due diligence of defence counsel funded by legal aid which went beyond paid remits of reading and searching through extra evidence at the time to challenge the police and prosecution about text messages which should have been disclosed.<sup>55</sup>

If a defendant within the Crown Court is facing a conviction for an indictable offence it is essential that neoliberal austerity be stopped within its tracks and that the adversarial justice system's legal representatives be adequately funded. The CLAIR report published on the government's request has commenced the first steps towards such requirements by suggesting that safeguard procedures should be initiated under the 'Equality of Arms' principle to match the prosecution barrister fees.<sup>56</sup>

Based on the recent actions of the barrister strikes, a delve was made into the government's neoliberal agenda where Rt Hon Brandon Lewis MP agreed to a 15% fee increase for the majority of cases within the Crown Court.<sup>57</sup> In October 2022 the CBA accepted the government's proposal of 15% plus £30 million on top of that increase, however, criminal solicitor-advocates only received a 9% increase to represent under legal aid where many are still considering leaving the profession in their masses.<sup>58</sup> Neoliberal austerity has suffered a blow due to advocates standing up for fair payments, however, the notion remains open if such action was in the interest of the defendant facing an indictable sentence within the Crown Court. The increase, however, is a successful start to quash the political ideology of neoliberal austerity providing a stance that such ideology possesses no grounding within the interest of due process.

## VII. Conclusion

The article presented awareness into the accessibility of criminal legal aid with extensive focus on defendants facing trial on indictment in the Crown Court. Concerningly, inequalities were evidenced in relation to the political instability of the economy in which the implementation of neoliberal ideology and the pursuit of austerity was sought to reduce state debt. This came at the price of creating a reduction in access to justice, however, from the government's perception, austerity was an imperative requirement to reduce the deficit within the economy placing a price on due process. Defendant's due process became further compromised in the creation of LASPOA legislation which served the purpose of dismantling criminal legal aid to its foundations while further evidencing a breach against United Nations protocol hindering defendants who possess a low income. The enforcing political party, however, should not be discredited, as literature evidenced that the government is aware of the impact caused by LASPOA.

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<sup>55</sup> Holly Greenwood & Dennis Eady, "Re-evaluating post-conviction disclosure: A case for 'better late than never'" (2019) 59 *Intl J of L, Crime and Justice* 1 at 1, 2.

<sup>56</sup> Ministry of Justice, *Response to Independent Review of Criminal Legal Aid* (London: Secretary of State for Justice, 2022).

<sup>57</sup> Ministry of Justice, Press Release, "New Justice Secretary agrees deal to get criminal barristers back to work" (29 September 2022), online: <[gov.uk](https://www.gov.uk)>.

<sup>58</sup> Croft, *supra* note 53.

The same political party which enforced austerity since 2010 is now attempting to make amends 14 years later by offering more adequate funding through a cash injection of £135 million into legal aid representation. These are positive steps conducted by the government towards reform and making amends for a failed past of pursuing a neoliberal agenda. Nonetheless, regardless of attempts to improve access to criminal legal aid, reform relating to due process will take a considerable time to rectify. The money proposed may only place a limited hold over a haemorrhaging adversarial system which may have been applied a little too late. Means testing procedures provided an insight into how defendants fund their right to due process. Methods introduced by the LAA, however, seem to place many at a disadvantage, especially if they fall between the funding criteria which require contributions placing many defendants in financial instability. On that basis, this is an area which requires sufficient improvement to maintain that fundamental right to due process.

Due to the lack of funding over the years, it became evident that criminal legal aid work is not lucrative and places not only the defendant in jeopardy but the advocacy which represents them. Solicitor firms which provided criminal legal aid could no longer do so as it was not financially viable, and barristers were leaving on a large scale due to an excessive workload and not being paid adequately, with barristers moving to other areas of law. This exodus first prompted research into how much advocacy is paid which presented minimal for the work carried out. In relation to advocacy funding, the quality of defence became scrutinised which evidenced that a lack of money will result in advocates cutting corners. Based on such findings, an area for reform is required to protect a possible innocent person's liberty becoming compromised. Under the premise of due process, the defendant should receive the best defence possible, and if the advocate cannot provide this, then there is no hope for the defendant. The government-funded LAA needs to learn that the advocacy role must remain lucrative for solicitors and barristers to remain within the profession.

The means test system requires improvement, especially regarding defendants paying 90% of the final fee over six months. As a consequence, defendants may have to sell property or obtain loans for the purpose of achieving an adequate defence which yet again impacts a defendant's human rights while discrediting the international policy of the United Nations. This austerity enforced action leaves the adversarial system of England and Wales vulnerable to international reputational damage and potentially impacts the nation's credibility surrounding the Rule of Law Index where justice systems are measured on how they treat their citizens regarding fair access to justice.

Recently, it became evident that the barristers were not afraid to challenge these impacts mentioned. The CBA took their fight and won a considerable deal which the government must now honour. Obtainment of such a deal will provide the first steps towards the fight to provide a fair trial for defendants. This upholds the very foundations of due process as advocates will hopefully work to their full potential if being paid effectively. One further issue which remains is that solicitors did not receive the deal that barristers received, and due to this, a storm may be on the horizon once again ready to challenge the legal aid process. Neoliberal Austerity is alive and well circulating in the criminal legal aid process, even though the government is attempting to make minor amends by providing reasonable adjustments to advocacy funding. However, at present, it is not enough and until a full overhaul of the criminal legal aid system is conducted, the defendant's right to fair due process in the Crown Court is at stake further impacting their liberty and human rights leading to a possible wrongful conviction.