

## Justice Committee

Oral evidence: (a) [Court Capacity](#), HC 284; (b) [Future of Legal Aid](#) HC 289

Tuesday 12 January 2021

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Members present: Sir Robert Neill (Chair); Paula Barker; Richard Burgon; Rob Butler; James Daly; Miss Sarah Dines; Maria Eagle; John Howell; Kenny MacAskill; Dr Kieran Mullan; Andy Slaughter.

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### Witnesses

[I](#): Thomas Pope, Senior Economist, Institute for Government; and Callyane Desroches, Strategy and Insight Manager, Crest Advisory.

[II](#): Beverley Higgs JP, Chair, The Magistrates Association; Richard Miller, Head of Legal Aid, The Law Society; and Derek Sweeting QC, Chair, The Bar Council.



## Examination of witnesses

Witnesses: Thomas Pope and Callyane Desroches.

**Chair:** Good afternoon, everyone, and welcome to the Justice Committee's evidence session. This is the first of our evidence sessions in relation to two inquiries where we are running the evidence sessions together: one relates to court capacity and the other to legal aid. Because there is quite an overlap of potential witnesses and a number of relevant issues, we have decided to hold the two evidence sessions jointly but then produce individual reports for the two inquiries in due course. That is how we are going to approach it.

I will introduce our two panels of witnesses in a moment, but first the members of the Committee must make declarations of interest, as at the beginning of each Committee meeting. I am a non-practising barrister and a consultant to a law firm.

**Rob Butler:** Prior to my election, I was a magistrate. I was the magistrate member of the Sentencing Council and I was a non-executive director of HMPPS.

**James Daly:** I am a practising solicitor and partner in a firm of solicitors.

**Chair:** Sarah Dines is not with us yet; she is a barrister, not currently practising, and has not practised since the general election.

**Maria Eagle:** I am a non-practising solicitor.

Q1 **Chair:** Thank you. I don't think any of the other members we are expecting have any declarations. Kenny MacAskill, who will be joining us later, is a former solicitor in Scotland. I hope that has dealt with all relevant declarations of interest.

Our first panel is going to deal with some of the modelling that has informed some of our inquiry and other matters. Perhaps I could ask Mr Pope and Ms Desroches to introduce themselves.

**Thomas Pope:** Thank you, Chair. I am Thomas Pope, senior economist at the Institute for Government. We are a non-partisan think-tank trying to make Government work more effectively. We have been doing work across a series of public services over the last few years through our performance tracker work, and more recently have been doing work in particular on the courts and criminal justice system.

**Callyane Desroches:** My name is Callyane Desroches. I am a strategy and insight manager at Crest Advisory. We are a specialised criminal justice consultancy and have been commissioned by the Hadley Trust to carry out some research to understand the impact and legacy of Covid on the whole criminal justice system. As part of that research, we have done some modelling, which was the substance of our submission.

Q2 **Chair:** Thank you very much, Callyane. That is very helpful. Perhaps you



can help me with the Hadley Trust, who commissioned your work. Are they a charitable body?

**Callyane Desroches:** Yes, they are a charitable body who commission research from a variety of institutions—think-tanks—and us.

Q3 **Chair:** In the criminal justice field or other fields?

**Callyane Desroches:** In the criminal justice field mainly.

Q4 **Chair:** Fine, thanks. I think Crest also does work in the criminal justice field.

**Callyane Desroches:** Yes, absolutely. It is our main field of activity.

Q5 **Chair:** Thank you very much. I would be interested if you could very briefly tell me, Thomas, the basis on which you did your inquiry and the timeframe in which you collected the evidence.

**Thomas Pope:** Of course. We started work thinking about pressures on the criminal justice system early last year. At the beginning of our inquiry, we were mainly thinking about the impact of additional police officers and the additional funding upstream, if you like, in the criminal justice system and how that was going to feed through.

In the middle of our analysis, events somewhat took over and the coronavirus crisis struck, so we supplemented that analysis to think about how the coronavirus was likely to impact the courts. We made a series of assumptions for our initial piece of work, which was in April, when obviously at that point there was a lot of uncertainty about exactly how the crisis was going to affect the courts. Since then, we have continued to update our analysis, based on the relatively timely data that has come out of HMCTS, which has given, month by month, weekly updates on how many cases the courts are processing.

Q6 **Chair:** What is the basis for the assumptions that you made? You said you made a series of assumptions; what were they?

**Thomas Pope:** The main assumptions related to coronavirus. We looked at thinking about what was going to happen to the number of cases coming into the courts and how badly affected the court would be in its ability to dispose of those cases. We assumed that the number of cases coming into the courts would fall by roughly 20% in our main scenario. That seems more or less consistent with what we have seen in the data so far.

We had a couple of different scenarios based on how long the crisis might last. Unfortunately, both of our scenarios in April, on that basis, proved to be a bit optimistic: we had a three-month scenario and a six-month scenario, and obviously we are still here. We distinguished cases that require juries and cases that do not, and we assumed that in cases that require a jury it would not be possible to process more than about half of those cases. We assumed that you would be able to process up to 80% of



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the other cases. That is in our central scenario. We had a sensitivity either side around that, but we have continued to update our analysis based on the latest figures, so if things continued as they did, say, in November, we could talk about where we would be.

Q7 **Chair:** Thank you very much. Callyane, you published your report in October last year.

**Callyane Desroches:** Yes, absolutely.

Q8 **Chair:** When did you do the data gathering for that and are there any particular assumptions on the basis of your modelling?

**Callyane Desroches:** We did the data gathering from March through to July, and there were bits of data that were gathered in August. Our data is historical, and we have been referring back to data from 2014 to try to understand what the dynamics within the system are and what the baked-in relationships were prior to this.

Q9 **Chair:** Perhaps both of you could set out your assessment of the current levels of capacity for the criminal courts.

**Thomas Pope:** If we talk first about where we are now, given nine months of coronavirus and where the system is, our analysis is related specifically to the criminal courts and I think it is important to tell two stories there: one on the magistrates courts and one on the Crown courts.

In the magistrates courts, initially backlogs increased quite quickly as the pandemic hit and the ability of the courts to process cases was severely diminished. Actually, the magistrates court has been very successful at getting capacity up to not quite where it was before the pandemic but not far from it. That means that the backlog in the magistrates court has been falling since August. At the end of November, in the latest figures we have from HMCTS, the backlog was about 18% above pre-pandemic levels, so there is a significant increase and it is in a relatively stable place.

The Crown court, unfortunately, is a different story, largely because jury trials are much harder to do under social distancing and not possible to do virtually, so the backlog in the Crown court is now 53,000. That is up from 39,000 before the pandemic. That is not quite the worst level that the backlog has ever been, just looking at the raw numbers, but unfortunately 53,000 understates the scale of the problem, because not all cases that go to the Crown court require a jury. In fact, only about 20% do, but they account for almost all of the hearing time. Jury trials are the minority of cases, but they take up more than 70% of hearing time.

In our analysis, we have adjusted that backlog to account for the fact that it will include more cases requiring juries than a regular backlog. If you compare on a like-for-like basis, the current backlog is the equivalent



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of closer to 70,000 rather than 53,000. That is a significantly worse position than we have ever been in before.

I am afraid it now sounds a bit more pessimistic, given what has happened over the last few months. HMCTS had a recovery plan where they hoped they would be able to do 330 jury trials per week in November. As it happens, they were able to do only 200. I sympathise with HMCTS—they are in a very difficult position—but it is quite possible that we are not going to be able, during the pandemic, to get up to the types of levels of jury trials that they were hoping. If that is the case, for every month the pandemic continues, that backlog will continue to grow. In November, it grew by about 1,000, and you could expect it to continue to grow by a similar amount unless it is possible to ramp up capacity even more.

**Q10 Chair:** Thanks very much. That is helpful. We will explore some of that in a moment. Callyane, what is your assessment?

**Callyane Desroches:** It is perhaps helpful if I build on what Thomas has just said. I think we would agree with your assessment largely, Thomas. The thing we would also say is that this has to be understood in a long-term context, where the backlogs, both in the Crown court and the magistrates court, were growing and the capacity of both of those courts was already struggling to respond to that growing demand. That is the first thing to take into account.

The second thing to add, if we take a slightly longer-scale perspective, is that if we consider, as our model does, that pressures are going to continue to increase, that demand is going to continue to increase and that inflow into the system is growing, the current rate at which the system is recovering capacity is not enough to stabilise the backlog. Our model shows that even if we recover capacity at 2019 levels by September 2021, if we look at the backlog levels in 2024, we will have a tenfold increased backlog in the magistrates courts and a fourfold increase in backlog in Crown courts. Not only are we struggling to reach equalised capacity now, but it is posing problems for the long term.

**Chair:** James Daly will follow up those issues.

**Q11 James Daly:** Thank you very much for that evidence; that is very helpful. I was going to ask some questions regarding the historical context, but perhaps I could go to something that you have just said. Capacity is an interesting word in terms of magistrates. If capacity in the magistrates courts is evening off and getting back to where we were, are we seeing the same numbers of cases go through the magistrates courts? Is that what you are saying to us at this moment?

**Thomas Pope:** I do not have the precise numbers in front of me. I think the case flow in the magistrates is still a bit below where it was before the pandemic, but there is at least 80% or so of the cases they were



hearing before, and because the inflow to the courts is slightly lower as well, that is enough that the backlog is not growing.

Q12 **James Daly:** Can I ask a question? This is my ignorance rather than you, as you have been extremely articulate. If we are talking about fewer cases being charged and therefore going through the magistrates courts, it still suggests a problem, in that the system is not able to deal with the amount of work that it had prior to the pandemic. Would that be perhaps a naive but correct view?

**Thomas Pope:** Yes. I think that is a fair assessment. When we think about court capacity, it is probably helpful to distinguish between what the courts can reasonably do while social distancing is in place and while we are in the midst of a pandemic, and their ability to scale up over the next year or two once social distancing has passed. How hot could we run the courts, effectively, to deal with any future pressures and to deal with the Covid-related backlog?

Q13 **James Daly:** If you cannot answer this question, please say, because it may be outside the scope of your research. One thing that concerns me regarding the courts is the use of release under investigation, which is a Home Office prerogative. What is clearly happening in the system at the moment is that cases that, shall we say, would normally have a better chance of being charged are parked in release under investigation. Is there any academic research that you are aware of, or that you have carried out, about the impact of the work that is sitting there and when it is going to come into the courts system, if ever?

**Thomas Pope:** You have picked on one of the really interesting unknowns for the next few years. As you say, release under investigation has been used extensively over the last few years, and I am not aware of any academic research. We do not know, and it is a big uncertainty about future demands on the courts, whether that work is, effectively, going to be forgotten, and most of it will not end up being charged and the cases will quietly be dropped, or whether it is actually an additional backlog, earlier in the criminal justice system, that we will have to deal with over the next few years. That is a really important question and I certainly do not know the answer.

Q14 **James Daly:** Can I ask one final question in respect of Crown court capacity? Are you saying to us, or does the evidence suggest—if you are able to give an opinion on this, it would be very helpful—that if we remain in the pandemic period, and I do not know how long that is going to be, we have to increase capacity to deal with the issues in the Crown court? The Crown court estate, as it is at this moment in time, does not appear to be able to deal with the amount of work that is going through, and we are going to leave ourselves, if this situation continues, with some very severe delays in cases, probably years, from charge to trial?

**Callyane Desroches:** Absolutely.



**Thomas Pope:** That is right. At the moment, every month that things continue as they are, the backlog in the Crown court is growing considerably and that means more delays for the cases that are being heard now and for cases that will come in the future.

Q15 **James Daly:** Callyane, can I ask a question regarding the upward pressure? We have the general picture, the bigger picture, regarding cases and things going through. Have you done or seen any academic research on other issues within the court system that are perhaps putting pressure on the capacity of either the magistrates or the Crown courts to deal with matters? As a practical example, the increased use of remote hearings is very good—nobody can dispute that—in protecting people within the court environment. There is no way around it, but it obviously impacts capacity because of the time it takes to do a single case. I was a criminal defence solicitor in a previous life, and cases that I would have done with somebody in the court that may have taken 10 minutes I am told are now taking an hour, through nobody's fault. I wonder if you have any views on that.

**Callyane Desroches:** It is a good question, and the question of wider pressures is really important. One thing to add to what Thomas said about wider pressures coming in is the fact that the cases that are coming into the Crown court are increasing in complexity and in severity, and are projected to continue to do so over the next five years. We are coming with cases that require more evidence, more preparation, and so on.

To answer your question on the complexity and other things that are happening within the court, our model does not differentiate the different types of capacity, but we have done research by interviewing practitioners. What we are hearing is that there are issues around coherence across the system—around listing, around information sharing, around, as you say, moving online; there is a strong need for all of that to be evaluated. There may be some impacts on procedural fairness and access to justice, both positive and negative. I hope that has answered your question.

Q16 **James Daly:** It absolutely has. I think you said the research took into account data from 2014. Is that correct?

**Callyane Desroches:** Yes.

Q17 **James Daly:** If it is possible, can you give us a brief outline of the picture in 2014 compared with where we are now—or whatever date in the past? Can you give us a flavour of the historical context of where we are?

**Callyane Desroches:** Yes, I will try to paint that. What should be said is that over the course of the past 10 years there have been closures, both in Crown courts and in magistrates courts, and there has been a trend of decrease in the volume of crime but also a perception of decrease in the severity of crime. There has been a reduction of resources in a variety of



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agencies. Essentially, 2014 is when we start to see the trend reversing—when we start to see serious offences like sexual offences and violence against the person start to increase again.

From 2014, we see that timeliness within the criminal justice system from offence to completion has gone up. Timeliness between offence to charge, charge to first hearing, first hearing to sentencing and sentencing to completion—all of those measures—has increased across time. As you said, that is a reflection of some complexities within the system itself as well as pressures from demand and resources.

**James Daly:** That is very helpful.

**Callyane Desroches:** May I add something to your question about what it would take to resolve the Crown court backlog? Our model suggests that it would take a doubling of resources, from a 2019 base, to stabilise the backlog over the next three years.

Q18 **James Daly:** Could you clarify what you mean by resources? Do you mean court capacity? Could you give us an idea of what you mean?

**Callyane Desroches:** It is the ability for cases to flow through the court from entrance to disposal, and there are a number of ways that can be done. As you said, it could be court capacity, judicial capacity, innovation in the use of technology and online video use for trials and so on. The whole result of that needs to be a doubling of throughput in the courts to stabilise the backlog.

**James Daly:** Thank you for that.

Q19 **Chair:** Are you able to give us any assessment as to how long it might be before we are able to get the Crown and magistrates courts back to sustainable levels? We all know that there will always be a pipeline of cases—just out of necessity, in fact, as things work through the system—so it is never going to be without a pipeline, but there is a difference between that which is sustainable and enables cases to come to trial swiftly and be disposed of and what we seem to have at the moment. Can you help us around that at all?

**Callyane Desroches:** Yes, absolutely. The model shows that it depends on the rate at which resource is injected in the system. If we are able to double our court capacity from September 2021 within the course of a few years, the model suggests that we can come back to a stabilised and manageable backlog by the end of 2023. If you inject resource at a faster level, you will be able to bring the backlog down quicker.

Q20 **Chair:** Thomas, do you want to add to that, or do you broadly agree?

**Thomas Pope:** I should probably highlight at this point that our model and the Crest one differ a little bit, not so much on the impact of Covid but more on the expectation of how much pressures over the next few years will impact the courts. We are not quite as pessimistic.



Q21 **Chair:** What is your assessment?

**Thomas Pope:** Our assessment is that the additional police officers and additional support for the CPS will mean that more cases are required. The figure of 20,000 police officers is roughly a 15% increase in the number of police officers. In our model, we assume in our central scenario that that will lead roughly to a 15% increase in the number of cases that need to be heard and therefore, approximately—in fact, quite precisely—a 15% increase in the capacity required in the courts by 2023, so not quite as big as the doubling, but still more resource than where we are at the moment.

How quickly you can get back to sustainable levels depends on how quickly you are able to ramp up capacity, as Callyane says. One thing to note is that the courts were running at a much lower level in 2019 than they were even in 2015 or 2016. In 2019-20, there were only 82,000 sitting days in the Crown courts. There were 110,000 sitting days in 2015-16, so if we could just get back to that level, I think over two and a half to three years, depending on how big the additional pressures down the line were, we could probably eliminate a fair bit of the coronavirus backlog.

It is important to have in mind that in 2019 we were not at the limit of what the courts could do. Even in more recent years, we have done more, but it has been a Government decision not to process as many cases as they could, partly because demand from the rest of the system was lower, and police resources and CPS resources were stretched too.

Q22 **Chair:** The Ministry of Justice told us that the spending review that was announced allocates £275 million of extra funding to deal with the impact of the extra police officers being recruited and to reduce backlogs. Do either of you have any view as to where that sum sits as against the quantum that you think might be necessary?

**Callyane Desroches:** I am afraid that is beyond the scope of our research.

Q23 **Chair:** Fair enough. Thomas?

**Thomas Pope:** We looked in our April report at the amount of extra resource you would need to deal with extra police officers. I do not have precise numbers to hand now. I can provide them to the Committee afterwards.

Q24 **Chair:** If you are able to, that would be helpful. For both of you, if you need to come back with any additional data, you can.

**Thomas Pope:** We are restricted by what we actually know from HMCTS. We are only given a budget for all of HMCTS, not split between criminal and civil cases, so we have made some assumptions to get to our number, but there will be caveats around that, based on what we know from HMCTS.



Q25 **Chair:** The other thing we have heard about future demand, from the Lord Chief Justice among others, relates to the number of complex multi-handed serious crime cases that are likely to come into the system that have not yet reached the Crown court, and may or may not have reached the stage where they come to the Crown court for initial hearings. You are aware of those—I can see both of you nodding. Are you able to make any allowance in any of your modelling for them?

**Callyane Desroches:** I think that is perhaps one of the things that may explain some of the differences between our model and Thomas's. We have tried to project the increase of cases by offence type, and what we are seeing, based on the trends from 2014 onwards, is an increase in more serious cases that themselves have a higher charge rate, which means that you are likely to have more complex and more severe cases coming into the courts. Essentially, we have assumed that it would be in proportion with the increase of more severe cases coming in at the police level. I think that explains the fact that our model projects that you need more.

Q26 **Chair:** You are saying that you tried to take that into account, to a degree.

**Callyane Desroches:** Yes, exactly.

Q27 **Chair:** Thomas, is there anything else?

**Thomas Pope:** There are two things that are important with complex crimes. One is the fact that they take more police time, so often there is a longer period between the offence and its being brought to court, and then, once it is in the court system, the hearings themselves tend to take longer. Since around 2013-14, there has been a 15% to 20% increase in the average hearing time in the Crown court. We saw that level off a bit in 2019. In our model, we have a scenario in which we reach a new level of complexity and it levels off, and we have another scenario in which it increases and continues to increase, and that would add another 5% or 10% or so to the amount of capacity that the Crown court would need.

Of course, double-handers or multi-handers in particular pose a specific problem during Covid. It is hard enough to find the space to fit a jury and a judge and barristers in place for a single defendant, and it is even harder with multi-handers. My understanding is that those cases are even less likely to be heard, and therefore they are in the backlog, and because they tend to take longer than average to hear, it means that the backlog is even more complex and will be even more difficult to shift than you might otherwise assume.

Q28 **Chair:** We have your modelling, from each of your two organisations, and you have explained the variations between those approaches. We also have the projections based on modelling by the Ministry itself. Can you comment about why you think yours are different from theirs, and what the difference in the modelling is that may give rise to that?



**Thomas Pope:** The MOJ modelling makes fairly similar assumptions compared with our police modelling. They broadly assume that the number of charges increases with the number of police officers. The main difference between our model and theirs is the sort of bands—the higher and lower bands. We have slightly narrower bands than they do. Our model was produced some time before theirs, but broadly the base assumption is fairly similar across the two models.

**Callyane Desroches:** I agree with that. For us, the main difference that has been discussed has been the impact of the increase in police officers on charged crime, and the fact that we have factored in a long-term increase in police-recorded crime that existed pre-Covid and was a trajectory anyhow.

Q29 **Miss Dines:** This is a question to Crest. In relation to the suggestion that capacity needs to double, can you give a greater explanation for that? There are efficiencies, and upping the amount of throughput, which do not necessarily mean that physical capacity needs to be doubled. Can you give further clarification, please? I would be very grateful.

**Callyane Desroches:** You are right. When we mention a doubling in capacity, we mean a doubling in throughput of cases that go through the court, from receipt all the way to disposal and to successful disposal. That can be achieved by efficiencies, and by greater use of technology, as I said earlier. The main lever, and the main importance, is that throughput increases. The means can be varied and adjusted over time to what is possible based on pandemic conditions.

Q30 **Miss Dines:** Do you foresee any reduction in the quality of cases being disposed of in terms of the experience of both sides—the prosecution and the defence? Is there going to be any compromise made in upping that throughput?

**Callyane Desroches:** I can speak for what we have seen so far. What we have seen so far is that timeliness has certainly affected the quality of evidence in the experience of victims and witnesses, and it has affected the experience of defendants in access to justice and procedural fairness, but also with delays in establishing their lives. At the moment, there is nothing to suggest that the situation will change for the better, unless we manage to stabilise the backlog.

Q31 **Miss Dines:** Do you foresee any potential for extra appeals, for example, because the system has to be compromised in some ways due to Covid?

**Callyane Desroches:** I do not think I would like to comment on that; it is too detailed for the level of modelling that we have done. But certainly, we can say that cases have been more complex, and partners across the agencies have found it more difficult to get satisfactory results, as a general rule.

Q32 **Miss Dines:** Moving on to the Nightingale courts, and the Covid operating hours, how in your view has the capacity increased, and what



do you think has made the biggest difference in expanding the capacity of the criminal courts?

**Thomas Pope:** This is something where we currently lack enough data and evidence to be able to say anything firmly. With the Nightingale courts, my understanding is that they are not holding very much Crown court business at all, certainly not many trials, because they do not have the necessary infrastructure. Their main contribution to criminal court capacity has been to move other cases out, so that there is more space in the existing court estates for those trials. I am afraid I have not seen very much data recently on how extensively they are being used. The only data we have is the high-level data on how many trial cases are being disposed of, which is much lower than HMCTS hoped they would be able to achieve as at the end of last year.

On the Covid operating hours, similarly, there has been some analysis of the early trials, but they have not really assessed how much more effective the hours are at generating more cases. As I am sure you will hear in future sessions, some lawyers have been sceptical about how many more cases you can actually hear under Covid operating hours. There has not been a thorough assessment that I have seen.

I have heard that any improvement in the system—in hours or in the number of cases that are being heard—has been more efficient listing, as much as the hours themselves leading to more cases being heard.

**Miss Dines:** Thank you.

Q33 **Rob Butler:** I wonder if I could turn a little bit to your analysis of magistrates courts and some of the implications that flow from it. You talked at the outset, in your first response to the Chair, about the raw figures. Have either of you done any analysis in your modelling of the efficiency of magistrates courts, either pre-Covid or during Covid, in terms of cases that are processed, and whether any of that has been broken down—for example, comparing cases that are heard by district judges as opposed to cases heard by lay magistrates? Have you been able to find anything about what I might call dead time?

When I was a magistrate, we would frequently find ourselves sitting in the retiring room waiting for cases to be ready. I am not putting blame on anybody, least of all my colleagues in the legal profession who sit on this Committee, but there can be all sorts of reasons why things do not happen. Has that come into the ambit of your modelling or your investigations at all?

**Thomas Pope:** I agree that those are important questions, particularly as we are thinking about how the courts can process more cases. A really important question is, can they be doing more with the time and resources they already have? Unfortunately, data for the magistrates courts is worse than it is for the Crown courts. We would like more information on the Crown court as well, but for the magistrates courts we do not know very much about what is going on inside.



We know that there has been greater use of judges hearing cases in the magistrates, or panels of only two magistrates hearing cases, in the last few years, largely because the number of magistrates has fallen. That is more of a pre-Covid story. I suppose that might technically be considered more efficient, but obviously there are lots of concerns about the quality of justice and the implications. I am afraid I do not know much more about what is going on in magistrates courts based on the data.

**Callyane Desroches:** I agree with Thomas about the availability and granularity of the data that we would need to be able to answer your question fully. If we look at timeliness as a proxy for efficiency, timeliness has been increasing across certain types of cases. As Thomas said, that was a trend before Covid hit, so we can only assume that Covid has been a challenge in that respect as well.

**Thomas Pope:** The introduction of the single justice procedure and the ability to hear many summary cases not in the courtroom and in court time has been a big improvement in efficiency in the court. I do not know what it has done to the quality of justice in those cases—that is obviously something you cannot see in the data—but I think it has both improved the way we process those cases and been helpful in continuing to process those cases during Covid, because it requires one magistrate and a legal adviser in a room, rather than requiring people to come to court and requiring the use of courtroom time. That is a notable efficiency improvement in the magistrates over the last few years.

Q34 **Rob Butler:** Particularly on that latter one, having done the single justice procedure myself, the other concern that exists of course is about transparency. As you said, when it is not Covid, it is the magistrate and the legal adviser sitting in a room; there is no media or public access, so that is obviously another factor that does not sit within the raw definition of efficiency.

I wonder whether I could be so bold, Chair, as to invite both our witnesses almost to itemise the sort of additional information that it would be helpful to get from the magistrates court, not here and now but perhaps in writing, because it may well feature in what we find. If we do not know what we do not know, it is hard to make assessments, so perhaps I might make that suggestion.

Do you think there is anything in the potential solutions that have been proposed in terms of allowing, for example, magistrates to hear a wider range of cases? You may be aware that, for example, the Magistrates Association has expressed an interest in being allowed to hear cases where the ultimate sentence could be up to 12 months in custody rather than six months, as at present. Have either of you done any modelling around what implication that could have on capacity, which would then of course also impact the Crown court because it would mean fewer cases going to the Crown court?



**Thomas Pope:** If you look at the people who are being sentenced and required to go to prison, there are a lot more short sentences than long ones. Even if you took only, say, the set of people sentenced to six-to-12 months—I suppose it would be slightly less than that because it is people who could be only sentenced up to 12 months—it would be nowhere near the majority of the cases that they are hearing in the Crown court, but it would be more than it sounds, so I think it would make some difference. I do not think that, as an economist and an analyst, I am in a position to say when it is right that someone's case is heard by a jury and when it is only required to be heard by magistrates.

In England, we make more use of trial by jury than in other countries. For example, in New Zealand you are only guaranteed trial by jury if you could be sentenced to more than 48 months in prison. It is not the case that it is a rule that applies around the world, but that is not to say that England has the wrong approach and New Zealand has the right one or, indeed, what the positions of other countries are. Because we rely more on trial by jury than other countries, it has put us in a slightly more difficult position in this pandemic when trials by jury are the hardest thing to hear. But, as I say, I make no presumption about what the right answer is. There are big questions about what we mean by the rule of law, and what we consider to be an appropriate use of juries, that go beyond my remit.

Q35 **Rob Butler:** Ms Desroches, is there anything you want to add?

**Callyane Desroches:** The only thing I would add about trials by jury is that in the course of our work we did some citizens juries to try to understand what the public's opinion was. Consistently, one of the main things that came up as a consensus, which is rare when you talk to the public about the criminal justice system, was that the right to a trial by your peers and with a jury was incredibly important. As Thomas said, there is an element that is practical, and there is an extremely sensitive element in terms of the public's opinion.

Q36 **Rob Butler:** Do you think, either of you, that there is anything more that could be done, aside from talking about trials, to enable magistrates courts to reduce the burden on the Crown court, or indeed to increase their capacity themselves—for example, more effective use of technology or different hours? Is there anything that occurs to you, from your perspective, that could help?

**Callyane Desroches:** Our model shows that there are three big levers, one of which is to increase capacity in the courts. The second is to decrease demand on the courts in the first place, and that would mean increased prevention and diversion early on. All of the problem needs to be taken as a whole-system approach. Indeed, the courts are a bottleneck, and if you change the behaviour of the courts, you have a change of behaviour in probation and prisons. In this case, in addition to getting more efficiency and the small changes that we can make within courts, if we are able to decrease the inflow at the beginning with



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effective and robust diversion, then not only do we support the magistrates court but also the Crown court.

**Thomas Pope:** As I pointed out, from the data so far, it seems that the magistrates are already doing quite a good job of at least processing their work. Anything the magistrates could do to assist the Crown courts would have to be something they were directed to do by others, rather than something they had the power to choose to do themselves, if that makes sense. If there are things that they could do to take on some more of the work in the Crown court, it would clearly help from a purely processing-cases perspective, although it may not be the right answer from a legal perspective.

**Rob Butler:** Thank you both very much. Fascinating.

Q37 **Chair:** Out of interest, does New Zealand have lay magistrates or an entirely paid judiciary? Do you know, Thomas?

**Thomas Pope:** That is a good question, but I am afraid I do not know the answer. I am referring to work by the Centre for Justice Innovation, which has been looking at what other countries are doing.

**Chair:** Fair enough.

Q38 **Paula Barker:** Thanks to our witnesses for being with us today.

You have talked about the backlogs in the Crown and the magistrates courts and the complexity of those cases. I am interested to understand whether, in your analysis, there have been particular types of cases that you have come across that pose particular capacity issues. If so, would you say that they require specific solutions?

**Callyane Desroches:** Our model takes a higher-level approach, and, because we look at offence types, we will have certain offence types that have more severe cases within them, but I am not talking at a very granular level. We see that cases of a more severe offence type tend to take more time, so, if you wanted to expedite those, there probably could be ways to support that, whether it is more resources or more targeted information.

We have done interviews alongside the model, and we have heard that there are issues for witnesses, victims and defendants in giving evidence. If you are looking at complex and serious crimes, whether they are multi-handers or more complicated, such as sexual assault, there will need to be some accommodations for that in access to video links, locations and specific services that are normally allowed but during Covid have been difficult, such as screens for victims and so on.

**Thomas Pope:** The increase in complexity and average hearing times in the Crown courts, in particular in the lead-up to 2018 and 2019, was driven largely by the increase in sexual assault cases. They tend to take a lot longer, largely because defendants are much less likely to plead guilty



and therefore you need full trial by jury. In general, offence types where more people plead not guilty take up a lot more time. It is also the case that multi-hander trials tend to take a lot of time, and there are, as I have already mentioned, particular Covid-related challenges with holding those cases.

**Paula Barker:** Thanks very much.

Q39 **Kenny MacAskill:** I think both of you have alluded to some of what you will probably say in answer to this, but it might be appropriate for me to ask specifically. In improving capacity, what role do you think other elements in the criminal justice system can play, in particular statutory agencies and partners such as the CPS and the police?

**Callyane Desroches:** That is an excellent question, and certainly key to resolving capacity issues in the long term. In terms of police, the first thing, as I said earlier, is prevention and diversion. We have an additional influx of police staff. There can be some decisions made as to where they are deployed and what resources are invested in prevention.

The CPS interim charging protocol was already in place in order to decrease the number of cases that came to court—it raised the bar that cases had to pass to be charged. What the CPS and the police can do is decrease demand as much as they can and, once the demand has come into the system, treat it in line with what tended to be the policy in recent years—i.e. right the first time—so as to decrease the backwards and forwards with courts and decrease the number of cracked or ineffective trials by increasing the availability of evidence. That means making the best use of platform and the best information-sharing mechanisms and interoperability between IT systems. There is quite a bit that can be done from a practical perspective, but there probably also need to be policy choices, whether about low-level crimes and the levels at which they can be diverted, investment in out-of-court disposals, or investment in robust partnerships with the third sector or with other policy and public sectors.

**Thomas Pope:** I agree with that. The Crest model and the IFG models give quite different answers about the trajectory we are on, but they are both very useful in telling you that you need to think about the criminal justice system as a whole system, and if you are putting more resources upstream into the police and the CPS, it is clearly going to have implications downstream. I agree that thinking about out-of-court disposal options would perhaps be a good thing for the Committee to consider. That is from an analyst's perspective, not from a legal perspective.

Over the past few years, there is some evidence that the CPS has become a bit of a bottleneck in the system as well. More money was provided for the CPS in spending review 2019, and you need to continue to keep all elements of the system well-funded. If we are to get significantly more throughput in the courts, we need more capacity in



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prisons, and our prisons are almost full as well, so a whole system approach is certainly very important.

Q40 **Kenny MacAskill:** Thank you very much. Your modelling obviously focuses on criminal justice. What, if anything—if you have had an opportunity to look at them—can you say about other courts, the civil ones?

**Thomas Pope:** Our analysis of the Covid crisis has shown that the problem in criminal justice related to Covid has been the inability to hold jury trials, and in particular the inability to do them virtually, whereas the magistrates have managed to do things virtually quite successfully. I am afraid most of our analysis has been on criminal justice, but, broadly, in areas like family, where they have been able to move quite a lot online and do more virtually, I think the impact has been less. My understanding is that the county courts tend to be much more paper-based, and that may have complicated doing more of the civil work virtually, but I am afraid I do not have a model to back that up.

Q41 **Chair:** Do you have anything to add, Callyane?

**Callyane Desroches:** On civil courts, I agree with Thomas that our research does not necessarily translate. The most important thing would be to evaluate the use of technology and the impact on victims and defendants, which will be at a different level of vulnerability—whether we are talking about county courts or family courts, they are quite different cases.

**Chair:** Indeed so. Thank you very much.

Unless colleagues have further questions for our first panel, thank you both very much for your time and for giving evidence to us. We are very grateful to you, and if you would like to follow up on those matters that you said you would come back to us with, we would be very grateful in due course. Thank you very much.

**Callyane Desroches:** Thank you, Chair and Committee.

**Thomas Pope:** Thank you.

### Examination of witnesses

Witnesses: Beverley Higgs, Richard Miller and Derek Sweeting.

Q42 **Chair:** Welcome to our second panel. Ms Higgs, Mr Miller and Mr Sweeting, it is very good to see you all. Perhaps you could introduce yourselves and the organisations you represent.

**Derek Sweeting:** I am Derek Sweeting. I am chair of the Bar Council of England and Wales.

**Richard Miller:** I am Richard Miller. I am the head of the justice team at the Law Society of England and Wales.



**Chair:** It is good to see you again, Mr Miller.

**Beverley Higgs:** Good afternoon. I am the chairman of the Magistrates Association. We are a charity and membership body with over 14,000 members, mostly magistrates. We use them as a powerhouse of knowledge and expertise to draw data and analysis from, among other things.

Q43 **Chair:** Indeed. Thank you very much, all of you, for your time. Mr Miller is a not unfamiliar witness to us on behalf of the Law Society. Mr Sweeting and Ms Higgs are new in your current posts; congratulations to both of you and welcome. We look forward to very constructive engagement with you, as we have had with your predecessors over the course of our work.

Before we move on to longer-term matters, I will start with some of the immediate issues: the pressures that the courts are facing around Covid. As somebody who sees it himself, I thank all of your members for the work that they are doing, as I know the Committee would say too. I am conscious that magistrates, barristers, solicitors, court staff and many other court users are making real efforts and sacrifices to keep the wheels of justice going under extremely difficult and testing circumstances. I think at the very outset that the public and this Committee, on behalf of Parliament, ought to extend our thanks to all of your members for what you are doing.

You have had experience fed back to you by your members as to what is happening on the ground. We know that there are attempts to put various mitigation measures in place. You will have heard the evidence of the first panel around some of the modelling, and we can pick up on that in due course. One of the key things that I pick up from constituents who are practitioners, or involved in the court system and so on, is around safety issues, and that is also a concern, of course, for court users, victims, witnesses and jurors.

What is your assessment of things at the moment? Are you confident that there are currently sufficient safety measures across the court estate, certainly in areas you are involved in, to enable it to function safely and appropriately? If there are gaps, what do you think they are?

**Beverley Higgs:** The Lord Chief Justice, the senior presiding judge and HMCTS have been very clear that the courts must be a working place of safety not only for the participants who come through our courtrooms but for magistrates and staff.

I can only speak of magistrates courts. We started to receive Perspex round about November/December time in most of the courts, so we were able to start to return to benches of three after an extended period of time with benches of two. In the south-east, there are no courts that could facilitate benches of three because they are mostly modern-style courts.



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The messaging has been very clear about the wearing of masks and about sanitisation, and, from what I have personally witnessed, the cleaning regime from our contractors has been outstanding. I think that has, in large part, contributed to the way we have been able to maintain our throughput of cases and have a relatively minimal impact from all the circumstances of Covid.

**Q44 Chair:** One of the concerns that I have seen raised on social media and elsewhere, particularly earlier in the pandemic—perhaps you can say how it has developed—was the position in relation to waiting areas in busy magistrates courts, particularly in some of the cities.

**Beverley Higgs:** Yes. It is normal practice for magistrates courts to have double listings, triple listings even. They were very quickly taken down to single listings, so that the staff at front of house could manage the throughput of participants better and more safely. That is what I am aware of happening there.

**Q45 Chair:** Thank you very much. Mr Sweeting?

**Derek Sweeting:** We conducted a survey recently that suggested that about 84% of the barristers who responded had concerns about practical arrangements in courts that they had visited recently. I think they break down into three things.

The first is behaviour, particularly the question of to what extent the public health message is reflected in behaviour in the court, with security staff and so on. Barristers are not immune from that; we certainly get plenty of feedback from HMCTS about the need to ensure that legal professionals are obeying the rules. The second is around buildings, particularly custody suites. Some of our buildings, of course, are very difficult to physically distance in, because they are old and the rooms are small and so on. Then there is cleanliness. The point to make is that we are not in the same position as in March. At that stage, we were calling, entirely rightly, in my view, for the courts to close, or at least pause. What can be done in our existing court estate has been done very effectively in many courts. There are obviously limits to that.

The difficulty, I think, is the position we are now in, where things are changing rapidly, because of the new variant in particular, and we are talking to HMCTS about that. The difficulty is that the SAGE advice is, effectively, that the existing mitigations are sufficient if there is a higher level of adherence to them than was found in the last phase of the pandemic. The logic of the position at the moment is that that is not happening. It does not really matter whether infections are being acquired in the community, which HMCTS thinks is often the case when we have outbreaks at court, or whether they are directly being acquired in court; the effect on the system is the same.

We are beginning to get increasing numbers of reports of court proceedings having to be interrupted or halted as the result of infection,



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self-isolation and so on. That of course is reflected in what is happening in other institutions across country.

Q46 **Chair:** I know you are talking to the various specialist Bar associations as well. Do you find any distinction in levels of concern, levels of mitigation and levels of compliance between different jurisdictions—crime as opposed to civil, family and tribunals, and so on?

**Derek Sweeting:** Yes. I am concentrating these remarks on jurisdictions where you see a high level of court attendance because, undoubtedly, where remote working is less of an option—particularly the criminal courts and particularly around jury trials, for obvious reasons, and the ones that your last witnesses talked about—we get the interface between how effective physical safety measures are and how safe legal professionals feel. That is not the position in relation to High Court trials and so on, where we have very different settings in the buildings themselves and much greater scope for remote working.

Q47 **Chair:** Basically, the High Court seems to be operating as normally as one can under the circumstances.

**Derek Sweeting:** Absolutely. The civil picture shows a big difference between the county courts and the higher courts, for reasons that we will probably come on to.

Q48 **Chair:** Yes. Mr Miller?

**Richard Miller:** Towards the end of last year, we had reached something of an equilibrium: the rules in place were widely known, they seemed to be reasonably effective, and there were measures in place to enable practitioners and other court users to raise concerns when they felt that the rules were not being effectively applied. What we have seen over the past couple of days, however, is a very rapid and extensive increase in the number of reports of outbreaks of Covid, non-compliance with the rules, and social distancing not being met

I think a combination of things have come together. We saw the police withdrawing from the video-remand-hearings system that was in place before Christmas. That has led to increased footfall in the magistrates court. We have the new variant of Covid, which appears to be more infectious. There is real concern that things are taking a turn for the worse right now, and, literally in the last few days, it has been getting noticeably worse. Even if, with all good faith, people thought that the existing measures were sufficient, experience is calling that significantly into question.

There is also concern that the pressure to clear the backlog, which is absolutely understandable, may be leading to people prioritising that over taking on the chin the fact that there are problems with the new variant that need to be addressed, and that may lead to a further slowdown in throughput right now, in the short term. The real risk is that, if that is not done and there is a major outbreak across the court estate, you may



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have to close courts for deep cleaning, and you may have staff, magistrates and judges going off sick and not able to hear cases. It may have a worse impact on capacity overall than trying to keep going despite what is happening at the moment.

**Q49 Chair:** We were told that police withdrawal from the video remand hearings was, essentially, a budgetary consideration. Are you able to quantify how big an input that is? How many of the new issues being reported by your members can be put down to that, as opposed to other issues?

**Richard Miller:** I do not have anything analytical on that, but anecdotally we are being told that footfall in the magistrates court has increased significantly. My latest information is that there are still seven police forces that are not even agreeing to use the video platform for suspects who have either Covid symptoms or a diagnosis. All other police forces have agreed to use it at least for that, but, as I understand it, all of them have withdrawn except in cases of diagnosis or symptoms.

**Q50 Chair:** Do you know which are the seven that are not even doing that?

**Richard Miller:** I do not have the names, unfortunately—just the numbers.

**Q51 Chair:** Ms Higgs, your members are directly impacted by this, perhaps more than most. What is your assessment of the police withdrawal from the video remand system?

**Beverley Higgs:** I have not heard anything specifically about video remand stopping in December, but I know that there are plans to get all police forces back on board. I understand that at the police-force end it was a resource and training issue, and it was difficult. I am unaware of what Richard said about extra throughput.

To emphasise one of Richard's points, it is not just the courts. We are the swans that sit atop a machinery of administration and management that is vital. I was in a court yesterday where the morning trial was cancelled and three magistrates, who had been asked to sit until 1 o'clock, had nothing to do. Apparently, the court had been told on Friday that the afternoon trial had gone as well, but because there are not enough admin staff, and there was an inbox of over 700 emails, that was missed. The other two magistrates were released. I sat and waited to see if any prisoners turned up. None did.

The point is that those magistrates are volunteers and have taken time off work, or spent time away from home, or are perhaps self-employed. Those two particular wingers were very short of sitting days. One had not had his threshold appraisal because that part of the system is awry at the moment—the mentoring, appraisal and training system that backs us up is suffering. Consequently, we do not have enough presiding justices like me to sit in courts, and, perversely, at the other end of the scale the wingers are not getting enough sittings. There are knock-on effects from



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all these things. I know you have heard many times before that magistrates' morale is critical. It is really important that that is taken into account when we have these discussions.

Q52 **Chair:** Beverley, you mentioned the situation about people wearing masks in court and so on. The Speaker in the House of Commons has just enjoined Members to wear masks in the Chamber other than when we are actually speaking. Is that the position now in courts?

**Beverley Higgs:** It is, apart from the presiding justice, who has a need to speak. In my court, there is Perspex between me and the legal adviser and the professionals in the well of the court. If the two wingers want to wear masks—in some cases they are closer together, but in the court I sit in we are a good 3 metres apart—it is down to personal choice.

Q53 **Chair:** Should there perhaps be a direction that all court users should do it?

**Beverley Higgs:** Possibly.

Q54 **Chair:** It is a genuinely open question. Mr Sweeting and Mr Miller, what do you think?

**Derek Sweeting:** It is not happening consistently, or by any form of guidance or direction, but it is happening in some courts. It is a matter for judges, who have to take a view about the appropriate mitigating measures. There are arguments one way or the other. The general position is that those with speaking parts remove their masks while they are doing that. We are hearing quite a few people commenting on the fact that the allocation of Perspex around the court is not entirely even. For example, the court clerk is sitting in front of the judge and often does not have Perspex and so on.

To add to a point you raised about CVP, the Highbury Corner magistrates issued a message today saying that, because the police are not providing CVP links, every prisoner will have to be produced in court, with very few exceptions. In the present situation, plainly that will materially increase risk. Their message, notwithstanding what the Lord Chief Justice says about it, is, "We simply cannot do remote hearings at the level we would like to." That is a funding and technology issue.

Q55 **Chair:** That is very serious, isn't it?

**Derek Sweeting:** Absolutely.

Q56 **Chair:** As some of us know, it is a very busy London court.

**Derek Sweeting:** Extremely busy.

Q57 **Chair:** Mr Miller?

**Richard Miller:** Our experience is similar. The rules are reasonably clear, but actual compliance with them seems to be very varied. We have put



out official guidance to our members strongly recommending them to abide by the rules and to encourage others to do so.

Q58 **Chair:** That is very helpful. The other area where there is a question about whether the intention is being delivered in practice is around guidance on which cases should be conducted remotely. Mr Sweeting, you said that in the civil jurisdiction, particularly in the High Court generally, that is going pretty smoothly. It is tougher in other areas where the kit and technology are not there.

Particularly in relation to trials, the Lord Chief Justice told us earlier this month: "No participant in legal proceedings should be required by a judge or magistrate to attend court unless it is necessary in the interests of justice." Is that always adhered to in the experience of your members, Mr Sweeting?

**Derek Sweeting:** The interests-of-justice test is potentially a very wide one. Whereas I think the vast majority of judges take what could only be described as a fairly sensible and consistent view, and some courts are now pushing out a message to try to ensure that people know precisely what they should expect in remote or in-person hearings, we are still getting a great deal of idiosyncratic listing. Obviously, remote hearings and listing are safety measures in themselves—they are probably the most effective safety measure where it is appropriate to do them—and it is a worry that we continue to have people being required to go for short administrative hearings and often having to travel far longer on public transport than the hearing itself will take.

There was one example of someone who turned up at Euston to go to a hearing in a court just north of London and was stopped by the police. When she told them she was going for a short five-minute hearing, they said that was not an acceptable excuse. Nevertheless, they let her go on. That shows you—doesn't it?—what the common reaction to that scenario would be, not just from police officers but from ordinary people? Plainly, there cannot be any justification for that. I think there are reasons why that is happening, around communication with the courts and so on, and, to go back to your question, Chair, notwithstanding what I think are very helpful and clear remarks from the Lord Chief Justice and the Lord Chancellor. At street level, as it were, we are not always finding the consistency we hoped we would find in relation to remote versus in-person hearings.

Q59 **Chair:** Does it perhaps need a more hands-on approach by the presiding judges? Or something more?

**Derek Sweeting:** I have said on more than one occasion that some form of guidance would be welcome that goes beyond simply saying that it is a matter for individual judges. Having said that, it is very important that listing decisions and decisions about the form of the hearing remain judicial decisions. We absolutely accept and support that, but there is a difference— isn't there?—in saying that the position is that you should go



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remote in all these hearings, unless it is in the interests of justice not to have a remote hearing and doing it that way, rather than the other way round and saying, "We have usually done these things in person. If it is in the interests of justice, we will consider doing it remotely." I suppose that is a slightly unfair way of posing the question, but we probably need a different starting point at which the test applies.

Q60 **Chair:** Is it practice directions territory?

**Derek Sweeting:** Practice directions are getting a bit prescriptive in terms of individual judicial discretion. I can see the argument around that, but I think there could be some very firm guidance. We have had some guidance. It is just a question of saying, "Routinely, would we expect these hearings to be done remotely? If they are not going to be done remotely, should there be an explanation of why, and an exercise by the court of its discretion?"

**Richard Miller:** That very much reflects the experience of our members as well. There are many courts where sensible decisions are being taken, but there are some where very minor administrative matters are being listed for in-person hearings, and judges are refusing requests to have those cases heard by video link, including where the advocate has said the reason they are asking for it is that they are vulnerable and do not want to risk exposure. There are some cases where judges are taking what would appear from the outside to be patently unreasonable decisions to require in-person hearings. They are fairly few and far between, but the more that can be done to give a very clear steer from the centre that the default should be remote, unless the interests of justice really require an in-person hearing, the better, as far as we are concerned.

Q61 **Chair:** What advice do you give your members if they are confronted with that sort of difficult behaviour by a judge? What do you think their firms should do? Swallow it and get on with it?

**Richard Miller:** It is very difficult. We encourage them at least to let us know when it is happening, so that we can identify whether it is just an isolated issue. Is there a problem with that particular court or judge? Sometimes, we can speak to the presiding judge in the area and ask them to intervene. There are various other measures we can take.

A related issue that has arisen which concerns us is that, particularly in family cases, some judges are directing that our members should host the client in their offices to deal with video-linked hearings, particularly where the clients may have issues with digital technology and software. Our members are being required to go into their offices, and host the clients in those offices, in order to access the court technology. We do not think that should be happening, particularly at the time of actual lockdown. Frankly, we are not happy with it as a practice even generally during the pandemic, but during lockdown it forces our members to travel



to their offices to mix in person with their clients in a way that we think is really undesirable.

Q62 **Chair:** How common is that?

**Richard Miller:** We have had fairly frequent reports about it over a number of months. We have raised questions with HMCTS about it, but it keeps happening. We have had some further reports since Christmas of this being done.

Q63 **Chair:** Have you had any decent response? What response have you had from HMCTS? It seems rather extraordinary.

**Richard Miller:** It tends to come down to the fact that listing is a judicial matter, and the judge has discretion to ask the lawyer to do that.

Q64 **Chair:** It sounds a bit rich to say, "You don't come to my court and put me at risk, but you go to your client's office and put yourself at risk instead," to be blunt about it.

Ms Higgs, a lot of this may be professional judiciary, but we have seen one or two incidents. A member of the Bar tweeted that she had been told to attend court in person because the magistrates would "prefer for us to be in courts," rather than necessarily the interests of justice test being applied. Have you come across issues like that? How do you try to resolve them with your members? You cannot manage them—you do not have a managerial role—but obviously you want to try to spread good practice where you can.

**Beverley Higgs:** We do not have a managerial role. I am not sure about that case. I am inherently suspicious of tweeting anyway. The Secret Barrister seems to take great delight in popping at magistrates at every other opportunity, so I tend not to take too much notice of it.

When we talk about remote and virtual hearings, I would like to focus on the fact that it is not always court-to-court or court-to-prison. Very often, as Richard was beginning to allude to, it is court-to-somebody's home. This is happening particularly in a very high proportion of remote hearings in family cases. We have had reports of participants on mobile phones with dodgy signals and the process taking a long time. Hearings take three hours instead of one hour. It is not an ideal situation. We have heard of hearings with children running around in the background, and even with the opposing party in the same room, so it has not been ideal.

I would call for what the earlier panel said: any measures such as this that have been taken up under Covid should be very carefully evaluated before it is assumed that they can continue post pandemic. Some of the things that are being done now for expediency are certainly far from ideal in terms of quality of justice or participation.

Q65 **Chair:** In fairness, the barrister in that case wasn't the Secret Barrister, as you may have picked up; she was a named practitioner.



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**Beverley Higgs:** No, but there are quite a few who enjoy themselves at our expense on Twitter.

Q66 **Chair:** Welcome to the club, but there we are. To be fair, it gives the impression of an undercurrent of concern, doesn't it? Would you recognise that?

**Beverley Higgs:** It does. The other thing I should bring to light is that, when there are remote hearings before magistrates, they often use their own IT equipment in their own homes. It is not court-provided equipment, and there is no HMCTS support for their equipment. There are concerns about security and so on. Those are all matters that need to be looked into further when there is more time. Family magistrates especially have been holding this together with unbelievable capability. They receive bundles at 9 o'clock in the morning for a 10 o'clock start, and they have all the technical issues to deal with on top of that. They have been doing an amazing job.

To go back to my point about morale, the well of good will is not an inexhaustible one. Given the concern about recruiting to family in particular—as you know, we now directly recruit to help with the shortage of family magistrates—we might start seeing people drift away, and that would be a tragedy.

Q67 **Dr Mullan:** There has been a very helpful discussion about how you conduct matters safely. The reason why there is pressure to come up with ways to do that is that we want the system to keep going because we are concerned about backlogs developing and delayed justice. I would be interested to hear your views on whether you think enough has been done so far to allow proceedings to continue, or what more might be done, from your perspective, to allow us to continue to deliver justice wherever possible in these difficult circumstances.

**Beverley Higgs:** The measures that I have seen and heard about are in the main good and have allowed the magistrates courts to keep the backlog, under all the circumstances, relatively low. I do not know whether it was taken into account in the modelling by the earlier panellists, but, given that we only received Perspex in most of our courts come November/December, we were doing well up to that point, and we have really accelerated since then. I heard projections that our backlog would be down by the middle of the year to pre-Covid levels. I am not sure that we need to consider doing much more than we are doing, other than the day-to-day business of keeping ourselves and others as safe as possible, as everyone else has said.

**Richard Miller:** From the point of view of the Law Society, over the course of last year a lot of lessons were learned about how to operate courts safely, with the equipment—Perspex screens and so on—coming in. We would have liked to see swifter roll-out of Nightingale courts, because having more premises available to hold hearings was, to our mind, the one thing that could have increased capacity quicker and more



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effectively. We would still say that is the most effective way to get increased capacity to try to keep the backlog under control and start to eat into it.

The use of technology has been vital. There are things that can be done by technology that we would not approve of in normal running, but when faced with a choice between holding a hearing remotely by technology or delaying it indefinitely—two unpalatable choices—very often holding it remotely is the right way forward at the moment, and a lot of progress has been made on that.

One key question is the extent to which the capacity for holding cases remotely can improve, given that we were all on a very steep learning curve last year and are now much more familiar with the technology. I wonder whether there will be scope to increase the number of cases that are dealt with that way, but the CVP issue has been a real downer. That was an efficient way to deal with remand hearings during the pandemic. Bringing people into court, given the need for social distancing and all the other measures, means you cannot deal with anything like as many cases, so that has been a real negative in dealing with backlogs.

**Derek Sweeting:** I echo what Mr Miller has just said about physical capacity: we, with the Law Society, have long said that the best approach to this is to roll out Nightingale courts as quickly as possible. It does not matter that they are not dealing with custodial criminal cases. The fact is that they can take work out of combined court centres and free up courts in buildings that have cells and so on. That has been done, but we would have wanted to see it done at a greater pace, perhaps. It is still part of the solution where you have a physical problem. This is against the background of a number of years of court closures, so we have lost physical capacity in the system as well, and we are paying the price for that to some extent.

Apart from physical capacity, capacity can be achieved through remote hearings. That is undoubtedly right. What we found last year was that the county courts in particular, where most of the civil work is done, outside what is in magistrates courts, were not equipped to go remote quickly. They compared poorly with many other jurisdictions in that respect. There is still largely a paper-based system, where even before the pandemic issue-to-hearing times had increased, so the lack of technology particularly in that jurisdiction was a big brake on trying to get things done. A lot has been done in that jurisdiction, but going forward we will have to make sure that the court reform programme puts in place well-funded technical solutions to having hearings remotely and so on, particularly in the civil jurisdiction.

Q68 **Dr Mullan:** Are there other things in particular that you are keen to see reversed, if that makes sense? There are some things that we have all agreed might be deployed in different ways in ordinary times that we can learn from. I think the Magistrates Association said in its evidence to us



that there are some things it does not think are good and wants to see reversed. Are there things that stand out to any of you?

**Derek Sweeting:** The thing I ought to mention is Covid operating hours, extended operating or flexible operating hours—it has gone under a number of names. It is something that HMCTS has been keen on and has been trialling for some time. We still have not seen the results of the original extended operating hours pilot. We do not think that is a solution; for various reasons, it has not been evaluated in a way that convinces us that it is going to add capacity. We think it is a bit of a dead end and it should be abandoned. It will also undoubtedly have a discriminatory effect and set things back in terms of social mobility and so on. The pandemic is already going to do that, so we do not need to add to it. That is one of the things we think it is unnecessary to toy with further.

**Richard Miller:** One of the concerns with Covid operating hours is that they have the effect of increasing footfall in the courts. While we are grappling with the more infectious variant of Covid, increasing footfall is exactly what we should not be doing if we can avoid it. Hearing cases across more sites means that you are not increasing that risk, and therefore it looks to us to be the better solution right now.

Q69 **Dr Mullan:** Could you argue perhaps that longer hours, if you are spreading cases throughout the day, and longer sittings, might reduce the amount of mixing or the density of people in the courts?

**Derek Sweeting:** The difficulty with that is that the model at the moment for Covid operating hours is squeezing two court trial days into a somewhat extended court day, so you are starting a bit earlier and finishing a bit later in the afternoon. You have a cliff edge at the end of the morning session, and then you have to do cleaning because a whole new cast will be coming in for the afternoon performance. It is not the leisurely extended period that I think your question might posit in terms of the ability to get more in. We are still trying to fit it into a reasonable court day. There are good reasons for that, because people have to travel and they have to prepare, so there is only so much you can do to concertina in more, even with a slightly extended court day.

Q70 **Dr Mullan:** Ms Higgs, in that regard is there anything you would prioritise stopping doing?

**Beverley Higgs:** We surveyed our members on extended hours. The vast majority were in favour of extended hours, but we would be reliant on other court practitioners going along with that. We are thinking particularly of Saturday mornings, for example.

As for things not happening, that is an interesting question. We are very aware, although we have no evidence of it yet, that there has been an increase in legal advisers using their powers to do box work, and take decisions administratively, where they are able to, that would normally have come into an open court, with all the transparency and access to



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justice that that allows. I would like to be reassured that we return to judicial decisions being made by judicial officers rather than in offices by legal advisers.

Q71 **Dr Mullan:** Without wishing to put you on the spot, what might be an example of that, for a lay person?

**Beverley Higgs:** Case management decisions, which might normally come before a bench, might just go to legal advisers. That might be efficient, expedient and right in Covid, but in normal times case management, wherever possible, should be an open process.

Q72 **Dr Mullan:** Another area I would like to ask you about—you will know this much better than I do, and those on the Committee who have walked the boards in courts might as well—is whether you have seen any changes in the approach to listing to help to deal with the backlog?

**Beverley Higgs:** I mentioned earlier that we are now single listing, whereas before it would be common to double or triple list for a morning or afternoon. If one trial went away, or nobody turned up, for whatever reason, we would have some back-ups and reserves, but that is not happening now. I gave the example earlier that yesterday we ended up with the court doing nothing. I completely get that under the circumstances. It is not a criticism; it is just what is happening now.

Q73 **Dr Mullan:** Mr Miller and Mr Sweeting?

**Richard Miller:** We are seeing much more single listing. It is one of the reasons why across all jurisdictions where you have to have face-to-face hearings they take a lot longer. You can fit fewer into a court day. With remote hearings, generally speaking, you can fit in more than you can with face-to-face hearings, but it is still less than you would be able to do normally in a court day outside pandemic conditions.

One other issue I want to flag is that, particularly in the family courts, one of the keys to tackling the backlog is better early advice and representation for litigants. That can solve matters: it can get them resolved in negotiation between lawyers for the parties and stop them even getting into the courts in the first place.

One of the issues following LASPO and taking away legal advice for family matters is that there are far more litigants in person. Many of them, rather than resolving matters outside the court, go straight to the court, issue proceedings and are more likely to go to a fully contested final hearing. The cases take longer because judges have to explain every step to them, rather than leaving it to the lawyers to do that outside the courtroom. We feel that family cases in particular would be much more efficiently disposed of, and fewer would come into the system in the first place, if there was better early advice and representation.

**Beverley Higgs:** I completely endorse those comments.



**Derek Sweeting:** We have seen changes in listing. Listing has been a very effective contributor in dealing with the pandemic where there has been an increase in communication with the parties around listing. Covid operating hours are a good example. Particular cases were listed in the Covid-operating-hours courts and were then very successfully disposed of.

Our intuition about that, borne out by some of the feedback, is that it was because great care had been taken about the cases that were put into the Covid-operating-hours list. That suggests that, if there is a higher level of communication with the parties about issues, such as whether the case will really stand up, and there is advanced dialogue about how long the case is going to take and, in the case of the civil jurisdiction, whether a hearing can be done remotely, those are all features of listing activity which, if they are done in conjunction with the parties to a greater extent than perhaps we have seen in the past, are likely to produce dividends.

Q74 **Chair:** That is very helpful. As an observation, I suppose it depends on having experienced listing officers who know the practitioners in their area. That was very often my experience at the Bar.

**Derek Sweeting:** That is undoubtedly right. A lot of it is down to listing officers, in conjunction with judges, whose ultimate responsibility it is, which we are reminded of whenever we raise the listing question. It is also partly to do with technology. The technology that supports listing in the courts has been notoriously bad for a long time—it has been a paper exercise in many courts.

**Chair:** Indeed. That is helpful.

Q75 **Miss Dines:** I would like to turn the conversation towards jury trials. I am very much in favour of jury trials. I would like to hear what the witnesses feel about ideas in other countries, such as removing juries physically from the trial, maybe to a different location or maybe via Zoom, without compromising the quality of justice.

**Derek Sweeting:** What you might have in mind immediately is the Scottish experience, where juries have been put in cinemas at a remote location from the trial. The Scottish system now has a jury centre that is a converted cinema. The jury are hosted there and attend the trial remotely. It is broadcast to them, and all the other participants are in the courtroom. The starting point is that Scottish juries are much larger; they are 15, so the problems involved in attending on one site are multiplied by the addition of another three people on the jury. I have heard some reports in relation to that and have watched some of the videos online. It seems to be working successfully in Scotland. The other point is that it is a much smaller jurisdiction, and I understand that it would require legislation in this country to separate the jury from the courtroom setting.



It is fair to say that our Crown court judiciary are pretty reluctant to remove the jury from the courtroom because the relationship between the judge and the jury, which is developed during the course of a jury trial, is very important to the fairness of the proceedings—a view I would share—and the efficient conduct of the trial. There is then the question as to whether or not the jury need to be face-to-face with the defendant in particular and with the witnesses who are giving evidence in order to make an informed assessment. The answer is that it would be very interesting to see the evaluation of the Scottish experience. As yet, there has not been any academic work done on it. It would be interesting to see whether there is an endorsement as a result of any research studies.

Q76 **Miss Dines:** Mr Miller?

**Richard Miller:** I agree with that. There is a real question mark over the extent to which having the jury not physically present impairs their ability to assess body language and see reactions to things happening in the courtroom, and affects their relationship with the judge. A move like that would certainly be preferable to moving away from juries at all in particular cases, but there are some real questions that we would want to see at least assessed and evaluated before we move in that direction. Ultimately, we are in a crisis and we have to keep our minds open to alternative ways of doing things, but we would certainly prefer to see other methods exhausted first before we looked at that.

Q77 **Miss Dines:** In relation to jury trials, what else do you think could be done to make sure that they happen justly and that we can speed up the process safely? What more can we actually do?

**Derek Sweeting:** It is a difficult question. I give credit to the courts service and the Ministry of Justice, and the judiciary, who have been intimately involved from the outset, for exploring to the greatest extent possible what measures can be put in place to make jury trials possible during a pandemic. You have only to go to the two new jury courts that have been opened in the Royal Courts of Justice to see a forest of Perspex. Some of the jurors are, effectively, sitting in little telephone boxes looking across the court at witnesses, the judge and so on. It would be difficult to think of any more that you could do physically in a court like that. It is a good example of the most recent types of courts that have been set up in what were formerly civil courts to try to make matters safe.

The problems you have are the problems you get with any body of people who have to get up and leave court, assemble elsewhere and come back into court. There are minor things that judges are working out. We have to reduce the number of times we ask jurors to go out of the court because matters of law have to be discussed between judge and counsel, but I am absolutely confident that those sorts of things, between the criminal Bar and the judiciary, are being addressed and thought about in an inventive way.



The one thing that can be said about the criminal law in a jury trial is that the show must always go on. Once you have started, there is a great incentive to get through it and do it justly and fairly. It is being worked out on the ground, and it is difficult to think of substantial mitigations that could be put in place without doing something like putting the jury in a completely different spot.

Q78 **Chair:** Even then they have to retire together, don't they, to consider their verdict?

**Derek Sweeting:** They do. The way it is done in the ones I have just visited is that the jury are in a very large room and have seats around the outside. In other court centres, it is a bit like going to a UN conference. There is a big horseshoe and the jury are all around that, to maintain physical distancing. Although it is a body of people, it is often easier to do it with a jury than with counsel and defendants, who have to meet downstairs in cells that are often quite small.

Q79 **Miss Dines:** I have a question on a slightly different subject arising from anecdotal stories I have heard from former colleagues at the Bar. They say that remote hearings can be very fast and prompt, but they seem to serve the lawyers more than they serve the lay parties. Could I have your views as to whether we are compromising on justice in so many remote hearings, particularly perhaps in family cases? Do you think that is a possibility or something we just have to accept because of Covid?

**Beverley Higgs:** Let's talk about family in particular. The reduction in legal aid under LASPO affected family more than any other jurisdiction. Representation went down from 41% to 18% in 2020. You already have a lot of people who may be disadvantaged by lack of understanding of the processes, lack of knowledge about how to put cases together and whom to ask for advice, and lack of understanding about confidentiality, safety and all of those issues. To add to their woes, they may not be particularly IT-literate and may not have IT equipment, or they operate from mobile phones, and you are asking them to conduct a fairly complex legal process, of which they have no experience, by that method.

The potential for lack of access to justice and fairness of justice is right there and it is made worse by Covid. As others have said, when family cases come to court, and criminal cases, particularly for unrepresented people, you spend unusually more time explaining process and making sure that they understand the implications of the decisions they are making for themselves and what they are saying. It is extraordinarily difficult. Family magistrates are exhausted. Shorter hearings take two to three times as long for all of those reasons.

Q80 **Chair:** Mr Miller, do you want to come in next?

**Richard Miller:** Early in the first lockdown, I read a report of a case where the lawyers had been priding themselves on having been able to conduct a complex case by video link. But then a blog was published by a witness support volunteer who had been assisting the party, who said



that she felt completely disconnected from the proceedings, had not really been able to follow or understand what was going on, and really did not feel that she had been given anything remotely akin to justice out of it.

There is a real risk that, even when we as lawyers think things have worked well, we do not understand how the vulnerable parties have experienced the same process. That is one of the reasons why I think consensus has tended to develop that where you have vulnerable parties and complex issues to be discussed, and when you are looking at final hearings, they tend not to be suitable for video hearings. It is an area that I think needs a lot more analysis and would certainly be one of the prime areas for going back to face-to-face hearings as soon as possible, in my view.

Q81 **Chair:** Mr Sweeting, do you have any thoughts on that?

**Derek Sweeting:** I agree. The point made about digital exclusion is a really important one. Not everyone has the wherewithal to participate properly, and the next question is whether or not it is appropriate to do certain sorts of hearings remotely. I remember the feedback to which Mr Miller referred in that particular case. It was quite apparent that the lawyers had a different perspective on what had happened. It was a technological result for the lawyers because the hearing had gone ahead and it felt as if it had gone well, but the experience of the participants was suboptimal. The problem is that there is always a balance. That is one of the reasons why the judiciary have to have the final say about whether hearings should be remote.

The real point at the moment is that we are in such difficult circumstances that many people do not want to wait around—they are prepared to accept the compromises. The counter-narrative to what Richard said is that a lot of people are prepared to take the downside of a remote hearing in order to get their case on. That will not be the position when we come out of the pandemic. That is the point at which we will need a wide conversation about what it is appropriate to continue doing remotely, because plainly we are going to do some things remotely.

Q82 **Rob Butler:** I would like to continue the conversation in exactly the same vein. Perhaps we could explore in particular the impact on alleged victims of offences at the trial stage. We have touched on witnesses, but could I get a snapshot from each of you of your experiences in your various courts of how you think victims have fared under the current temporary measures, and what lessons we need to learn from that?

**Beverley Higgs:** Broadly, victims are as susceptible to not feeling as though justice has been done as every other participant, in terms of delay, communications and the way they access the courts. As you know, we went to very great pains over the years to achieve victim personal statements. As my colleagues said earlier, the relationship between the bench and the victim and all witnesses, who are potential victims, is



important. We can ask them subsidiary questions. Eye contact and body language is so important. It may feel to victims in what is anyway a difficult, traumatic process that it is a little bit disengaged and impersonal in the remote arena.

**Richard Miller:** Our members tend not to have that sort of direct engagement with victims to be able to get direct feedback from them, but what we have observed is that the delay in the criminal courts, which was very much one of our concerns pre-pandemic as well as subsequently, has a huge impact on victims. It means that they are unable to put the matter behind them and get on with their lives; it means that they have to wait months, sometimes years, before they get to court. Sometimes, they are called to court repeatedly before the case finally gets on, and that results in attrition, with some victims losing faith in the process and not being willing to continue to participate. The additional delays caused by the pandemic, and the backlog that has developed, can only worsen that situation, unfortunately.

**Derek Sweeting:** If the question was touching on remote hearings, one of the mitigations for vulnerable witnesses is to appear in the court hearing remotely because that is often less traumatic, so it is a complex question. Where otherwise a victim would be prepared to come to court, for example, the experience of being disembodied and not able to participate or be supported in quite the same way at court might be one that is undesirable and not something we would want to proceed with.

In terms of the overall impact on victims, I echo what Mr Miller was saying, which is that it is delay. The evidence you heard in the previous session must be bad news for all of us, but in particular victims and people waiting for years for their cases to be resolved ought to be right at the top of our societal concerns about the effect of the backlog.

Q83 **Rob Butler:** In a similar vein, I wonder whether we can talk a little bit about cases involving young defendants—say, children under 18. We have talked a lot about adult criminal courts and family. Having touched specifically on the youth jurisdiction, the Lord Chancellor and HMCTS have been very keen to say that they have continued to try to prioritise those cases. Has that been your experience in practice? Is there anything you want to share with us on what you think the impact has been on youth trials, youth sentencing and so on?

**Derek Sweeting:** Before I hand over to others, who I suspect may know a bit more about it, we have been pressing for the data on that. We have established very good data-sharing arrangements with HMCTS and the Ministry of Justice, but one of the exceptions is that we do not have a lot of data about the youth courts. In fact, it was a topic raised at a recent meeting with the deputy chief executive of HMCTS. We would like to see that because, as with a lot of these questions, the data is king. You ought to make an evaluation based on what you can see. It is a bit dispiriting to be told, as we were, that the data is pretty slim, and it cannot be



analysed in quite the way we expected it might be. I think we need to get on top of the problem by looking at what the numbers are to begin with.

Q84 **Rob Butler:** Mr Miller, do you have a view on the youth situation?

**Richard Miller:** One added issue you always run up against with youth offending is that the sooner the matter is addressed, the sooner you can start to intervene in the young offender's life and, hopefully, turn them away from a long-term future in crime.

The other issue that has been cropping up more and more frequently is that someone commits an offence as a young offender and the matter does not come to trial until after they have turned 18. When that happens, you lose a lot of the opportunities to intervene that are available when sentencing a youth offender in the youth courts. Beverley may be able to say more about that, but it has been a major concern of ours that young offenders are not processed quickly enough. That predated the pandemic, but it is worse now.

Q85 **Rob Butler:** Indeed; it is worth saying that it is something we addressed in one of our other reports on the impact of Covid on the courts. Ms Higgs, you may well have something you want to say specifically.

**Beverley Higgs:** The issue was discussed at length at our last magistrates conference. There was a successful AGM motion for the Magistrates Association to adopt as policy that we lobby for defendants offending at 17 to be dealt with in the youth jurisdiction, even though they may turn 18 in the time it takes for the matter to come to the court. With the added delay with Covid, more people will be falling into that net. That is something the Magistrates Association is very concerned about, and it is lobbying for change in that area.

Q86 **Rob Butler:** The area I was meant to be talking to you about was extending operating hours, but you addressed that quite a lot in conversation with Dr Mullan. Perhaps I could pursue a couple of points on that. Ms Higgs, you referred to a survey of your members, a majority of whom were prepared to sit for longer hours, including on Saturdays. Do you have any breakdown among those who said they were in favour of that by gender, age or occupation that would enable people to be sure that, if there were extended hours, there would still be a balanced bench, representative of the community?

**Beverley Higgs:** I am not sure that a balanced bench is something we are that much concerned with now. I have the data here, but I don't have time to read it all out to you.

Q87 **Rob Butler:** Perhaps you could share it with us.

**Beverley Higgs:** It is broken down by region, and we can certainly share it with the Committee. I have sat on many benches that have been all female—I do not think we have talked about gender-balanced benches. The majority of our respondents were from the adult criminal benches



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and they were in favour of early mornings, late evenings, Saturdays, even Sundays in some cases. Unlike the Crown court, some of our cases are listed for two hours, so it might be possible to split a day into three—morning, midday and evening—if you have three two/three-hour cases.

As I have said to others, the court system is an oil tanker, not a speedboat. You cannot change processes on a sixpence; it takes a long time to make any kind of administrative or procedural change. We need to be cautious about making knee-jerk changes for something that, hopefully, will be over within the next year to 18 months.

**Q88** **Rob Butler:** Mr Sweeting, perhaps I may put a similar question to you in a slightly provocative way, if you will forgive me. You stated that your members are very unenthusiastic about extended hours. I understand that within the context of only a narrowly expanded court day, but if there was rather more flexibility to extend the court day, I am wondering whether it is down to a preference to stick to old and more traditional ways of working that perhaps have not adapted to current life.

In many other occupations and professions, people have to work very early, very late or over weekends. We can think about nurses and doctors, people working for airlines, whether they are pilots or in airports, and police and prison officers. A huge number of people, even—dare I say—MPs, have to work many different hours on many different days of the week. Are we not at a stage when the legal profession should be a little bit more flexible, too?

**Derek Sweeting:** The answer is that the legal profession is flexible, because we are working those hours. The question is, what should court hours be? The amount of work that is required to be done out of hours in order to make sure that court days are effective is considerable, and the amount of that work in some jurisdictions that is done for virtually no pay is also considerable. I do not think we should go away with the idea that people are wedded to a short working day.

It is a bit like what is often said about teachers, who, on the face of it, appear to have a short working day. I am told, and know, that many of them are working a great number of hours outside that day to make sure that they can deliver a proper educational offering during school hours. The courts are like that, particularly the criminal courts where a lot of thought has to go into what goes in front of the jury and what is done out of court sitting hours. That is the first point. Based on experience, there is a good reason why we have the hours we do.

We also have everyone else who is involved. In particular, we have court commuting times. Everyone else has to get to court. Imposing longer hours on people who have to turn up and give evidence is not necessarily what we want to do, particularly since HMCTS itself now thinks that a reasonable start time to get to court, because of court closures, is 7.30 in the morning, getting home by 7 in the evening. Those are very long days in themselves when you start adding the commute time. Often, members



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of the Bar are working in different courts—they have to go to different courts. That is part of the flexibility that is built into the system with an independent profession rather than employing lots of state employees to do it.

There are lots and lots of efficiencies in the system that are dependent on the fact that we have a set court working day. Everyone can assemble and go away, they can get to court and get home within a reasonable time, and they can do what they have to do in relation to caring responsibilities and so on, as well as preparing for the court case. There is a lot of concern about the discriminatory effect on certain sections of the Bar, particularly women, and areas of the Bar where there are already pressures, particularly around pay.

Q89 **Rob Butler:** Mr Miller, do you have anything to add?

**Richard Miller:** It is very similar for solicitors. They are often on duty 24 hours a day covering police stations; they have to be ready to be called out at any time. They spend evenings and weekends doing preparation and dealing with management issues related to their firms.

I refer to what the Victims' Commissioner, Dame Vera Baird, said in relation to Covid operating hours. She said she was concerned about the limited data on the impact on victims and witnesses and the potential for victim attrition. She recommended that "no cases with vulnerable victims or witnesses" should be listed in Covid operating hours courts. It is not just about lawyers objecting to the extended hours; there are real concerns for other court users as well.

Q90 **Chair:** I suppose there is always that dilemma from the victim's point of view. You do not want difficult hours to create a strain and you do not want attrition because of delays with cases not being listed. It is a difficult balance to achieve, isn't it? Thank you very much for your evidence about court capacity. It has been very helpful.

We want to turn finally to the issue of legal aid, which is the other part of our inquiry. Can we start with crime? The Government announced the establishment of the independent review of criminal legal aid. Some period has elapsed since LASPO and the change, if I can put it neutrally, and the timeframe envisaged is a report at the end of 2021. What is your reaction to that timeframe? I know there has already been criticism of the delay in starting it. Is it too leisurely, or is it necessary to give it the better part of a year to do justice to it? What is your take on that length of time?

**Derek Sweeting:** The starting position is that there has been a considerable delay already, but now that we have part 2, and Sir Christopher Bellamy has been appointed, it needs to be done properly. The ambition to sit and hear evidence and produce a report within about six months is quite rapid progress. What really matters is implementation, and the length of time it takes to put what I am sure will be a thorough review into practice to achieve some meaningful change.



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What we do not want is something that just provides a two-year solution to funding shortfalls or anything like that. We need something sustainable and long term for the criminal Bar.

I was struck by the evidence you heard in the previous session and the perfect storm we are facing, not just in terms of numbers and the backlog, but what happens when you add to that the position of the criminal Bar, which is being hollowed out. People are coming to the criminal Bar, staying for 10 years or less and then leaving in numbers, so we have a sandwich with no meat in the middle, which is comprised of young members of the Bar with not much experience and older members of the Bar who are ageing, and we have very little in the middle. If we are to see very substantial increases in complexity and numbers, and a growing backlog, that is not a position we need to be in. The solution is to have proper funding and a sustainable career path for criminal practitioners. That has been lost.

Q91 **Chair:** Mr Miller, what do you say from the point of view of solicitors?

**Richard Miller:** We would echo much of that. CLAR was first announced in 2018 to address what even then was seen as an urgent problem, with an ageing criminal defence profession and areas where there were no lawyers under 35 doing the work at all. Duty schemes are collapsing. One in the north-west collapsed and had to be combined with a neighbouring scheme, and others are down to their last three or four lawyers. The system is struggling. Somehow or other it just managed to keep coverage, but there is a real concern that, if we see no further improvement before the report at the end of this year and then there is implementation time after that, it will be too late for many firms.

We had 1,122 firms holding a criminal legal aid contract as of 14 December. That is 150 fewer firms than in 2019, so 12% of the supply base has gone in the course of a year. There is an urgent need to address the problem. What we would like to see is an interim, across-the-board increase in rates, at least to stop the situation from getting worse while we look at the detail of what is needed to make it sustainable in the longer term. This has been done for our Scottish colleagues: in December, the Scottish Government announced a 10% increase across two years for Scottish criminal legal aid lawyers. We urgently need something similar here while we await the outcome of the review.

Q92 **Chair:** Does that apply to the Bar as well, Mr Sweeting?

**Derek Sweeting:** Yes. I think the position is dire. Holding the fort would be a sensible thing for the Government to do, particularly if there is to be any delay, but the priority must be to get an effective remedy in place for shortfalls in criminal legal aid.

Q93 **Chair:** Do you think they have the themes and the scope right?

**Derek Sweeting:** The terms of reference are pretty wide. I think they encompass the things we are concerned with. There is no difficulty with



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that. We were consulted on the terms of reference and we added things that we thought had not been adequately covered, so that is not a concern.

Q94 **Chair:** They have been prepared to shift on that, by the sound of it, when you have raised issues.

**Derek Sweeting:** Yes.

**Richard Miller:** We would agree with that.

Q95 **Maria Eagle:** I have been listening to what you said about the extent of the challenges in legal aid. Could you identify a particular reform that you think would improve the sustainability of criminal legal aid that the independent review should consider? You obviously do not disagree with the terms of reference, but is there one particular thing you think they should be considering to improve the sustainability of criminal legal aid?

**Beverley Higgs:** One of the things we would like to see is that all cases that come into court are in scope. There is a lack of preparation and legal advice at the earlier stages. The point was made separately earlier. It can save so much time later down the track. Backtracking and reworking cases with more hearings and administration can be so easily avoided if people have the right advice from the get-go. That makes so much sense to us.

I know it will be done, but it is probably sensible to mention that the eligibility criteria need to be considered, especially in serious and complex cases.

**Richard Miller:** From my point of view, the first thing is that the review needs to come up with a structure that ensures a better relationship between the amount of work required on a case and the fee paid. We have a series of fixed and graduated fees across the structure, but many of them were fixed 10 or 15 years ago. The system has changed, the nature of evidence has changed and the processes have changed; the fee schemes have not changed and they do not reflect the work that is actually required. The system has to be revised so that it reflects the work required and fair payment for it.

The second thing is that there needs to be a regular review of fees in a situation where there have been no cash increases since the 1990s. That is why the professions feel there is no future in the work at the moment. Unless there is shown to be a clear Government commitment to get the system viable now, and maintained in the longer term, it will not be sufficient to retain and recruit new lawyers.

Q96 **Maria Eagle:** Thank you. Mr Sweeting?

**Derek Sweeting:** I echo what Mr Miller just said about the fact that there needs to be a mechanism for regularly reviewing the fee levels, because the historical injustice the criminal Bar has had to face is, just as



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Mr Miller said, decades of no movement to reflect increased costs and so on. Effectively, there has been a reduction in pay over a very long period of time.

Whatever arguments there may be about the starting position for criminal legal aid, they have long since passed. It is a low-paid job for many people now at legal aid rates, and that needs to be addressed. We need a mechanism for dealing with it. That leads to the next point, which is that it needs to recognise career progression. It needs to recognise that there should be a difference according to complexity: there should be a recognition that, as people get more senior and experienced in the profession and do cases of more complexity, of the sort we have been told are on the way in numbers, that is reflected in pay as well, because that will provide a career structure for criminal barristers. We desperately need that.

It would be very helpful if the review also looked at the amount of work that criminal barristers and legal professionals involved in crime do that simply goes unpaid. That cannot be right. Identifying how that should be addressed is a very important part of what the review should be doing.

**Q97 Maria Eagle:** Thank you. Those are very clear answers. We have just been talking about the impact of the current scheme on the practitioners. Would you like to say anything about what effect the current legal aid means test has on access to justice?

**Beverley Higgs:** As I said, the eligibility criteria need to be looked at, but Richard and Derek have more expertise in this area than I do. Clearly, when LASPO came in, quite a lot of the family work was intended to come out of scope, but it was never intended that criminal work should come into scope in quite the way that it has, and I think that needs to be looked at again.

**Q98 Maria Eagle:** Thank you. Mr Miller?

**Richard Miller:** In 2018, we commissioned reports on the means test, which demonstrated that people who were below the Joseph Rowntree Foundation minimum income standard were being asked to pay contributions that they could not afford—in some cases, they were even being deemed too rich to qualify for legal aid. The means test has not been touched since before 2010, so the thresholds have not been looked at, the structure has not been looked at, and nothing has been uprated in line with inflation. The effect of that is that every year more and more people are falling outside the eligibility levels.

We have been lobbying the Government, and we are really pleased that they undertook the review. We have had some really good discussions with officials. Alongside that, we have been taking test-case litigation, and we had a couple of successes last year. In one case, the court ruled that, contrary to what they had said, the Legal Aid Agency has discretion to disregard capital that a party jointly owns with an abuser.



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In another case, the Ministry accepted that the rule capping the amount of a mortgage that is taken into account should be changed, and regulations were brought in to change that just before Christmas. Prior to that change, if you had a £250,000 house and a £250,000 mortgage, the Legal Aid Agency treated you as having only a £100,000 mortgage and having £150,000 equity, which would disqualify you from legal aid. That was clearly untenable, and we were delighted that the Ministry moved before the final report on the means test review to change that rule, but we hope that there will be significant further improvements when the report comes out in spring.

Q99 **Maria Eagle:** You have made one recommendation there. Before I come to Mr Sweeting on that point, are there other changes that should be made to the means test for criminal legal aid? Would you also like to say something about the means test for civil legal aid?

**Richard Miller:** This applies very much to both civil and criminal. There are a whole range of allowances. There are allowances for personal living expenses, allowances for dependants, and allowances for housing costs for single applicants. There are capital rules as well. All of those need to be addressed. They need to be uprated and changed to bring them much more in line with the minimum income standards, to ensure that anyone who is below an objectively defined poverty line automatically gets legal aid. As I said, our discussions with officials so far have been very positive on this front, so we hope that a lot of those issues will be addressed. It is fairly urgent that they are.

Q100 **Maria Eagle:** Mr Sweeting, do you have anything you would like to say on those two points?

**Derek Sweeting:** Yes. Some things should not be subject to a means test. Legal aid in domestic abuse cases is a really good example. As Mr Miller said, the assumption that capital assets are available to people seeking legal aid needs to be revisited in some cases, and there needs to be a mechanism for ensuring that the thresholds are adjusted as we go forward. In some senses, it is the mirror image of the point I made about the fact that the system has been allowed to ossify and does not have a mechanism within it for regular updating reviews to reflect changes. Those are the things in particular I would wish to add.

**Maria Eagle:** Thank you.

Q101 **Chair:** That is helpful. We touched on civil legal aid at the end of Maria Eagle's questions. What is your assessment of where we are around the sustainability of civil legal aid? What are the challenges there? We have highlighted the pressures on the criminal Bar and solicitors firms doing criminal legal aid; what about civil—what is the situation there?

**Richard Miller:** On civil legal aid, the situation for many solicitors firms is that it is simply not economically viable to carry on doing the work. The result has been a whole series of advice deserts opening up across the



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country. We have published maps highlighting those deserts over the past couple of years.

The Lord Chancellor announced last summer that he intended to undertake a piece of work looking at civil sustainability. It is demonstrated by the fact that, for housing contracts for example, the Legal Aid Agency has held something like a dozen separate tender rounds since the current contracts were instituted, trying to find practitioners to cover areas where they do not have suppliers, and they are not getting people taking up their contracts.

Basic rules of economics say that, if you cannot find suppliers willing to supply at the current price, the price is too low. We hope the Government will take that message on board. Rates need to be increased if the Government are serious about having a comprehensive civil legal aid system in place. At the moment, too many people who Parliament has said should be entitled to legal aid are unable to find the advice that they should be getting.

Q102 **Chair:** The suggestion is that, since LASPO, there has been a drop of about 30% in the number of providers of civil legal aid services. Does that fit with your experience?

**Richard Miller:** I do not have the figures immediately to hand, but that 30% figure certainly sounds not outside the realms of probability.

Q103 **Chair:** In the sustainability review that the Government wanted to look at, although it is not a formal review in the way the criminal side is having—you are right to say they want to look at the sustainability of civil—they said they wanted to consider the delivery and contractual model within that. What do you think are the issues they ought to be looking at around the contractual and delivery model? Is that a problem? Is it the rates, or what?

**Richard Miller:** It is primarily the rates, but there is scope for looking at the structure of the system as well. For example, back in the early 2000s, there was a not-for-profit legal aid contract that operated on the basis of funding a post rather than paying for each individual case in the system. It is a bit strange that we have a system where the Legal Aid Agency makes decisions on each individual case, leading to extensive bureaucracy, which of course has a cost in itself.

There is a lot of scope for looking at the bureaucracy within the system, both in how it is managed and how the resources are allocated, and at all the requirements placed on firms for them to be entitled to a legal aid contract. Both those strands are worth looking at. Ultimately, the rates are grossly insufficient for the work to be economically viable. It is the same as with the criminal work. There has been no increase in rates since the 1990s, and more and more firms are giving up on it.

Q104 **Chair:** Mr Sweeting, what about from the Bar's end?



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**Derek Sweeting:** The Bar Council is about to publish a comprehensive report on civil legal aid this week. I hope that will be of some assistance when it comes.

Echoing the points that Mr Miller has made, the widespread closures of advice centres and high street solicitors, and the withdrawal from doing legal aid work, has produced advice deserts for some of the constituencies of members of your Committee. It is impossible to get advice on housing matters in large areas of the country. You can only get advice in urban areas in many cases. That is a matter of widespread concern. There are particular areas where it has produced serious inequalities of arms where there is not legal aid. For instance, the position at inquests in which bereaved families find themselves is an area that ought to be reconsidered in terms of the aid available.

For practitioners, the fact that we have not had an increase in rates and that so many people are getting out of doing that work means that it has been supplemented by increased work volumes. People are doing more and more work for less in order to keep afloat, and that is obviously not going to be sustainable in the long run.

I want to pick up what Mr Miller said about bureaucracy and the fact that the Legal Aid Agency is effectively doing a case-by-case analysis of submissions. We have suggested that they should do something that we term dip sampling—in other words, random sampling—which is not checking every application but checking them to make sure that enough of them are being done properly to ensure that there is confidence in the legal professionals who are submitting them. Otherwise, people will find a culture of refusal where the slightest slip leads to an application being refused.

Q105 **Chair:** That is useful. Ms Higgs, from the magistrates' point of view, although the bulk of your work is criminal, you do some civil work and some family, of course, which is one of your specialisms. Do you notice any particular impacts from changes in eligibility for legal aid on the civil front in what comes before you or your members?

**Beverley Higgs:** We surveyed our members in 2014 and 2017. They noticed a drop in the number of people who had representation from 41% to 18%. As I said earlier, the impact of LASPO on family was intended to be so, and, unfortunately, in terms of access to justice, for people who have vulnerabilities of any description, whether that is learning difficulties or mental health, or even for victims of domestic abuse, the impact of the lack of legal advice across the board has been awful. Unfortunately, you have to say that, when you reduce what could be considered a vital public service, the effects and impacts of that on the victims and the participants were entirely predictable and avoidable.

Q106 **Chair:** It was always said, on the family side, "Don't worry, everybody will go and mediate." Of course, that never happened at all. Mediation fell through the floor as well. Is that what you found?



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**Beverley Higgs:** That is not something I have information on with me now, but I certainly can get it to you if you need it at a later date.

Q107 **Chair:** Mr Sweeting and Mr Miller will probably have come across that. The evidence we have had subsequently is that early advice by a lawyer might point people in the direction of, for example, mediating rather than going to trial, and it may also reduce burdens because it is the lawyer very often who tells the client the blunt news, "You haven't got much of a case and it's not in your interest to pursue it."

**Beverley Higgs:** Certainly in criminal, yes, but I am not sure how that plays out in civil.

**Derek Sweeting:** In civil, early legal advice is absolutely key because that heads off a lot of problems at the pass. We do not get to the next stage if people know whether or not they have a good case, and, if they have a good case or a good defence, how it should be articulated and what they should concentrate on.

The point with mediation, as you say, Chair, is that it has not been successful across the board in the way that might have been envisaged, and that is because that is inherent in mediation. It is a very effective form of ADR, but it is not effective in every case because it is not an adjudication. You can adjudicate every case successfully, but cases that are successful when they mediate are usually cases where there is a will to seek a compromise and there is some uncertainty in the outcome that gives people an incentive to do so.

Q108 **Chair:** Sure, I understand that. If you could prioritise one thing on civil legal aid, what would it be? If you could restore one element of it while they were doing this work on sustainability, what would it be?

**Derek Sweeting:** Early legal advice. It is something that was administratively easy, and easy for those who were applying for it. It could be dealt with by the people who were giving the advice in the knowledge that the application would be met. It is something of the sort that we had at one stage where you—

**Chair:** It is the old green form.

**Derek Sweeting:** A green form, absolutely. You could go and get some advice that would set your mind at rest or would kick off a process in the right direction and in the right way.

**Richard Miller:** I agree with that, with the caveat that, if you were going to introduce early legal advice, it has to be structured so that it is economically viable for the firms to do it. If you do it based on two hours' work at current rates, that will not be economically viable. You will not find suppliers able to provide that advice in that format.

**Chair:** That is very helpful.



**Q109 Maria Eagle:** What role should the Legal Aid Agency play in making sure that legal aid services are available to the general public? Should it be doing something it is not doing, or should it have a role that is different from the role it is currently carrying out?

**Richard Miller:** We have touched on some of these issues already. As Mr Sweeting says, there is a perception among many practitioners of a cult of refusal on the part of the Legal Aid Agency. I know the current chief executive, Jane Harbottle, is concerned about that. She has recognised that it is an issue that needs to be addressed. There is still perhaps some debate as to the extent to which it is real or perception.

One of the things that our members regularly report to us is that the constant struggle to get legal aid granted in the first place and to get bills paid is one of the things that causes them to lose morale, and to lose faith in the system and feel that there is no future for them in legal aid. If that can be addressed, it would go a long way towards improving the overall environment.

Legal aid should be a partnership between the Legal Aid Agency and the profession. That is the way it operates in Australia, for example, where the Legal Services Commission is very much seen as a commissioner of services. It fights and argues with Government for the funding to provide the services that it believes are necessary. In this country, the Legal Aid Agency and its predecessors have always been seen as the voice of Government against the profession. That is one of the key changes that it would be good to see.

It does a lot to try to commission the services that are required, but there is a split in responsibility between the agency and the Ministry of Justice. The agency is not free to say, "We can't get suppliers at this price. We need to put the price up." That is a decision for the Ministry and it then goes back to the Treasury. That is why the LAA has not been able to resolve the problems that it comes up against a lot of the time.

**Q110 Maria Eagle:** Mr Sweeting?

**Derek Sweeting:** I do not want to go over the same ground as Mr Miller because I agree with it, but I would like to add to or elaborate on the point he just made about the split, because the operational policy split can be very problematic. When the pandemic broke, the Family Law Bar Association raised with the LAA, in one of our liaison groups, the fact that barristers were having to have more conferences than were allowed for under the general assumptions that were made in the legal aid grant. We waited a long time for an answer from the LAA as to whether or not more conferences would be funded, only to be told months down the line that it actually was an operational matter for the Ministry of Justice. We are still waiting for an answer.

That is not the sort of rapid response that inspires confidence. It is a really good example, together with the culture of refusal, which we have



both talked about, of why there are impediments to the much more agile partnership that there should be between the Legal Aid Agency and those seeking assistance.

Q111 **Maria Eagle:** Beverly Higgs, do you want to say anything about that?

**Beverley Higgs:** No, it does not come within the remit of the MA to take a view on that.

Q112 **Maria Eagle:** What further measures are needed to ensure that legal aid services continue to operate efficiently during the national lockdown that we are now in?

**Richard Miller:** On that issue, I want to give credit to the Legal Aid Agency. Early on, we had extensive discussions with them about changes that were needed. Those were changes to deal with the fact that so much was happening remotely, and to ensure that lawyers were paid properly—for example, when dealing with a police interview remotely rather than being physically present in the police station. They made changes to their contracts enforcement, allowing for offices not being open for remote supervision. A whole host of changes were brought in to enable firms to continue working in pandemic conditions. They have recently extended most of those provisions until March, which has been very welcome.

For most firms, the issue has been the financial impact. The LAA brought in some cash-flow measures, but there has been no additional financial support beyond the generic support that the Chancellor of the Exchequer made available to businesses. We are possibly at the most critical point yet: third lockdown, tax bills coming due, and furlough potentially coming to an end so that firms will have to choose between bringing staff back or paying them in full when there may not be work for them because of lockdown. There are some key financial pressures that are coming to a head right now, and there is a real fear that some firms will not survive them.

Q113 **Maria Eagle:** Thank you. Mr Sweeting?

**Derek Sweeting:** I do not have much to add to that. Removing complexity around applications, which we are often told are difficult to follow, both for exceptional case funding and general applications, and making that process more streamlined, is an obvious point, and, as Mr Miller said, so is addressing the question of the sheer throughput of funds that are going to firms and legal professionals that depend on legal aid to survive.

**Maria Eagle:** Thank you. That is all from me, Chair.

**Chair:** Then last but certainly not least, Dr Mullan.

Q114 **Dr Mullan:** Thank you, Chair, and thank you, witnesses, for your patience today. We have discussed throughout the session the challenges of digital and remote proceedings and so on. It probably seems common sense to us that those on legal aid may in particular have challenges with



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access to technology and IT, but, on the other hand, we have covered the benefits potentially of remote ways of working. What are your views on how you think technology and digitisation will be potentially beneficial for legal aid, and what are the potential downsides?

**Richard Miller:** I tend to see our role at the Law Society as treading a path between the zealots and the luddites. There are some people who are really gung-ho about what technology can achieve. They think remote hearings are the answer to everything, websites can deliver everything, with artificial intelligence and automated services. The truth of the matter is that, for reasons you alluded to, a lot of the people we are dealing with need practical face-to-face individual support to be able to achieve access to justice effectively.

A lot of these developments—remote hearings and automated services—are really positive. They should be encouraged and used where they can be, but with a view to directing resources to help those who need more intensive support. It is not about solving the problem through those methods and just removing the funding altogether. We should use the technology where we can and direct resources to providing intensive support for those who need it.

Q115 **Dr Mullan:** We touched on some of this earlier, but is it for the solicitor to advocate on behalf of their client when they feel those approaches will not be appropriate? Is it for the judge in those higher-risk groups?

**Richard Miller:** Potentially a mix. One of the things I would like to see with the exceptional case funding provisions is that a judge should be entitled to make a direction that an individual needs representation, and it should be binding on the Legal Aid Agency to provide exceptional case funding in that case, because the judges know better than anyone what the impact on that individual is. If they make that ruling, surely there can be no better evidence that the test is met and that the person needs the help. That is one change that really could improve the exceptional case funding system.

Q116 **Dr Mullan:** Ms Higgs?

**Beverley Higgs:** The MA would absolutely endorse that. We believe that it should be for a bench to make a legal aid direction if we come across someone who is particularly vulnerable, is neurodiverse in some way, or has learning difficulties. We are aware that, on the Government's own assessment, 18% of the population are digitally excluded, and that even among people who have equipment and the ability to have digital engagement, 52% are not confident in doing so, much less in a complex legal environment. It is something to be borne in mind.

Slightly outside the legal aid arena is the reform programme, where the common platform is coming down the track. It started its early trials in Derby prior to Christmas. There does not seem to be any provision for unrepresented people—litigants in person—to be able to access data from the common platform. It has been designed entirely around very secure



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access for criminal justice professionals and the defence community. We are not sure quite how that is going to work going forward.

Q117 **Dr Mullan:** That is a really important point. Is that something you have raised with Government at any point and had some initial views on?

**Beverley Higgs:** We have representation on the Magistrates' Engagement Group, which sits under the senior presiding judge. What has certainly been part of the discussions about the development and implementation of the common platform is how people access it if they are not part of the criminal justice system. It could be that they still get their documents sent in the post. It could be that they only get things on the day, which is patently unfair if the other side has had them for weeks electronically. It is all in the mix and being worked out, but in terms of digital exclusion and problems, even outside the legal aid arena, we need to keep a good eye on it.

Q118 **Dr Mullan:** In all of your experiences with legal aid clients, should there be almost a presumption against them being digitally equipped unless they come forward and say they are, or do you think it should be on a case-by-case basis? To what extent is it an issue among legal aid clients?

**Beverley Higgs:** Again, that would not be a position that the magistrates would consider individually.

Q119 **Dr Mullan:** Do the other witnesses want to comment?

**Derek Sweeting:** I would not jump to too many conclusions about it. It is probably a difficulty that surfaces in some sectors of the population more than others. I would be very sceptical, for the reasons that Mr Miller touched on, about thinking that there is some AI solution where we could have decision trees that would answer your legal problems and so on. What most people need is access to legal advice from someone who is qualified. Although digital exclusion is a problem that cannot be underestimated, and we would hope that, with the incoming wave of technology, younger generations would deal with the problem in due course, at the same time I do not think we should not be innovative about how we deliver legal services.

You only have to look at the change in the way in which we now consult our GPs. A lot of people are now doing that online, often with a mobile phone, and there is a lot of evidence that there is a very high rate of smartphone use in this country, even compared with Europe. Being able to deliver some initial legal advice at the very least, or advice during the course of a case, or case progression of documents, through that sort of platform is certainly something we should be looking at. Simplifying our procedures so that that can be done sensibly is the sort of concomitant activity that we need to think about going out of the pandemic.

Q120 **Dr Mullan:** We talked earlier in the session about struggling to maintain a geographical spread of legal aid practitioners. If you were able to be more flexible in that initial discussion—in those initial consultations—and



if that was supported, it might allow a service to be maintained over a greater area at a decent standard.

**Derek Sweeting:** That is absolutely right. One of the things we have been looking at recently with Advocate, the Bar's pro bono charity, because we have had a massive uptick during the pandemic in the number of barristers, the younger Bar in particular, offering their services on a pro bono basis, is to make much more use of remote hearings in cases where there is pro bono representation—not on the basis that that should be mandated, but that it is an option. The court could opt to have a representative there as long as the case is on a remote basis. That would be quite a good initiative.

We cannot have a second-class system either for legal aid or pro bono claimants—a sort of two-tier system. We need to have the same approach in each case. I think you are right: many of the problems that we have in finding people to represent individuals pro bono in certain parts of the country could be addressed by the hearing being remote in a way that it could not have been only a year or 18 months ago.

**Richard Miller:** I would like to sound a note of caution on that. We have heard from a lot of the not-for-profit sector advice organisations that, since the pandemic, they have seen a new wave of people who have problems arising from Covid, but they have also observed that they have lost a lot of their traditional previous client base and they do not know where they have gone. The clear message is that they are not able to access services remotely. Yes, the remote provision of advice services could well go some way to addressing the issue, but it is not an adequate, full substitute for having on-the-ground services in each individual area.

Q121 **Chair:** I suppose, from a judge's point of view, it is better to have an advocate acting pro bono remotely than—

**Dr Mullan:** Than not at all.

**Chair:** Than a litigant in person trying to wade their way through the thing, and you are having to almost hold their hands as a judge or a magistrate because it takes much longer.

**Derek Sweeting:** I certainly was not suggesting that there is a substitute. That is the point I am making: these things are not a substitute for face-to-face meetings and representation in person and so on, where that is necessary. We ought to be innovative in looking at what we can do to facilitate access to justice.

**Chair:** Thank you all very much. We have covered a good deal of ground this afternoon. Thank you for your patience and your time. These are important topics, and they warrant proper examination and exploration. You have all assisted us very greatly with that. I am indebted to you for your time and for your evidence. Thanks again, too, to all your members for the work that you are doing to keep the system working under these



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stressful conditions. We are grateful for that. I look forward to seeing you, no doubt in other guises, at other points, hopefully, over the coming year. The evidence session is concluded.