HOUSE OF COMMONS

Justice Committee

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

Tuesday 26 January 2021

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Watch the meeting

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

Questions 122 - 211

Witnesses

I: Dr Natalie Byrom, Director of Research and Learning, The Legal Education Foundation; and Dr Hannah Quirk, Reader in Criminal Law, King's College London.

II: Dr Mavis Maclean CBE , Senior Research Fellow, University of Oxford; Dr Vicky Kemp, Principal Research Fellow, University of Nottingham; and Dr Jo Wilding, ESRC Postdoctoral Research Fellow, University of Brighton.

Examination of witnesses

Witnesses: Dr Byrom and Dr Quirk.

Chair: Good afternoon, everyone, and welcome to this session of the Justice Committee of the House of Commons. This is a further evidence session in our inquiries into court capacity and legal aid. For convenience, we are holding the evidence sessions on both inquiries together because there is some overlap.

I welcome our witnesses, whom I will introduce shortly. As is always the way, Members have to go through the formal procedure of declaring their interests at the start of each meeting. I am a non-practising barrister and former consultant to a law firm.

Maria Eagle: I am a non-practising solicitor.

Rob Butler: Prior to my election, I was a non-executive director of HM Prison and Probation Service and the magistrate member of the Sentencing Council.

Q122 **Chair:** Other members will come in. I will make their declarations to speed it up. Mr Slaughter is a non-practising barrister; Mr Daly is a practising solicitor. Sarah Dines will be with us shortly, too. She is a barrister but has not practised since her election to the House of Commons.

On our first panel we have Dr Byrom and Dr Quirk, who are both familiar to a number of us. It is great to see you again. Will you just introduce yourselves for the sake of the record and for those watching or listening?

Dr Byrom: I am director of research at the Legal Education Foundation. Between 2018 and 2020, I was seconded to Her Majesty's Courts and Tribunals Service as an independent adviser on data and academic engagement.

Q123 **Chair:** I think you also published a report in June 2020 on Covid and its impact on the courts.

Dr Byrom: Yes.

Dr Quirk: I am a reader in criminal law at King's College London. I have a particular interest in miscarriages of justice and general criminal law and justice issues.

Q124 **Chair:** Thank you both very much for introducing yourselves. We have your written submissions in front of us.

Perhaps we can kick off with the impacts of Covid on the system. Natalie, I think your work concentrated initially on civil justice, did it not? Perhaps we will come to that in a moment. What would you say have been the impacts of the pandemic on the justice system? We have a pretty rough idea about backlogs and pressures, but can you encapsulate it for us?

Dr Byrom: That is quite right. Operationally, the big picture is that, thanks to huge efforts by judges, lawyers and court staff, cases have continued to be heard using remote technology. Overall, the picture we are facing, which you heard about last week, is one of increased delays and case backlogs.

I think that the question the Committee is really asking here, which I know your constituents would want you to ask me, is: what have been the impacts of the pandemic on access to justice? To be very clear with you, we do not know. That is not because it is not possible to know, or because it is too difficult to know; it is because the courts service has chosen not to collect the data that would enable us to understand the impact on access to justice.

One of the most important things the Committee can do and the role Parliament can play is to work with the Government to ensure it delivers on the commitments it has made to improve the data it collects to enable it to manage the court system, deliver value for money to the taxpayer and demonstrate to all that the justice system is upholding access to justice.

Q125 **Chair:** What specific sets of data are you referring to that it has deliberately "chosen not" to publish, to quote your words, Natalie?

Dr Byrom: To be quite clear, we are not talking about particularly sophisticated data. One of the things my research revealed was that the courts service does not have data on the number of judges who have sat since March, or good data on the number of trials or the number of remote hearings that have taken place. There is a severe absence of data on users of the justice system.

It is basically the equivalent of a hospital going into the pandemic choosing not to collect data on the number of surgeons it has or the number of operations that have taken place, or not to follow up patients after they have been treated to find out whether they survived.

The other thing that is particularly frustrating is that, thanks to the efforts of your Committee, in 2019 the courts service was presented with a report that told them about the specific data they would need to capture. In principle, they committed to collecting it. What we now need to see is consistent, credible action to implement the recommendations it received, in particular to ensure that the funding it received under the spending review 2020 is dedicated to this, because without it we are just flying blind.

Q126 **Chair:** Hannah, what is your take? I know that you are particularly interested in the criminal side.

Dr Quirk: To focus on the criminal side, functionally the courts have managed to keep some activity going by various means—for example, plexiglass screens and distancing within courts—but there is enormous pressure on the system from that and the backlog. As we know, the

backlog was unsustainable pre-Covid. I think it is very important to separate the two issues. This is not a backlog caused solely by the Covid crisis; it was out of control prior to that.

The qualitative experience is extremely important. Suspects now awaiting trial will perhaps have been questioned in police custody without a defence representative with them, because solicitors were unable to go into police stations during the worst of the pandemic.

Some of them have been held in custody in really ghastly conditions and are very concerned for their own safety. At times they have been confined to their cells and there have been no family visits or education. It has been very difficult to communicate, and there is perhaps an indefinite wait for a trial. We are hearing about trials being listed two and three years hence, which is dreadful for everybody concerned in the proceedings, whether it is victims, witnesses or defendants.

One of the very serious concerns about access to justice that has to be raised is the survival of the professions. Given the cuts to legal aid over the past decade or so, we know there has been a devastating effect on the number of practitioners who have been able to remain as criminal solicitors or at the criminal Bar. The lack of trials over the past year has caused very significant strains on members of the criminal Bar in particular, who are not well paid. There was a BBC report last week about criminal barristers who are essentially earning below the minimum wage. There is very little slack in the profession, and there is serious concern that the longer this goes on we may not have sufficient numbers to continue with criminal work.

Chair: I think that is on the basis of standard fee cases and the deductions they have to make: rent, clerks' fees, expenses and so on. They come out of the gross fee. People do not always understand that.

Dr Quirk: Thank you. My other concern is about something that is very difficult to measure: the risk of miscarriages of justice. If people are told they will not have a trial for two years, some may plead guilty just to get matters over with because they do not want it hanging over them. If it is an offence for which they might get a shorter sentence it will be served by the time the case eventually gets to trial. We have seen from the States that very lengthy pre-trial detention can increase the risk of miscarriages of justice.

Q127 **Chair:** Do you have any statistics on that in the UK?

Dr Quirk: About those pleading guilty?

Q128 **Chair:** Yes. Do you have any statistics to support that view?

Dr Quirk: It is very difficult to measure because they would put in a guilty plea but have either not committed an offence of that severity or just want to get it over with. It is almost like a dark figure, but there is certainly evidence from the United States, where there are very long

waits for trial, that quite aggressive plea bargaining goes on and so defendants will just plead to keep cases out of court.

Q129 **Chair:** It is fair to say there is no plea bargaining of that aggressive kind here.

Dr Quirk: Absolutely not, but that is perhaps the best example I can give, given we do not have hard data on that here.

Q130 **Chair:** Is it a concern based not on particular evidence at the moment but just a feeling?

Dr Quirk: I am not sure how you could measure it statistically because it is almost an unknowable, but it is a risk of which we need to be aware.

Q131 **Chair:** I understand. That gives us a bit of context. One other thing that has been talked about is that broadly online hearings have been a means of keeping the system going and are efficient within limitations. Is there something about the importance of the courtroom? Andrew Langdon, when he was charman of the Bar, discussed the move to online hearings in the broader sense of the court reform programme, even before the imperative of the pandemic came along. He talked about the danger of losing, in his phrase, the "majesty of the law"—the importance of being in a courtroom with its royal coat of arms and the degree of seriousness and solemnity of the occasion. Not everybody is of the same view, but is there something that is potentially lost, or not?

Dr Byrom: The courtroom serves a number of important functions, particularly when we think about court capacity. One of the issues being raised as a concern is that the courtroom, with everyone coming together in one place, provides the first option for cases to be settled prior to going to trial. Key to addressing the backlog is a reduction in the number of trials. When you remove the physical courtroom, you lose that opportunity for engagement between prosecution and defence to enable them to arrive at a situation where somebody decides to plead guilty to offences.

On the point about solemnity, there is some evidence again from the States, which we picked up in the two reviews I have done—one about civil justice and administrative justice and one about family law—that not having the courtroom there means that litigants and people involved in the justice system do not perceive what is happening and realise the finality or importance of the proceeding. If they do not take it seriously, that can lead to them not seeking legal advice when they otherwise would. That can lead to all those outcomes in the States. In two examples we have certainly seen that. Those are two things to be mindful of.

To go back to my central theme, we need to be collecting more data on these things to understand what difference moving to remote hearings has made for outcomes, engagement in the process and all those things.

Q132 **Chair:** The other concerns on the criminal side are about people making informed decisions.

Dr Quirk: Historically, trials could be held in all sorts of different places. They used to be held in marketplaces or under trees. The solemnity of proceedings is perhaps a more Victorian idea, but again it is measuring the intangibles.

Take a meeting like this as an example. Functionally, it works; we can communicate and see each other. This is the first time I have given evidence. Had I been able to come to Parliament, I think it would have been a very different experience from communicating online. As witnesses, we would probably have met beforehand and had a talk. Those sorts of things are much harder to measure but are very important in keeping the system going in being able to expedite a guilty plea, if that is going to be the outcome, or a change in plea, but also communication on the defendant's wellbeing. Do they need pre-sentence reports, for example? Are their issues about their mental health? It is functional, but I do not think it is emotionally the same experientially.

Q133 **Chair:** Natalie, are there ways in which the current approach to remote hearings could be improved?

Dr Byrom: Yes. There are things that are not intangible. Successive inquiries, including one by EHRC, have shown that there are issues when the litigant or defendant is not co-present with their legal advice. That can present real issues. I do not know whether you read the report produced by the Family Justice Observatory, but it gives some upsetting and distressing accounts, for example, of parents whose children have been removed, sobbing down the phone from their flat unable to be comforted by their legal adviser.

There are also issues in the mental health tribunal where patients with dementia have made decisions about their care on a phone that they have borrowed from their consultant. They do not follow the process and do not understand what is going on. That is important when we think about it.

Dr Quirk is completely right to raise the point that, without everyone arriving at the courtroom, it is more difficult to identify when defendants or litigants require reasonable adjustments to participate. There is concern that if reasonable adjustments are not made the wrong decisions will be reached.

As for changes that can be made to remote hearings, fundamentally we need to have better quantitative evidence. For example, it might surprise you to know that none of the databases at the moment is recording the number of remote hearings taking place; they are not recording the platform being used and things like hearing duration. Without that, it is impossible to compare the performance of different software platforms that have been used. Anecdotally, we have heard that Webex, which is

used in Scotland, is much more stable and fails much less, but, if we are thinking about remote hearings as a technology to be used in future, we ought to be betting on a platform that is least likely to fall over and is the most stable.

There are certain tweaks that can be made. One thing the profession has called for is a waiting area to enable different parties to have discussions prior to the hearing taking place. One of the things we have learned from this is just how much technology is required to participate effectively in a remote hearing. In my research we were talking about the need for two screens plus a mobile device to communicate with your client if you are a lawyer.

What we desperately and absolutely need to understand now is that the most important stakeholder in the justice system is the citizen and person who is using the courts. They are the people who need to have trust and confidence for the system to continue to operate. We do not have good data on what their experience has been, or how it has varied regionally, and that needs to be addressed.

Q134 **Chair:** Hannah, you are nodding. Is it that without that data and involvement of other stakeholders we cannot adequately future-proof these reforms, leaving aside the pandemic? Going forward, are there other things we need to do? If you are to go down the route of reforms along these lines, to a greater or lesser degree, beyond what Natalie has said, are there other things that need to be done?

Dr Quirk: There are specific concerns within the criminal system. I echo a lot of what Dr Byrom has just said. Consider in particular how many defendants in the criminal justice system do not speak English as a first language, or have mental health issues or learning disabilities. It is relatively straightforward for somebody like me to come to a meeting like this. I have a quiet room and a stable internet connection. In an ideal world, these things might be more suitable, but given the people who are before the criminal courts a lot we need to take that into account.

There are also issues to do with those in prison—whether they feel comfortable speaking, who is around them and all those kinds of issues.

As for future-proofing, one of the things we need to consider is that we do not necessarily always have to look for an IT solution. One of the greatest problems with the courts we have seen recently is that the physical infrastructure is in such a terrible condition. There is a lack of hand-washing facilities; there is no air-conditioning; you cannot open windows; there is no heating. While we need to think about IT solutions, some very basic things could be done in the meantime to improve the physical conditions if and when people can come back into court.

Chair: That is very helpful; it gives us a pretty good idea. We will move now specifically to the criminal jurisdiction.

Q135 **Andy Slaughter:** You have set out quite a lot of the problems with the system at the moment. I guess what we are trying to look at is the way forward. Do you have any suggestions in relation to how the capacity of courts could be increased? We have seen a variety of figures. It is quite difficult to get the information on, say, jury trials, but it looks like they are running at about 230 a week against a very large backlog. Although we have had backlogs of that order before, we have also had two to three times that number of trials taking place. Do you have any initial views? You have diagnosed the problem. What is the solution to it at the moment?

Dr Quirk: A number of things could be done. One of the issues that surprised me was how slow the courts service was in making physical adjustments to courtrooms to get juries back in. I believe that it was left to the recorder of Leeds to go round the courtrooms with a tape measure trying to work out whether Perspex screens could be put up. This kind of adaptation seems to be done on quite an ad hoc basis within the different courts. If that were to be supported centrally it would be much easier to get more courtrooms available, not necessarily staying within existing court buildings. For example, in Scotland they are using cinemas. JUSTICE, the human rights organisation, has run a number of trials on different scenarios where juries can be in one room and the judge, lawyers and defendants in another, and it looked at some of the issues surrounding different models for that.

At the moment we have theatres standing empty; we have university buildings standing empty. We could be a bit more imaginative in where courts could be held. A significant issue about the original backlog was the lack of judicial sitting days. There were courtrooms sitting empty. There needs to be an investment in that area, and also in the CPS, police and defence being able to speed it up.

Q136 **Andy Slaughter:** We have heard about Scottish cinemas before. I do not know whether you have any examples. Do they not suffer from the problem you identified earlier that, as soon as you remove people from a courtroom sitting, you are removing that relationship that you have there? We talked about seriousness, communication and things of that kind.

There have been more radical suggestions—for example, restricting trial by jury. That could be judge-led trials; it could be extending the jurisdiction of magistrates; it could be having smaller juries and things of that kind. The Lord Chancellor is resistant to that, and most of us probably are as well. Do you have a view?

Dr Byrom: We need to understand whether or not the measures that have been introduced in trials so far are effective. We do not have good data as to whether Nightingale courts or Covid operating hours are effective in tackling the backlog. We do not have good data on delays that have clustered regionally or at particular courts; we do not even have good data on the impact on serious or complex cases.

Before we start experimenting with remote juries or restricting the right to jury trial, which is such a fundamental tenet of our legal system, we need to get serious about evaluating things that we have tried so far to identify the way forward. The way you deal with the backlog is to triage and ensure we are using the physical court capacity that we have most effectively for those cases that most need a physical hearing. That is those cases where you have a defendant with a learning difficulty where it is a serious or complex matter. The only way you do that is by having good data on which cases are in the system.

I know that Vera Baird has raised the impact on victims and witnesses. You collect the data on cases going in and proactively list those cases where there is lots of live witness evidence, because we know that degrades over time. You need to think about recovery in the same way you would think about it if you were a hospital or business. To me, it is crazy that we are suggesting all these different methods, even trialling some of them, and not bothering to follow up to find out whether they are effective. That cannot be right. It is not a good use of taxpayers' money, and it is not the way to run a world-leading justice system.

Q137 **Andy Slaughter:** I agree with all that. We have heard that the MOJ is stopping its projections, so the only way we can judge the backlog is to look retrospectively at what it was last week or last month. Let us assume you are right and we collect data that shows there is more intensive use and that currently the backlog is either stable or continuing to go up. There is still a big problem and I am not hearing any sort of solution. You can quantify or look at the quality of it, but how are we going to get on top of it when we still have this big restriction in the use of facilities?

Dr Quirk: It will take an enormous injection of funds and quite creative thinking. I share your concerns about remote hearings. I think of something like holding trials in a university lecture theatre, or some of the Nightingale courts in the Lowry theatre at the moment and Birmingham Rep too, which also has the benefit of cross-subsidising industries that are struggling.

I have very serious concerns about restricting the right to trial by jury. We have seen what happened in Northern Ireland. When you introduce emergency measures they have a tendency to stick. A measure was introduced in 1973. We still have Diplock trials in Northern Ireland almost 50 years later. We need to be very cautious about doing that.

As I said in my earlier remarks, these are suspects and defendants who have already had a much less satisfactory experience of the criminal justice system than they would normally. If any measures are introduced to mitigate the problems of delays, it would be wrong to introduce another one that was to the detriment of defendants.

We might want to look at more diversion schemes. Is it necessary to bring all these cases to trial? We could be quite imaginative about that.

Are there other ways of sanctioning somebody's behaviour if it does not necessarily need a Crown court trial?

Increasing magistrates' sentencing powers recurs very frequently. Again, there are quite significant concerns about that. While we need to be imaginative and flexible, it would be quite problematic to introduce these measures as a reaction to the Covid crisis because it would be very difficult to row back from them afterwards. I am sure the Ministry of Justice would see the savings that would ensue and it would be very difficult to reinstate the system.

A judge-only trial is particularly problematic because it requires such a fundamental cultural shift. It is not a system of justice that we have had in this country before. It would seem somewhat ironic suddenly to impose a much more European method of hearing cases in the current climate. I am not saying that a jury trial is always the best way of doing things, but it is not a measure you can adapt without any kind of understanding of what is going on, or sense of what might be lost through it.

Q138 **Andy Slaughter:** We have talked about the practicality of the current system. I guess that practitioners, judges and so forth are pretty robust, but that cannot necessarily be said of witnesses and victims, even some defendants. Have you thought about or looked at the effect of the Covid climate and its impact on people going through the justice system—how they are affected differently by the trial process?

Dr Quirk: Very much so. I think the problem started with defence solicitors not going to police stations. They had a remote link—if any kind of consultation at all. Prisons are an area of the justice system that has been very under-publicised over the past year, and the conditions in prisons at the moment are dreadful. For anybody who has been on remand it has been an awful experience, with the uncertainty about when their case may or may not get to trial and difficulties of communicating with their solicitors and barristers. It is incredibly difficult. I am not saying there are easy solutions, but restricting a very fundamental part of our criminal justice system would be a dangerous reaction.

Dr Byrom: I totally agree with what Dr Quirk has just said.

We are trialing a range of different methods, expanding the court estate to include theatres or using remote hearings. What you need to understand is whether that is effective at doing the thing you want it to do. We have heard that proceeding with some types of cases remotely can lead to hearings lasting longer. We need to develop some clear criteria for identifying that. If we think that the only way to deal with the backlog is by making more trials happen, we need to be really clear about which methods will be most effective to ensure that hearings do not take longer.

The only way we will understand that is to capture fairly basic data on what is happening within the system. If you are asking about how we can

develop practical solutions, we need to have some evidence about what is working, and then we can encourage the Government to invest in those solutions that appear to be most likely to work.

We must not lose sight of the fundamental principles that the justice system is there to protect. You will often be told that access to justice is intangible or difficult to measure. It really is not. Your Committee provided a framework last year in your report on HMCTS that would enable it, if it implemented it, to capture the data in order to be assured that access to justice was being delivered. Those measures and metrics set out for it need to be embedded as a key performance indicator for the organisation. To me, it is crazy that it is not a key performance indicator. That is one thing that could really be taken forward.

Dr Quirk: The number of unrepresented defendants in the criminal justice system and litigants in the civil system increases delays. We know that having access to legal advice is a much more efficient way of using court time.

Chair: That is a fair point.

Q139 **James Daly:** Thank you for your evidence. It is very helpful. A number of us on this Committee have long experience of the courts. My experience is in the criminal courts. I want to set this in context. We are not talking about the system before Covid being some panacea. During my 16 years in the criminal court, exactly the same conversation we are having now, save for Covid and the challenges it brings in court space, has been taking place. There are delays within the criminal justice system, in particular with Crown court cases. In the 16 years that I have been practising, this discussion has gone on every single year. Governments of all political persuasions have tried different methods to reduce the number of cases that get to the Crown court.

There is one thing that always concerns me when we talk about general legal principles. I can tell you from my own experience that the basic requirement for a court system to work well is the competence of the people who run that court and those who feed into it. You have to have an effective Crown Prosecution Service, effective and organised solicitors, and evidence served in the proper manner. If evidence is not served correctly, you will not have a trial, no matter what happens.

I appreciate the points you are making, but the issue that is different with Covid is how we overcome the problem with court capacity. If you have a trial in a cinema, high school or any public building, effectively a court is simply that: a room with a coat of arms above where the judge sits. I think that those defendants who are on bail are on bail for a reason, in that they are not perceived to pose a threat to the public. I just want your views on why we are not looking at innovative ways to use buildings to their full potential to help us get through this crisis.

Dr Quirk: I absolutely agree. I think we could be much more imaginative about the buildings we use. There could be benefits to industries that

cannot use their buildings at the moment. Theatres would be an obvious example; universities would be another; hotels would be another. We have seen examples of Nightingale hospitals being built. A purpose-built courtroom was constructed for the Hillsborough inquiry. Something like that could be done as well.

Q140 **James Daly:** But do you agree with me on the fundamental point, referring to what you have been telling us about, that we could have had that conversation pre-pandemic, save for the issue of safety measures that have to be put in place in the court process? Nothing has really changed in how we find an effective and efficient way of dealing with justice and Crown court cases. This is not new, is it?

Dr Quirk: No, absolutely. Two thirds of the backlog existed pre-Covid. You are quite right, and it is very important to acknowledge that point. There are obvious physical difficulties in arranging a courtroom in the current situation. Maybe it is more challenging now, but with imagination and money that could be overcome.

Q141 **James Daly:** Another hugely important part of this debate, which is within the remit not of the Justice Committee but of the Home Office is release under investigation. You talk about a backlog of cases in the system. The backlog of cases of release under investigation is immense, even compared with what we have in the court system. I know from personal experience and from speaking to local practitioners that there are people who are released under investigation for the most serious offences. As part of this debate about access to justice and the benefit to everybody, I wonder what your view is of the relationship between release under investigation and how the police and CPS interact in that process, and how we can get these cases through the criminal justice system.

Dr Byrom: What you are pointing to is a real issue and the failure to see the justice system as a system with a focus on siloing. We are having a discussion here about the courts, but anything you do within the courts has a knock-on impact on prisons and rehabilitation. Any changes you make to court procedure has an impact on the CPS and policing.

One example we saw quite recently was the failure accurately to model the costs of virtual remand hearings on the police service. That meant they were abandoned as a technique to reduce the backlog, because the police service was not adequately resourced to run them.

I am not an expert on what you say, but what you point to is that we need to move out of the various operational silos we have and start to think about this as an end-to-end system. It is only by intervening upstream that we are properly able to reduce the pressure on the courts.

Q142 **James Daly:** What I am pointing out is that a national policy has to do its very best to point to the best possible practice. The police officer who arrests somebody has to do the job efficiently, effectively and liaise with

the witness at the earliest opportunity; the Crown Prosecution Service has to review that case at the earliest opportunity; and the defence solicitor has to be able to interact efficiently with the Crown Prosecution Service; and you put that into the court system. That is what gets court cases moving. One of the things about court cases is that the nature of our system—it is nobody's fault—allows things to flow along without a proactive approach to getting solutions that will help everyone. Do you think that is a fair point?

Dr Byrom: One of the issues across the justice system is the absence of feedback loops, so actors in one part of the system do not get to see the implications of the decisions we have made. You see that in family justice where judges are making decisions all the time that are in the best interests of the child, but there is no follow-up research to understand whether those decisions do manifest themselves in best interests. I suppose the great promise of technology and reforming data and evidence is that you should be able to understand it. If we had better data that followed cases through the system from start to finish we would be able to identify where inefficiencies were occurring and work with either the police or CPS, or whichever actor is causing the delay, to address them. That is how you manage your way smartly out of the crisis and future-proof the system going forward.

Dr Quirk: In fairness, I think the problems with release under investigation were flagged up at the time. They were brought in because of problems with extending bail indefinitely.

Q143 **James Daly:** For the same reason. It is an inefficient system that is not putting cases through the court system quickly enough. One of the things I often talk about is the amount of time it takes for cases to be investigated The nature of evidence gathering and how that is served on the various parties to proceedings is a real problem.

Clearly, there is a role for remote proceedings in the court process, such as certain types of offences with vulnerable witnesses. It is entirely appropriate in those terms, but we should be very careful—I think you would agree with this—in bringing in remote hearings. That impacts justice, especially trials. If you are in a trial system, the human interaction within a court is hugely significant to the process of justice and how you assess whether evidence is credible. That would be my view.

We have very strong evidence coming out from the courts to show that, especially in magistrates courts, taking instructions from clients remotely, who perhaps do not have English as a first language, is causing increasing delays. I am told by colleagues that in magistrates courts the most basic bail application can now take up to an hour. That is an application that would normally take 10 minutes in a magistrates court. If you scale up that problem to the Crown court, while remote technology has its place, do you agree we have to be very careful about implanting it into the system because of the many injustices it could cause, as you

quite rightly said?

Dr Byrom: There is emerging evidence to suggest that in cases where a defendant—or litigant, for that matter—has English as a foreign language, it is harder to proceed remotely. There is also evidence to suggest that where issues are more complex.

On demeanour, a point you have alluded to, and how proceeding remotely impacts on perceptions of demeanour, we need a better evidence base, because reliance on demeanour as a proxy for guilt, innocence or veracity is not understood well enough.

What we need to be doing is collecting more and better data and evidence to help us understand where we can best deploy technology and fundamentally where the problems in the system are occurring. We can then decide on what a good solution to that problem would be. Just dropping technology into an unreformed system without thinking about where the problems are occurring, or what we are trying to address here, will not be effective in improving the system.

Q144 **Chair:** Hannah, you have a particular interest in miscarriages of justice. Mr Daly's question hints at the risk of this, does it not?

Dr Quirk: Yes, absolutely. I refer back to the points I have made previously. Something else you might want to consider is the effect on juvenile suspects and defendants with learning difficulties and their ability to interact. I think that is a problem.

With regard to police investigations, I am sure nobody goes to work wanting to do a bad job and, given the 25% cuts in staffing they have had over the past 10 years, it is unreasonable to expect them to be able to—

Q145 **James Daly:** That is an excuse to justify an inefficient system. That is a political point, not a practical point about how we address the issue we are talking about here.

Dr Quirk: I am sorry; I must have misunderstood you. I thought you were talking about delays in investigations.

Q146 **James Daly:** On delays in investigations, your evidence to this Committee is that that is due to cuts in budget—that there is no other reason for it; that is the reason and it is unreasonable to ask people to act efficiently.

Chair: Was that what you were saying?

Dr Quirk: I do not quite follow your point. I am sorry. I am saying that, realistically, if you have a far smaller number of staff having to do more work, something will have to give. I do not think that is a political point; it is just logistics.

Q147 **James Daly:** Tell me what evidence base you have to make that

statement.

Dr Quirk: You mean the reduction in the number of police?

Q148 **James Daly:** That is your opinion, is it not? You have no evidence at all that that is having the effect on the system that you are talking about.

Dr Quirk: If you have fewer people and the same amount of work, there are only so many efficiencies you can make. It takes the same amount of time to take evidence from a witness.

Q149 **James Daly:** You are not basing that on any facts, are you? You are not basing that on experience of the actual system; you are basing it essentially on these generalised headline statements.

Dr Quirk: No; I am basing it on statistics.

Q150 **Chair:** Hannah, perhaps you could provide us with the statistics afterwards.

Dr Quirk: Of course.

Q151 **Chair:** I say the same to all witnesses. If there is particular follow-up data you want to submit at any time, we are always happy to receive it.

Dr Byrom: If only we could, Sir Bob.

Q152 **Chair:** If you find any, it is always welcome.

Dr Quirk: I think it was in my submission, but I will double-check.

Q153 **Chair:** That is fine. As a practical matter, can we make more imaginative use of listing? Mr Daly was talking about buildings that you may not need for custody cases. Do you discern that enough is being done to refine the listing system to recognise that?

Dr Quirk: I do not practise and do not have day-to-day experience of listing, but using other venues where you have cases involving lower security would seem an obvious way, and triaging those cases that are waiting and deciding which ones can be dealt with more expeditiously and efficiently would seem a pragmatic solution.

Q154 **Kenny MacAskill:** I think both witnesses have touched upon this. I am coming at it more from the civil perspective, not simply criminal courts. What are your thoughts on whether the court reform programme and various recovery plans are initially going in the right direction with technology and are sound? Indeed, are they ambitious enough, or could they go further, and, if so, where?

Dr Byrom: I do not think the current reform programme is ambitious enough. What I mean is that it does not contain at its heart a key performance indicator around improving access to justice. A truly ambitious reform programme would, for a start, include within its strategy a definition of access to justice, which is available to it, and

ensure that it is collecting data to hold itself to account for delivering improvements against that goal of delivering improved access to justice.

If we are serious about future-proofing the system and delivering one where we are able to deploy technology and other types of initiatives to address backlogs or resolve problems, we need to have underpinning all of that a good understanding of who is in your system and where the blockages are. At present we do not have that.

As for the ambition, I would start by making sure that you are underpinning the new reform projects with good data, which means improving the data we hold on users and the way we record what happens in hearings. You can then think smartly and identify precisely where the issues are and about the role technology might have in addressing them. The ambition needs to be more clearly focused on the empirically verifiable definition of access to justice.

Q155 **Kenny MacAskill:** Are there any quick fixes that might assist in increasing capacity, given the current difficulties?

Dr Byrom: I think we have covered some of this. As for the way you tackle capacity, resources need to be invested in the system in improving the technology and infrastructure available to judges at county court level, but the way you identify where your quick fixes are is by having a better understanding of what is happening in your system. For example, we know that deprivation and poverty is highly linked to digital exclusion. If someone is digitally excluded, there is no point in listing their hearing to take place remotely. HMCTS holds postcode data on all cases that are filed. If, when judges were listing, the information was presented to them to show that the claimant or litigant in any particular case was more likely to be digitally excluded, they could not list that for remote hearing. This is all to do with thinking about how we use what we have better and more effectively. Unless we get a better understanding of where the problems and blockages are and we are able to triage, we will not work our way out of the crisis.

Dr Quirk: I would direct you to some quite old-fashioned things as well like having suitable venues. There has been an enormous sell-off of the court estate. It is problematic in London, but in other parts of the country you have great difficulties in getting defendants, witnesses and victims to court. I am referring to the very basic facilities like having hand-washing facilities, windows you can open and heating that works. My real concern would be the sustainability of the legal professions given the crisis in legal aid funding in criminal work. That really needs to be addressed.

Dr Byrom: Dr Quirk makes a good point, and that is the case in civil as well. One of the mechanisms the Government are keen to rely on in addressing the backlog is mediation and alternative dispute resolution. We know that one of the impacts of civil legal aid cuts is that fewer people are mediating their cases. Commonsensically, I would not mediate any case if I did not understand my rights or what a position was. An

important point here is that, if we are thinking about how to deploy different dispute resolution pathways, we need to ensure that people have access to good information to help them make informed choices and then they will make those choices.

Q156 **Miss Dines:** Before I move to my questions, may I ask Dr Byrom a question about an assumption she just made that I thought was perhaps a little too simplistic? She referred to listing cases by postcode, saying that the person who lived there would necessarily be suffering some deprivation. I am very concerned that that is not a thorough or academically well-tried proposition. That would be putting our social construct on somebody's postcode. I wonder whether you would agree with me that a far safer way would be to have on some general preliminary paperwork a question about that, rather than just assuming that because of where someone lives they must fall into some category. Do you agree there are lots of dangers in that?

Dr Byrom: I can give you an example of a case that emerged from the housing court. An 88-year-old man had lived in his home since 1938, I think. His hearing was listed to take place by telephone, but all the papers were served by email. Because he did not have an account, he was not able to access the very information he needed to tell the court that he could not participate remotely. These are some of the things that arise. I am not saying you would rely on postcode data to list cases, but if you know, for example, that a litigant is based in an area where there is lower broadband coverage, or someone is more likely to be affected by some of the problems that we know have affected schoolchildren all across the country and you have that extra source of intelligence, why would you not use it? You should obviously follow it up in other ways. It is really important that we think smartly and strategically about how we make sure we are making the very best use of court resource, including administrator time, to move through the crisis.

Q157 **Miss Dines:** We might have to disagree about that.

If I may move to technology generally, during 30 years at the Bar I experienced a great variation of cases, such as contested fact finding in care cases where technology was or was not used. Sometimes it was well used and sometimes less well. Can you tell us from your academic research, with evidence please, why you think the system was so slow before the pandemic at grasping remote access technology?

Dr Byrom: One of the things to emerge quite strongly from the consultation with users of the civil justice system was the historic under-investment in the tech infrastructure in county courts. When the pandemic and the move to remote hearings took place, county and district courts were playing catch-up. That is part of the reason.

What we have heard is that years of under-investment in the basic infrastructure provided in courts has meant that it has been difficult for them to embrace technology.

As we pointed out at the start of this hearing, we are all now using technology as a result of necessity in ways that we never thought we would, or would need to, because of the pandemic. Some of the rapid expansion in the use of remote hearings has been borne of necessity rather than necessarily thinking that this would be a good way of delivering the justice system as it stands. Does that answer your point?

Q158 **Miss Dines:** Your answer was that generally it was a lack of investment in technology, but my anecdotal experience is that it is not that. Quite often, there would be cases kitted out with the best stuff but a particular member of court staff or a judge might be reluctant to embrace it.

I wonder whether you have any research based on evidence rather than a submission that this is what you think in a very generalised way. I am interested in solving this. I want to know what has gone wrong historically. It is not just money, is it? Is it not about ethos, training and willingness? What is behind it from an academic perspective?

Dr Byrom: We have found that where judges have been asked to use remote technology they have done so, but we saw in your previous inquiry that people were concerned about what technology would do to norms of due process and issues around majesty. There is definitely a cultural element. Some of it is not necessarily making the case for why it is important. It has to be said that the evidence base for the role of technology in justice systems both here and internationally is not well developed.

The evidence is really mixed where this has been deployed at scale in the US, for example, in bail hearings and in immigration. What happened was that detained immigrants got worse outcomes. Some of this was about culture and scepticism. Some of this is about concerns that I feel have materialised through the pandemic, and evidence has suggested they have materialised during the pandemic. What we need to work on now is understanding in a more nuanced, evidence-based way where technology might work best and then deploy it in those instances. When people see how it can help uphold access to justice and deliver the things that everyone who works in the justice system cares about, you may well see some of these cultural barriers overcome.

Q159 **Miss Dines:** I do not know whether you agree with me, but from my observation it is likely to be a mixture of cultural reluctance to embrace technology and an over-sensitivity to want to preserve the very special relationships between the client and their lawyer that mean the difference between succeeding in their case. It is not all about money; there are deeper things we need to investigate. Would you agree that generally that is a good area to look into, with a rigorous academic exercise to assess it and get our teeth into it?

Dr Byrom: Absolutely. The EHRC report that came out in April raised huge concerns about the impact of a lack of co-presence or hybrid hearings on outcomes. We need to start looking at these questions about

how proceeding remotely and using hybrid hearings impacts the effectiveness of representation, the client-solicitor relationship and outcomes for people at the sharp end of the justice system. I absolutely agree.

Dr Quirk: There may be issues with the procurement of these measures because certainly you hear stories of courts not having particularly good wi-fi access. While investment certainly has been made, what people are experiencing on the ground is somewhat different. In particular, in the criminal system we are not dealing with just professionals who can be trained and provided with the appropriate equipment. The difficulty is that the people who are coming to use the courts do not always have ideal lifestyles and home situations that mean they can embrace this kind of technology.

Dr Byrom: You can look at where technology has been deployed effectively as part of the court process. For example, the civil resolution tribunal in British Columbia did not start with, "We need to use technology"; it started with, "We have a problem. It is costing too much and it is too slow to resolve condominium disputes. We need to redesign the process to make it more user-focused and easier for people to engage, and then we can think about how we can use technology to improve the ability of people to access that process." You do not start with the idea that tech is good; you start with what problem you are trying to solve and then consider the role that tech might play in addressing it. When you develop that solution, you evaluate it to check it is doing the thing you thought it would. This is the key bit we are missing. We are missing the evaluation and the data. Without that we are all running around doing stuff.

One commentator talked about how this period has been the great experiment in remote hearings. With respect, as an empiricist, it is only an experiment if you have a hypothesis and collect the data to verify that hypothesis. In that we have completely failed, and that is inexcusable at this point in the pandemic.

Q160 **Miss Dines:** In relation to the court staff and court system, do you not agree that we have to forgive some of these flaws in collecting data because we have been fighting a serious pandemic and it has been a struggle to get very much off the ground at all given staff absence and the like due to serious illness? We need to be slightly forgiving, do we not, but just have a plan for the future to collect that data? That would be fair, would it not, rather than it being unforgivable? It is perhaps something that will happen in such a pandemic.

Dr Byrom: It is not about something being unforgivable. Court staff have worked extremely hard. I think everyone on this Committee and all lawyers, judges and everyone involved in the process has worked incredibly hard to keep the show on the road, but, with respect, this is not a new issue. Since 2010 the MOJ has been resisting calls to collect better data on litigants in person. It is not a new argument. The fact is

that it was provided with a road map of the data it needed to collect a year before the pandemic hit.

This is not an advanced system; it is the type of data you can capture very easily on an Excel spreadsheet. It is not rocket science. You can repurpose codes in your software. While we need to acknowledge that the system has been under real strain and be incredibly mindful and grateful to the people who have kept the show on the road, we cannot allow the pandemic to become another excuse for inaction. If anything, it has revealed exactly how much not having this data undermines our ability to address crises. What it should lead to is more urgent action, investment and ring-fencing of funding to deliver this, not less. It is not an excuse not to do it.

Q161 **Miss Dines:** I appreciate those points, but I do bear in mind that staff were very much overworked. It may have been too much to expect them to embrace the new information collection process.

I want to go on to your views on the strengths and weaknesses of the use of technology, not as an experiment but as something that just happened to try to get us through the situation. What are the strengths and weaknesses of what we have done?

Dr Byrom: As for the strengths, what we have seen is that for procedural and interlocutory hearings it works really well. We have seen that in the senior courts, where both sides are more likely to be represented for those types of interlocutory hearings, technology seems to work really well. Reducing the need for people to travel could have a whole range of benefits in those areas.

What else have we seen that has worked particularly well? The data we produced as part of the civil justice review found that people were broadly happy with hearings where the technology held up, the outcome was less contested and both sides were represented. It has been problematic in cases where litigants in person are involved. It has been particularly problematic where one or more user has a learning difficulty and finds it difficult to follow. I think it has been problematic in cases where there is vulnerability in litigants or defendants. I am sure Dr Quirk will be able to add to that list in the criminal field.

Dr Quirk: There have been benefits in particular with barristers not having to travel the length and breadth of the country. It has enabled them to use their time more efficiently, and obviously there are cost and environmental savings as well.

There is some discrepancy between judges allowing submissions to be made remotely and those who have insisted on appearances in person. You may want to think about having a more centralised approach to that. Practitioners talk about being obliged to attend hearings and travel across London or the length of the country when it does not really seem necessary. Perhaps we could have a look at what needs to be dealt with

in court rather than because it has always been done that way. That would be very important.

There is a need not to say that everything cannot or should be done that way; there needs to be some protocol in place. Much of what has happened has been very variable according to court centre and sometimes even by individual judges. Perhaps there could be some kind of consistency, which could tie in with the centralised data collection. It is not necessarily individuals not doing things, but you can put a structure in place that helps them do that rather than everybody having to reinvent the wheel.

Dr Byrom: We need to be very careful with the reference to what works, because anyone involved in the justice system knows it does not exist to serve lawyers or judges. It exists to apply the law for individuals. In the absence of good data on the experiment with remote hearings in terms of outcomes and what it has done for engagement by different groups, we need to be very careful about making broad statements about what has worked because it is too early to call.

Chair: We go back to your point about data.

Q162 **Miss Dines:** Thank you very much for that. I am concerned that we need more rigorous academic consideration of the evidence in this field. I am particularly concerned—I wonder what your views would be—about whether the relationship between a vulnerable client and their lawyer is very much diminished by the barrister not being there. For my own part and from speaking to several practitioners in this area, it has been diminished. It is very convenient for barristers and solicitors not to travel, but those clients do not get a better quality of representation. Sometimes that personal presence and reassurance, that wrapping of arms around clients legally and sometimes even physically, has been lost with the remote system. Do you think there is a personal element of access to justice that has been lost, and how do we gauge that academically?

Dr Quirk: I am a more qualitative researcher. It is crucial; it is one of those things that is very difficult to capture but is absolutely fundamental to people's experiences of the criminal justice system, and—whether they like the outcome or not—to whether or not they feel they have been dealt with fairly. There are ways of capturing that through interviews and discussions not just with practitioners, but particularly with defendants and witnesses about how they feel.

So much of this is something you may not think about unless you have been in that position. Some defendants have said they prefer not to appear at court because they risk losing their prison cell if they have to travel in a horrible custody van for several hours across the country. They get back to the prison and find they are in with a different cellmate, for example.

As for that kind of personal experience, you are absolutely right. It is very important that we do not reduce this to a spreadsheet and what is the most time or cost-efficient. We need to think about the quality of the justice that people experience as well.

Q163 **Maria Eagle:** We have heard a lot about the pros and cons of the use of technology in courtrooms and during hearings. I wonder how the legal profession might make more use of technology to ensure more people can access effective and timely legal advice, because there are obvious issues about that ahead of anything ever getting to court. Is there a role for technology to make things more effective?

Dr Byrom: One of the most important roles that technology can play is in ensuring people are able to access timely and accurate information on their rights. If we are talking about the ways in which technology could be developed, one issue is that, if you google a legal problem at the moment, what comes up is dictated by who has paid for adverts. Often, what gets returned to you is content that is not jurisdictionally relevant, or it is paid- for content above content that is produced by high-quality providers of information and advice, like Citizens Advice and Law for Life. A project at Stanford in the US is attempting to work with the major search engines to ensure that when you search for legal rights information what is returned to you is relevant to where you are and is of the highest quality. Understanding that you have a legal problem is one of the first ways in which you move on to access advice.

There are definitely ways in which we can use technology and apps to ensure people are able to access information about their legal issues where they are. There are some good examples I would be happy to share on how that has been developed by some of the organisations we fund.

There is a real role for technology to play. The Civil Resolution Tribunal and its Solution Explorer, which is at the front end, uses technology to help people access and obtain content that is relevant to their legal problems. It is a huge conversation, but off the top of my head those are the three ways in which technology could be used.

Dr Quirk: But we need to be very careful about how people are able to use this. For example, technology was very helpful when I was buying my house in that I could sign documents and send them back to the solicitor very quickly, but I would not have wanted to do my own conveyancing. Law is a specialist profession and people need expert legal advice on very complex problems. Sometimes a little knowledge is a dangerous thing, particularly in the criminal law. It is perhaps easier if you are familiar with using the internet, and reading and assimilating very complex information, but so many people are not. Technology does have its place in expediting administrative matters sometimes, but there is still a fundamental role for professionals to play. It is almost unfair to put that on to people who may not be equipped to deal with that.

Q164 **Maria Eagle:** Dr Quirk, you have just referred to litigants in person. To what extent should courts be adapting to the needs of litigants in person, or should we be trying to reduce the number of litigants in person by going back to increased levels of representation?

Dr Quirk: My focus is primarily criminal work, but we should not expect people to do the work of skilled professionals, partly because it is not fair in terms of equality of arms but also in pragmatic terms. While money may be saved in legal aid payments, there is a cost in court terms in that judges have to do so much more work to ensure people are able to represent themselves and understand what is going on. If they do not know how to conduct proceedings it all takes far more time, so it would be a much more beneficial use of money in many ways to ensure people are properly represented.

Dr Byrom: What I would say is that there is a moral case and an economic case for adapting court processes and supporting litigants in person. The moral case is that it is really important that people are able to understand what is happening in fundamental areas. The economic case, which Dr Quirk has alluded to, is that we have anecdotal evidence to suggest that when litigants in person are involved in hearings those hearings take longer. The costliest part of the justice system is court time. One of the real disappointments is the failure of the Ministry of Justice to collect good data on the number of litigants in person within the system, and the failure accurately to model the impact that that has economically makes it much harder to make the business case to the Treasury for refunding legal advice and representation. That is one area we need to invest in because we must think seriously about the economic cost of having the courts flooded with people who are unrepresented and find it difficult to articulate their case.

Dr Quirk: To make one slightly related point very quickly, there is the innocence tax in criminal terms as well, whereby if somebody earns too much to meet the threshold for legal aid they are not reimbursed the money they spend if they are acquitted, which again increases the pressure on people perhaps to try to represent themselves in a way that can be very problematic and ultimately counterproductive.

Chair: That is a point well made.

Q165 **Maria Eagle:** How do you think the current legal aid system impacts upon the capacity of the courts? Obviously, there are more limits to legal aid than there used to be, but does that increase the pressure on the capacity of the courts or decrease it? Do you have any views about which way around the current legal aid system impacts upon court capacity?

Dr Quirk: I suppose people are juggling more cases because of the way in which barristers are paid. They take on more cases than they can deal with necessarily so you do not have continuity of representation. Somebody has to pick up a case at the last minute and there may be delays associated with that.

Again, there is the amount of preparatory work that can be done if solicitors are not receiving as much legal aid for things like unused material, but it is more a systemic problem as well, because there are also issues with the Crown Prosecution Service and its ability to prepare pre-trial. Every part of the system is struggling and it comes out at court with delays and bottlenecks, but certainly legal aid improvements would assist that.

Dr Byrom: I make two points. As to the concrete examples we can point to, legal aid undoubtedly reduces pressure on court capacity and the court system. The big example is family. We think that one solution to court capacity is encouraging more people to mediate. I have mentioned this already.

Q166 **Chair:** Natalie, that is a point you have already made. The lawyers are a gateway to mediation.

Dr Byrom: Yes.

Q167 **Chair:** And the other point?

Dr Byrom: The second point is that, if we think about the housing court, for example, we know that people who are vulnerable find it difficult to navigate hearings. The justice system needs to get hearings right first time. If there is a lawyer involved and the client is vulnerable, it is far more likely to reach the right decision first time if there is someone who is funded to represent them.

Chair: That is very helpful. Dr Byrom and Dr Quirk, thank you very much for your evidence. We are very grateful to you and for your time. We are much obliged to you.

Examination of witnesses

Witnesses: Dr Maclean, Dr Wilding and Dr Kemp.

Q168 **Chair:** We move swiftly on to our next panel and I ask our three witnesses to introduce themselves.

Dr Maclean: I have been doing sociolegal research in Oxford for many years—far too many. My interest in that work changed when I was pulled into the then Lord Chancellor's Department to act as an academic adviser. What they really wanted to do was benefit from any knowledge that was out there that could be put to good use. We set up the research function rather as a little brother to the Home Office next door.

The relationship between policy makers and academic work has absolutely blossomed since, as you have seen already this afternoon. It left me with a burning desire to know who is doing what in the family justice system. I saw a lot of surveys that did not always tell me quite what I thought they were telling me, and the numbers were not quite related. I wanted to go behind the numbers and see for myself, so I have

sat in every conceivable form of court agency, advice agency, whatever. My work is qualitative.

Q169 **Chair:** That is very helpful. For the record, you are a senior research fellow at the University of Oxford.

Dr Maclean: Yes.

Q170 **Chair:** That is great. We will come back to you in a moment, so it will be helpful.

Dr Wilding: I am a post-doctoral research fellow at Brighton University. I previously practised as a barrister in immigration and asylum law. My research is mainly on immigration legal advice, although I have a broader interest in social welfare legal aid. I published a report on the immigration legal aid market in 2019, and at the moment I am researching access to immigration advice in London.

Dr Kemp: I am a principal research fellow in the school of law at the University of Nottingham. I have worked for many years in areas of legal aid. I used to work with the old Legal Aid Board as a policy adviser and worked with the Legal Services Research Centre, the research unit with the Legal Services Commission. My research at present is on criminal legal aid, looking at police station legal advice.

Q171 **Miss Dines:** Dr Maclean, welcome and thank you for being so patient this afternoon. May I ask you about the family justice system and legal aid? How do the current rules affect the wider family justice system?

Dr Maclean: Appallingly badly, in a word.

Q172 **Miss Dines:** Can you summarise in some bite points the worst areas?

Dr Maclean: The difficulty is that the family justice system is different from other parts of the justice system, as you know better than I do, because it is not concerned with the past; it is concerned with the future. It is not concerned with one individual or one individual act. It is concerned with the welfare, the best interests, of children who are in effect third parties. It is a weird collection of activities to try to manage under one roof. Is it about justice or is it about welfare?

The Children Act is very clear that the primary duty of any decision maker considering the future of a child, or a case in which a child is concerned, is the welfare of that child. In a sense, we are trying to do two jobs in one place, and it is difficult. The changes to legal aid eligibility removed private law cases from public funding. Anything that was a result of an adult's own decision making was gone. The only thing that remains in scope is child protection and domestic abuse—domestic violence—cases.

That has left us with a very uncomfortable situation where a lot of cases that look as if they are private matters—contact cases, residence cases, child arrangement cases, as we call them now—are technically private law matters. In a very conflicted case, there may well be issues of child

protection or domestic abuse. We are stuck with what we call these crossover cases that many people are concerned about and would like to see restored to being within the scope of legal aid.

Q173 **Miss Dines:** In relation to legal aid, if I may follow that up, in an ideal world where money was not of concern, we would all want every form of the family system to have proper representation. We strive to have proper representation, but, coming out of the pandemic, money may be even more difficult to ascertain. How can we use the money that we have for the system to provide the fairest result and the best welfare result for children? What can we do to use the money we have more efficiently?

Dr Maclean: The big mistake in LASPO is to assume that people want to go to court—they gallop off there for a nice day out and, therefore, we should try to stop them—or that family solicitors in particular are desperate to get there. All the legal aid family practitioners I know are very keen not to have to go to court. They negotiate a settlement. That is their function, their aim and their skill. You have people on both sides who do not want to be there, so it should not be too difficult to find a way for them not to be there.

We did rather badly in assuming that mediation was a silver bullet, which it is not. Rather than assuming that the lawyers are the baddies and that we must get rid of them, we must value and treasure their expertise but find smarter ways of using it.

There are ways of doing that, using technology. The expertise in the machine in the way that CourtNav and some of these interactive websites use lawyers as back-up is one way of doing it. There are many other ways.

We could go down the barefoot lawyer route, which has happened in employment using the advice sector, which is so skilled but giving little bits of specific legal training to enable a lay adviser to use legal advice effectively.

My final trick would be that, if mediation remains policy choice No. 1, as it seems to be, despite all the evidence to the contrary, given that the majority of accredited mediators are qualified solicitors, family practitioners, can we not do what is done in the Netherlands and have what is known as legally assisted mediation? You can call it mediation, and you can see it as dispute resolution rather than judgment, and you can bring it all out of the courts into the pre-court area of sorting things out, but you can let these mediators give legal advice to both parties at once where they have a substantive common interest. That would be another way of doing it.

Q174 **Miss Dines:** Would your proposition to have lay advisers rather than fully qualified lawyers not be a risk in getting proper legal advice to that participant and in effect be worse, because there may be legal difficulties and even less way to appeal if you have a lay adviser? That may well be

all right for other sectors, but in the family sector, where you are dealing with the rights of children, is that not a slightly risky route to take?

Dr Maclean: It is extremely risky, but it is the one thing we have not tried. It has been such a stunning success in employment tribunals where skilled CAB advisers were trained to do a very specific thing, and off they go to court and they have not lost a case. It is a different situation because you cannot have a legal aid lawyer in an employment setting, but it is just something that I would like to think about.

I was trained to use the CAB AdviserNet interactive tool as part of my research, and it is terribly good at looking at the boundary between legal information and legal advice.

As soon as you start going anywhere near legal advice with your client, great big red arrows come up and bells ring, and you have to stop and do something else. The advice sector is very aware of it, and it is an interesting area because it is all so new to them. The advice sector never had to handle family matters because legal aid was there and did it all for them. They are thinking about it very hard from the beginning. Don't forget them.

Q175 **Miss Dines:** Other than mediation, what ways might there be of diverting family cases to court? What other ways could there be whereby we could somehow fairly divert the quantity of cases?

Dr Maclean: This fixation with diverting people away intrigues me because we have not done it so far. People are not giving up on going to court. Although they do not have any legal help, they are going as litigants in person. What you are implying is right. They are there not for fun or excitement. They are there because they have come to the end of their resources. They have nowhere else to go. We need to know more about them.

In Australia, they were in exactly the same position. They were trying to divert people from courts. They were trying to promote ADR, particularly mediation. It was not happening, so they did a very good study—I do not know if you have seen it; it is in my written evidence—of 1,000 court users and found that 59% of them had mental illnesses. They didn't just feel a bit depressed sometimes but were diagnosed and in treatment. They are people who were not able to use the support and help of friends and relatives, or any form of finding advice for themselves. They were people who needed help with a problem, which I think is very different from needing to know what your legal rights are. Your rights in family law do not carry quite the same weight as in criminal justice because it is much more about the best interests of your children. As a parent, you do not have parental rights; you have parental responsibilities. Those are much harder to define precisely, but they are susceptible to help if it is there.

Q176 **Miss Dines:** May I press on with another question? Could a more

inquisitorial approach, perhaps from the judge, supplement difficulties with legal aid? Could that speed things up in a just way? What is your view about that? Culturally, it is very unusual for us here to even think about it. What would your view be?

Dr Maclean: The president has already taken a little step in that direction—I do not know if anybody noticed—in his latest statement, "The Road to the Future". I am sorry, I do not have the wording in front of me, but it definitely says that to manage cases more effectively the judge will decide which issues will be considered and which evidence is appropriate to be considered.

That is taking the step that in France, where everybody thinks they have inquisitorial family justice, is what prevents them having it. They are utterly opposed to any encroachment of state authority on to the rights, which is where rights come in. Two people have a different view of the situation and have the right to say so in what is known as the adversarial system. They can do it much more efficiently if they have someone to help them who knows what is relevant and how to put it forward. If you take that right away by giving that control to the judge, that is a massive step to take. You cannot do it without totally retraining your judiciary. You cannot do it without providing the judiciary with an investigative staff.

We have CAFCASS, but it is already totally overstretched. Having sat with them for a while I think that they do extraordinarily good work, but there is no way they can take over the entire inquisitorial process. To my mind, it would be the worst possible thing to do because, to achieve anything, you would have to spend a fortune. It is an enormous expense, and it is limiting the power of people. People are coming to the courts for help because there is nowhere else for them to go, and you would be preventing them from being able to even ask for that help. It is a long way of saying no.

Q177 **Miss Dines:** It is very interesting, but what you are saying is that there may be a slight evolution of a style of inquisitorial approach by very experienced judges rather than a full-blown change to a new system. That is the way in which the English legal system works, is it not? It is a very slow evolution, but a very experienced judge pinpointing one of the major issues is probably more helpful than a full-scale change. I think that is what you are saying.

Dr Maclean: Incremental rather than full-scale.

Q178 **Miss Dines:** Thank you for that.

May I move on to what the courts could do, faced with the problems that we have with litigants in person and the amount of time they take up in making sure they have a fair trial? What could the family court do to assist the litigant in person?

Dr Maclean: Stop them being a litigant in person and give them some advice is the short answer. This morning, just thinking about this afternoon, I sat down and took upon myself a family law problem, and I tried to get divorced using online advice. It is desperate. I rang Civil Legal Advice three times. I could not get anyone whose English I could understand. I waited five minutes to be told all the caveats. It was unspeakable. When I finally got through, I said that I wanted to know whether they could deal with financial arrangements after divorce. The chap basically said he did not know, so I just gave up.

The phone advice of CA, Citizens Advice, is good. If we are sliding on from how litigants in person cope without a legally aided lawyer, obviously there is the advice sector. CAB is excellent. Advicenow is excellent if you are literate and can wade through 40 pages of detailed advice. If you are literate, capable, intelligent, and determined, there are sources of advice. If, as in Australia, you might be mentally distressed, your English is not good, your confidence is not good, your general coping strategies for life in the middle of a difficult divorce are not good, then there is nothing that will take your hand and support you and see you through.

Q179 **Miss Dines:** What do you think we have learned through the use of digital technology in family courts—the good and the bad? I have asked it of other witnesses in a different way. What do you think we have learned?

Dr Maclean: In care proceedings, we have always had expert witnesses giving evidence online. The courts are very used to that. It is very effective, and the experts are good at it. There has been some interesting evidence not from family but from the administrative sector in SEN—special educational needs—tribunals where Ernest Ryder is adamant, having done some research, that both parents and children can speak more easily online. Teenagers especially are totally comfortable in chatting away like this. Parents are very overawed by a court setting. They find they are getting better evidence in that setting. People are less distressed.

As you were saying earlier, administrative-type hearings, where it is case management or whatever, will be more effective online. What is more, solicitors are not going to counsel so often in family. I have just interviewed 30 practitioners—not a big number, but by my standards quite a big number—and had quite long conversations. The solicitors are very clear that they can cope with much more if they are in their office. They can get on with one thing and then another. They are not travelling, they are not waiting around for the judge to arrive, and so they are doing far more. That is probably an efficiency. They are thinking hard about getting rid of their big, expensive city offices and having much more working from home, which is another huge cost saving for everybody.

Q180 **Miss Dines:** Those are indeed very huge savings, but I am worried about the service that the client gets. I have had very vulnerable clients myself

in care proceedings where it has taken a skilled, experienced advocate, whether it is a solicitor or a barrister, to get through to them. Sometimes, it can shorten a three-week trial to two days. If we are destined to remote access, there can be disadvantages, can there not?

Dr Maclean: In family, the president has always been very clear that listing is for the individual judge, but it has become clearer and clearer that contested final hearings where parents give evidence should never be remote.

Q181 **Miss Dines:** Are there any lessons from foreign jurisdictions that could assist us in providing legal advice for families different from the present legal aid system, to get more capacity in the courts?

Dr Maclean: The Australians tried a thing called less adversarial trials, which did not work at all because the judges did everything and were not very good at it. Now, they have family resolution centres that began as ADR to get rid of lawyers and keep everybody away from courts. They put the lawyers back in there about 10 years ago. They are now having, basically, legally assisted dispute resolution, which is keeping the welfare-based idea of mediation but putting some law and the knowledge that is necessary into it.

In Denmark, the whole thing is administrative. They only set up a family court for the first time last year.

In Germany, judges are trained not to make decisions but to hold people safe while they reach their own decision and are supplied with free, high-quality counselling—not mediation but their own counsellor—which works terribly well. Of course, the Germans do not think that the counselling is good enough.

In France, they have the lawyers out of the courts. You now must see a lawyer for your divorce, but you do not have to sit with them in the court.

There are all kinds of ways of doing it. The one thing you cannot do without is the legal expertise, and we have to find more cost-effective ways of making it available.

Miss Dines: Thank you, Dr Maclean. That is most helpful.

Q182 **James Daly:** I will ask two very brief questions—I say "brief questions" and I hope they are, but my colleague Mr Butler will discuss this—on the relationship between criminal legal aid and the justice system. When we were talking to the witnesses in the first session, there was a lot of discussion regarding the court process and when people come into that court process. As you probably picked up, I have an interest in release under investigation and the role that legal aid and criminal practitioners can play in creating a more efficient system that delivers justice to victims and to the alleged perpetrators of the offences. Do you have any view on how criminal legal aid can be altered or a system can be put in place to support the effective administration of justice pre-charge?

Dr Kemp: It is a very important point. One of the things that criminal legal aid has suffered from over the recent years is the introduction of a fixed fee for police station work. That has led to the focus of the lawyers going into a police station—this is not everybody but a lot of them—and looking at the police interview only. This means that they are not looking at the wider picture. They are not looking at how they can input into key decisions that the police make, whether somebody should be detained in the first place, for how long, the speed of the investigation, and, perhaps importantly, what happens at the outcome, whether they should be bailed and what the case outcome is.

To my mind, what needs to happen is that defence solicitors should have a full-blooded adversarial role in that pre-charge process. They can talk to their client, they know what the position is, and they can look at the strength of the evidence as the police have it. They should be able to work with the police and the prosecution to make better-quality decisions at that earlier stage. If legal aid were able to incentivise that by front-loading so that they could put more time and attention, through conversations with their clients, into issues of mental health and of social welfare, they could look towards increasing diversion out of the process. That is what is lacking at the moment. Cases have to go to court that should not. People go to court who should not. Cases that should go to court perhaps could have the right charges in place if the defence was able to have an input.

Some of the issues could be resolved earlier. You could save money earlier on, with not having so many trials or so many issues in the trial. The solicitor's role at the police station should be far more full-blooded and should be involved with the prosecution. PACE does not allow for this at the moment, and I do not know why. PACE should allow for the defence. They are paid to be there and they are paid to do an important job. Let them do that job. It is much wider than what they are able to do at the moment.

Q183 **James Daly:** I completely agree with that. That is a very insightful view on what should happen to increase justice within the police station environment and the pre-charge process.

May I put one scenario to you, Dr Kemp? This is one of the difficulties with the concept of justice, because, when we just talk about the word "justice", it may mean different things to different people depending on their view of the process or if they are involved in the process.

When I started as a criminal legal aid solicitor, it was likely that daily I would represent in court a minimum of five people and perhaps even more for shoplifting. When I finished as a practitioner 16 years later, I was representing nobody in court on a shoplifting offence. It was highly unusual even for repeat shoplifting offenders because a view was taken that it was low-value shoplifting and we can find a diversion.

A number of the members of the Committee may well agree with this. We

are being lobbied by retailers and other people who say that a result of that is a proliferation of offending within the criminal justice system and the risk of assaults on retail workers and other parties. I do not know what your view is on that. It is a very difficult question that I am putting to you, Dr Kemp.

One of the things that we should be careful of is judging offending on the level of seriousness, because some offending that is viewed to be low level, for want of a better phrase, has a huge impact on the communities in which the offences take place. What is your view on that?

Dr Kemp: You make important points. Perhaps there was a reason not to take all shoplifters through to court. As you say, that then means that people think they can shoplift with impunity. In some respects, it is about getting behind what is going on with the offending behaviour. There are restorative justice approaches that could be adopted looking at what is going on in somebody's life and why they are shoplifting.

Sometimes you get to the position where you are looking at a deterrent for it to stop. I agree with you. If there are assaults happening in shops, if people are getting more confident, that is behaviour that people should not have to put up with.

In terms of defence solicitors working with the police—to look at the impact of the offending, what is going on, if it is a child starting out into offending, what is going on in their lives—it is rather more complex. It is not a one size fits all.

Q184 **James Daly:** That is exactly why we should have the solicitor involved in the issues that you are talking about and properly remunerated for that.

It is not unusual for people to be released under investigation for 12 months and longer, sadly, at this moment in time. This is all over the country, for various reasons. I am not pointing a finger of blame at anybody. Would you agree that solicitors cannot afford to wait for 12 months to be paid for police station work and that it has to be a process whereby that work is remunerated a lot quicker in the system?

Dr Kemp: There is a key issue about remuneration. If solicitors have been to the police station, then perhaps they should be remunerated for that case. If it carries on with release under investigation, if they are calling for more interviews, then perhaps that is additional work. Release under investigation is difficult for everybody. For the defence, as you say, it is impossible for them to keep their eye on so many cases and see what is happening. I agree they should be remunerated for the work that they do at the time.

Q185 **Rob Butler:** Dr Kemp, I shall continue in a similar vein. You talked to Mr Daly about the role of defence practitioners in the police station. May I home in on one specific element—children? You have some fairly strong views on representation for children. Will you tell the Committee about those and the rationale behind them?

Dr Kemp: I am very much interested. I have been to police stations for 20 to 30 years. The issue of children and young people is a frustration that I found in being able to put forward that there are differences. They are vulnerable. They are children. There is a United Nations convention on the rights of the child that talks about effective participation and understanding.

I, as an academic, question how we can deal with that within the context of a pre-charge process. It is adversarial. I am looking at developing digital resources, but how do I explain the modified caution? It can be put to people, "If you do not tell the truth now, you will be made to look like a liar." What about the privilege against self-incrimination?

I have Nuffield funding to study the issues for children. Fundamentally, I want to talk to children while they are in police custody. What do they understand that is going on? Have they asked to speak to a solicitor? The only advice that we could give through an app is to have a solicitor. We want to understand what their experience is in the police station—if they understand their rights and how to exercise those rights.

Most importantly, there is no difference when the police interview, whether it is an adult or a child of 10. There is no difference. There is if you are a witness but not if you are a child. There are issues of suggestibility and developmental immaturity. There is a whole host of issues that we need to flag up.

Q186 **Rob Butler:** I completely respect that you have the research to undertake. Is your position at this stage that it should be mandatory, at least for children, to have a lawyer present during any interviews in a police station?

Dr Kemp: That would be a very good position to have. That is what is happening in Scotland now—all under-16-year-olds, and 16 to 18-year-olds if they have a supervision order. If not mandatory—because there is an issue of whether somebody should have a solicitor imposed on them—there ought to be an opt-out rather than an opt-in presumption. By and large, if you have an appropriate adult—all children have to have an appropriate adult—if they come from a scheme, the police know there is going to be a lawyer, so they will arrange a lawyer. We should have that same presumption with family members—mums and dads—who are told, "We are going to arrange a lawyer because that is what you need in this system." That would be a big step forward.

Q187 **Rob Butler:** That is very clear. I would like to pick up some points that have been put to other witnesses and get your perspective on legal aid in the criminal justice system. First, how do you think technology could be used to enhance and expand the role of criminal defence solicitors in providing legal advice?

Dr Kemp: Technology can help in making them more visible within the custody suite. One of the problems is that solicitors are not visible. That

is partly because of the fixed fee not going down. They have also been designed out of custody suites. If they go down, they are not let in until the interview. This puts people off having a solicitor.

I spoke to 100 detainees in two custody suites. Those who did not want legal advice were most excited when I said, "If we had a television screen on your wall, you could press a button and get access to a solicitor, via the police of course, would that change your mind?" There was great excitement about that: "Yes, if it was that good, if I could speak to my solicitor that easily, I would have a solicitor."

It is important to say that that is about trying to have early access, early advice and increased visibility, but there is still an important role for a solicitor to attend the actual interview. To be present at the police interview is a key role, but there is a lot to happen before and after that, which I think technology can help with. A lawyer can come in via virtual mode and say to the police, "What are you looking at doing?" If they are back at home or somewhere with a virtual camera, they can make representations on bail, saying "We can get a bail address for you." They can make representations on case outcomes. It is an important step forward.

Q188 **Rob Butler:** Is there anything that the Covid-19 experience has taught us about the limitations of technology in this context?

Dr Kemp: There are lessons about the limitations. It has accelerated the way in which solicitors might use legal advice or remote legal advice. There are limitations that need to be addressed.

We are trying to develop digital resources, because I would like to get the user's point of view. I would like to talk to suspects in police custody, particularly at this time of Covid: how long are they being held; what is happening; are they able to speak to their lawyer? On some of the limitations about the technology and everything, there is a lot that Covid is moving forward and helping to address. That virtual site of the police station that other agencies can go into that can oversee the cautioning decisions—"Is that the right decision?"—opens it up as a virtual site. Covid has helped to show that that can be the case, but I recognise there are limitations with the technologies that we have for the moment.

Q189 **Rob Butler:** We heard a lot about what other jurisdictions are doing with the family justice system. Are there any lessons that can be learned from other jurisdictions' approaches to providing criminal legal aid?

Dr Kemp: It is interesting. I did a study of six jurisdictions—the UK, the Republic of Ireland, Belgium and the Netherlands. What I found interesting—and this was a couple of years ago—was that those countries that have recently moved to providing police station legal advice are perhaps looking with new insight about what they could do. In Belgium, it was a case of emailing and having solicitors on a rota. Scotland was looking at quite a few new developments. I would like to revisit some of

those developments. Where we have had legal aid providing free legal advice, which has been great for the last 35 years, there are lessons that can be learned from other jurisdictions.

Q190 **Rob Butler:** On the basis of everything we have just discussed—the international picture and some of the other ideas and concepts that you have been thinking about from an academic point of view—if you could recommend one reform to the independent review into criminal legal aid, what would it be?

Dr Kemp: We need more monitoring data to be able to show us exactly what is going on, and to have scrutiny of this process. It is a very silo-based approach. The police electronic custody record can provide easy monitoring, anonymous information. With Covid, it could have told you what changes there were in the volumes of cases coming through and the ages of those people coming through. It can tell you how long people are being held. It can tell you differences in case outcomes based on gender and race, most importantly, and age.

One thing that perhaps is missing for me is that overarching scrutiny and monitoring. In terms of monitoring, the data is there. We know from police custody records how many people request legal advice, but this is not information that anybody has. We do not know the extent to which in voluntary interviews people are having legal advice. This is data that could be captured and needs to be captured.

Q191 **Chair:** Dr Wilding, what are the key challenges and issues with the legal aid framework in immigration, and are we effectively, with the current framework, targeting the need where it most appropriately should go?

Dr Wilding: The short answer is no. It is very dysfunctional at the moment, unfortunately. I suppose there are three parts to the answer to the question of whether the targeting is reaching the most needy. First, are the right cases in the scope of legal aid? Secondly, is the means threshold at the right level? Thirdly, can the people who are in scope of legal aid and are eligible actually get access to it?

I do not want to say very much about the means threshold because the same issues apply across the whole of legal aid. There are real problems with what is in scope, and you have very complex matters that are excluded from the scope of legal aid.

Even judges in immigration and in the High Court and the Court of Appeal are commenting on just how complex immigration law has become. The scope of legal aid deliberately excludes, for example, a family with a British citizen child or a child who qualifies for leave by reason of long residence where the rest of the family then needs to regularise their immigration status. They may as a result of that be in extreme poverty—even destitution, and clearly very needy—but be excluded from the scope of mainstream legal aid except via the exceptional case funding system. That creates a barrier.

Complex issues like refugee family reunion, which a lot of people cannot manage by themselves, are likewise excluded except by exceptional case funding.

There are really serious problems with access to immigration advice in detention. The current detention duty advice system is working very badly, meaning that people often do not get advice until very late in the process, if at all, which then contributes to last-minute applications for injunctions that some members of the Government have been commenting on recently. There is no system at all for getting immigration advice in prisons.

There are serious problems around particular case types that do qualify for legal aid. For example, in the piece of research I am working on now, I was given the example of a woman who was suffering domestic violence, had been taken out of the family home, but returned to her husband in the end because she could not get immigration advice in time to make the application she needed to make. That is in London, where you have 40% of all of England and Wales's legal aid provider offices.

In another domestic violence case, a woman who needed to apply for the domestic violence concession to get access to public funds to leave the marital home, and then to make the application for leave to remain on the basis of domestic violence, could not get free legal advice because she lives in an advice desert. There was a solicitor who said he could apply for that concession but it would cost £170. She had no money.

This should be covered by exceptional case funding, but the process of applying for exceptional case funding is another barrier, so some firms just do not do it. The local authority refused to support her because the husband hit only her and not the child. She could have judicially reviewed that, but there were no firms within her area able to do judicial review work. The support organisation she was dealing with was also very stretched, unable to take the time to find someone outside the area to refer her to.

Q192 **Chair:** I have to stop you for a moment because you have raised a number of issues that we need to explore. You referred to exceptional case funding. Some people thought that might cover the egregious cases. Is it in fact adequate to meet the areas of complexity that were taken out of scope? How inadequate is it, if it is not?

Dr Wilding: It is not, for a number of reasons. First, the requirement to make the application is a barrier. It is initially a very low grant rate and a lot of firms simply stopped applying for it. It is also just the time it takes to make that application.

The fee that you get is very low—£234. As with other fixed fee cases, if you do three times the amount of work that is paid for on the fixed fee, you move on to hourly rates, but that is a very high threshold to escape

the fixed fee. You lose up to twice as much as you actually receive before you go on to hourly rates. It is a big amount of work that is at risk.

There is a range of providers saying to me that it is often easier just to do that work pro bono. You can do the whole application in the time it would take to faff about getting funding. The fact that these are pro bono means the numbers that they can cover is limited. It is effectively charity, even though the whole point of exceptional case funding is that you show that if your case is not granted funding it risks a breach of your human rights. It is really serious, tough stuff that depends on charity and on appealing to somebody that you are the one who is deserving.

Organisations also report huge difficulties referring someone to a lawyer once ECF is granted. Support organisations have shown me long lists of people who have received ECF on good co-operation between support groups, universities law clinics and pro bono organisations working with legal aid providers to make the application, and it is still not working as a safety net.

One really important thing would be to look at those issues that are routinely granted exceptional case funding: refugee family reunion, family cases—routinely granted exceptional case funding when people apply. Those could be simply brought back into scope and stop wasting the practitioner's time applying and the Legal Aid Agency's time in dealing with those. The cases would still have to meet the means and merits test.

Q193 **Chair:** You mentioned the impact on practitioners and burdens for them. Has that had any impact on recruitment and retention of suitable immigration lawyers in your area?

Dr Wilding: Recruitment is a massive crisis. It is a country-wide recruitment crisis at all levels apart from new graduates. There is a shortage of qualified case workers, supervisors and experienced solicitors. All but the largest organisations said that they cannot afford the cost of training. That is country-wide, but it is much more acute in the advice desert areas. As I mentioned in the evidence submission, the sole provider for Swindon, which is a dispersal area, has not been able to do any work in over two years. The sole provider for Plymouth, which receives 350 people a year dispersed through the asylum support scheme, can only deal with about 60 cases a year, and those are not all asylum cases. That is relying on remote supervision because they cannot recruit a supervisor on the salary they can afford. In that way, the advice deserts become self-perpetuating.

Even in London, where you have a lot of organisations, people available to supervise new recruits and people potentially moving between jobs, you still have severe difficulties recruiting, and that is *[Inaudible.]* people regulated by the Office of the Immigration Services Commissioner and people doing non-legal aid free information advice as well. It goes beyond legal aid. It is a really deep recruitment crisis and retention crisis.

People talk about how it is not even just pay; it is the stress of dealing with the Legal Aid Agency and all the bureaucracy of the system that has been driving individuals out of the sector.

Q194 **Chair:** It is funding levels and the structure of the funding, as I understand it, that are creating the difficulty.

Dr Wilding: Yes.

Q195 **Chair:** You talked of knock-on effects. As well as impacts upon the parties—the applicants, for example, and so on—have you come across specific impacts in the operation and workload of the courts? We have heard in some areas, for example, that litigants in person can slow up the proceedings as well as running the risk of not doing justice to their case. Have you found any evidence around that in relation to the tribunals?

Dr Wilding: My research has not been with the tribunal, partly because it is very difficult to research with the tribunal. Certainly, I spoke to people who sit part time as judges—who are practitioners and judges—and one of them talked about having had to adjourn every single case in a day's list because they were all unrepresented, and in all the cases there was some vital piece of evidence or information missing. Because most of the judges are fee paid—paid per case, if you like—that meant that those costs were effectively passed to the judge personally so the judge would not get paid for the day's work. It is having an impact, but I cannot give you any indication.

Q196 **Chair:** Quite a high percentage of judges are fee paid in the immigration tribunal.

Dr Wilding: Yes, that is true.

Q197 **Chair:** I understand that, too. That is helpful. The post-implementation review concluded that the civil legal aid market was sustainable at present. In your experience, certainly in the immigration world, could you say that?

Dr Wilding: I would say it is not, which probably is not a big surprise to you. It is not sustainable at present. I do not know whether you have seen the map—I will hold it up for you—but the grey areas are where there is no immigration legal aid. Even when you are in scope of legal aid, there is very little, and providers are hanging on. They are subsidising. They are working up to the fixed fee and capping the work at that level and doing no more because they cannot afford the losses and they cannot afford the at-risk work. That does not meet the needs of the applicant, the client or the courts, who then have to deal with the fact that the case is a bit half-baked when it comes to court, or they are working to the needs of the case, but then they do that at risk of heavy losses.

The average case cost is double the fixed fee for a lot of higher-quality providers. The same goes for barristers. I have set it out in my "droughts

and deserts" report, so I will not go through it in all the detail. The simplest of cases costs one and a half times what the barristers were getting paid. As self-employed individuals, it goes back to what somebody said earlier about criminal practitioners getting less than minimum wage. They end up not earning enough to make a living, which is one of the reasons I am now an academic and not a barrister.

Chair: That is very helpful. Thank you very much for your evidence around that.

We will move to Dr Mullan, who will put some questions to all members of the panel. I am afraid I have to go and switch channels to speak on the Environment Bill in the Chamber, so I will hand the Chair to Maria Eagle, the senior member of the Committee. Thank you all very much for your help today, and over to Dr Mullan under the care of Ms Eagle.

[Maria Eagle took the Chair]

Q198 **Dr Mullan:** Thanks to all of you for taking the time to discuss your topic areas today. I want to finish with some questions that you, Dr Wilding, alluded to in your evidence about the administration of the process rather than thinking about the topic area—the mechanism by which people evidence, claim and have money paid out to them for the provision of legal aid. Do any of you have any thoughts? How can the operation of the agency and the way in which it pays people be improved in the bigger picture or down to the individual way in which they ask you to bill and collect evidence for payment? Perhaps we can start with Dr Maclean.

Dr Maclean: It might be time to revisit the use of contracts with advice agencies. They are now at the top of their game and are well organised. The Advice Services Alliance amenity pool is going great guns, and that would certainly cut administrative costs enormously to have more block grants.

Q199 **Dr Mullan:** From my understanding of the area, the agency will currently pay some block grants and has some of this work, or it does not do it and you think it should.

Dr Maclean: I did not quite catch that.

Q200 **Dr Mullan:** To what extent is that a proportion of the current approach to how the Legal Aid Agency provides services through block grants?

Dr Maclean: It was a useful way of doing things, but it has rather slipped away. It could be revitalised.

Q201 **Dr Mullan:** We had, in some of the evidence related to that, a suggestion about paying organisations rather than individuals—

Dr Maclean: Yes.

Dr Mullan: I guess it is similar to that.

Dr Maclean: Yes, absolutely.

Dr Mullan: Dr Kemp?

Dr Kemp: I do not really quite know how the system is working at the moment in how solicitors are billing. There was an issue about getting paid police station work or not getting paid.

I was interested in what was happening in Scotland. They were introducing a whole new system of block fees for criminal legal aid work that had different amounts of money depending on the fee earner involved and the seriousness. I would like to take the opportunity of revisiting where they are at. I was involved when they first brought contracts into criminal legal aid, so I know how complex it is. I would need to talk more to the actual providers of the service, to see what is happening and to look at what is happening elsewhere.

Dr Mullan: Dr Wilding?

Dr Wilding: A lot of providers have said that the stress of working with the Legal Aid Agency is making them ill or driving them out of the sector. It is a whole swathe of things from the way auditing happens and the very punitive style of auditing. It completely misses the substantive quality of work and focuses purely on file keeping, demands files for audit in a condition that is far above the amount that they pay in terms of how much people are paid and how much time people can afford to spend on file keeping.

There is absolutely no earned autonomy. No matter how well you score on peer review, which is the only look at the substantive quality, you do not get any extra leeway in your dealings with the Legal Aid Agency. There is nothing that looks at how well you are meeting people's needs. It is purely about how well you are keeping the procedural things in order.

You have, for example, someone who has not ticked "nil" down the boxes of the partner's income in a case where there was no partner. Because there were no ticks down—"nil, nil, nil"—for all the income of the imaginary partner, they were nil-assessed on that file, and they had to go through a whole process of appealing, which wastes everybody's time because they have done the work.

There is a complete loss of pragmatism. The financial consequences of that are that people say that the unpaid administration on each file would wipe out any savings that they might make on the actual substantive work on the file, which means that that swings and roundabouts principle underpinning the fixed fee can never work.

There is just so much that I refer to as transaction costs, which are the additional costs around doing the work. Solicitors in immigration work have to bill and then pay the barristers. The barristers do not deal directly with the Legal Aid Agency. The dealings with the CCMS, the online system for applying for funding and billing, which works very badly indeed and has caused no end of problems, costs them so much in time

and money that people find they just cannot manage it. I have known firms go out of business because they just cannot manage the managerial demands on them of dealing with the Legal Aid Agency, and I do not believe it really needs to be that way.

Q202 **Dr Mullan:** In your experience in recent years, you have talked about the IT platform attempts by the agency to seek feedback to adjust or alter the platform as a result of that feedback, or are there other processes?

Dr Wilding: If you look at the minutes of the Civil Contracts Consultative Group going back to before that platform was made mandatory, when it was just being tested, it is a big topic in every single meeting. They are aware of those problems. Part of the problem was that all the other lines of communication, the phone lines, emails and so on, were cut in the sense that everything was moved to CCMS even though it was known not to be working.

There is this process of testing some other system to replace it, because CCMS is beyond redemption, and creating these workarounds for all the problems with CCMS, but ultimately the solution would be: don't impose that on people when it doesn't work yet.

Yes, there is some consultation. The outcome of the consultation is that this does not work, but it still ended up being the system, if that makes sense.

Q203 **Dr Mullan:** They might counter that tens of millions of pounds is paid out to providers every year. Clearly, some providers are successfully accessing and making use of the system.

Dr Wilding: Yes, people manage to submit bills. It is just how much extra work ends up being done. For example, when you apply for funding on CCMS, people say this takes longer than doing a paper application, and not only does it take longer, but it does not copy anything through. If, for example, you are applying for refugee family reunion, and you have one person here and, say, five other family members in the country of origin, you have to do that form separately for each of those people. It takes longer and then it won't copy over the information. So when you go, say, from an emergency certificate to full representation, you have to redo the whole process.

I had one interviewee whose case had fallen out between emergency and full certificate. The humans at the Legal Aid Agency understood the problem, but the system could not understand it and continually came up with these warnings, "Your legal aid certificate will be revoked." She could not bill the case because of this problem, and yet the bill was to go to the Home Office because she had won costs against the Home Office. She could not bill the Home Office because she had not had a legal aid certificate in place. You end up with these ridiculous problems that cost so much time and so much money.

Yes, of course, money does get paid out, otherwise the system would be completely gone, yet you have people who are just hanging on by their teeth because the system is not working properly.

Q204 **Dr Mullan:** As you have mentioned, there is peer review—an approach that grades the amount of evidence and questions you are asked, and the fidelity of your claim, depending on whether you have had previous claims accepted and where you have a consistent pattern or background of legitimate claims that are reviewed.

Dr Wilding: Broadly speaking, you can refer to it as earned autonomy, where you get less audit activity when you have shown yourself to be a reputable provider, and assessing the level of risk presented by an individual provider and then tailoring the amount of audit activity to that.

For example, you have peer review levels 1 to 5 where 5 is a failure in performance and 1 is excellent. Originally, the Carter review envisaged that only levels 1 and 2 would qualify you for a legal aid contract. In fact, level 3 was treated as good enough, so that is threshold competence. Whether that is good enough or not we can debate at great length.

It would make sense to reduce the amount of audit activity to devolve more powers to those reputable providers, but in fact it is the opposite way round. If you are doing higher level work, you are submitting files that you say should be paid at the escape fees—so on hourly rates. Those go for assessment. You submit your files that have gone to the upper tribunal. So you end up with more audit activity rather than less if you are a very high-level practitioner doing very high-level work. When you submit those fees for escape fee assessment, you then get bits knocked off here and there, sometimes to the point that it is not above the escape threshold any more.

Because a key performance indicator in the contract is that you do not have more than a certain amount of reductions, quite apart from wanting to be paid for the work, you then have to spend time appealing those reductions. So the higher level of work you do, the more time you spend on unpaid admin and dealing with audit activity and assessment activity. It is completely the wrong way round.

If you look at the value that the taxpayer gets from the Legal Aid Agency spending all that time looking at those cases, it is the wrong way round, because we are paying for the Legal Aid Agency to mess about with the high-quality providers instead of looking at perhaps the more risky ones at the bottom end of threshold competence.

Q205 **Dr Mullan:** If I could go back to the suggestion of block grants and moving away from a case-by-case fee, how easy do you think it would be to come up with a fair and reasonable costing that will address the variation you get from case to case in time spent, fees and costs to the providers?

Dr Maclean: It is not my area of expertise and I am sure it would not be easy. Does the agency have good information about how much they are spending on this activity?

Q206 **Dr Mullan:** Yes; it is identified. The agency has a significant price tag attached to it, indeed.

Dr Maclean: I was talking to someone from a law centre the other day where they hire somebody with their grants to do all this auditing work. They are taking taxpayers' money to accomplish none of their actual purpose. It is circular. If one could measure how much is just going round the system, that would be helpful.

Q207 **Dr Mullan:** I guess that what I am getting at is what the level of variation is within individual cases, because that would guide how difficult it might be to create a block grant or a firm-based contract.

Dr Maclean: With the bigger agencies it is easier, particularly if they have a more focused line of work. If you have a small local agency doing all kinds of different things, it is difficult.

Q208 **Dr Mullan:** That makes sense. Dr Kemp, do you have anything to add?

Dr Kemp: In an area like police station legal advice I would welcome the opportunity of seeing perhaps a more experienced practitioner being given a higher rate for dealing with more serious cases. I do not think it is appropriate that you can have the same fee. It does not work out on the swings and roundabouts—10 minutes for a possession or a shoplifting and dealing with murder. The threshold to kick over into a higher fee is very rarely paid out. After all these years looking at the block fee arrangements across the board, I would like to pay attention to the police station work.

Q209 **Dr Mullan:** Dr Wilding, what about the variation in immigration cases?

Dr Wilding: It is not so long since we had block grants being paid to the old Refugee Legal Centre, which then became Refugee and Migrant Justice. So there has been a system not so long ago looking at that. One of the problems is that we do not have any data on the average cost of an immigration case in the wild, if you like, without the fixed fee serving as a cap on what people spend on them.

The fixed fee was not based on any actual cost data. It was based on guesswork. Now, for some asylum appeals, you have an hourly rate, because there were problems over a new fixed fee being proposed for a new procedure for dealing with asylum appeals. There is very little data on what is actually spent, and I would suggest that you would need to implement an hourly rate for a while, perhaps with those providers who have earned the autonomy, to get some data on what it costs to run a case to the level that needs to be done. You can think about what kinds of cases would be in the average case mix and then work it out from there. But it is a matter of collecting the data.

The other thing to say is that, certainly in immigration and asylum, you have to look at how the demand is generated before you start thinking about the cost of a legal aid case—where the costs are driven up by the system, deciding asylum and immigration cases, by the rules, by the hostile environment, by the decision-making processes in the Home Office, by the procedures in the tribunal.

I would suggest that, rather than fiddle about with legal aid in this area, you need to look at the whole system. Could you triage cases so that the people from countries who are almost inevitably going to get asylum in the end get some form of very early advice, go through this triaging system and get granted asylum quickly, rather than having to go through a whole legal advice process that ultimately should not necessarily be needed? Then you can work out what your block grant needs to be once you have taken out some of the massive excess of generated demand in the system, if that makes sense.

Q210 **Dr Mullan:** I understand that. In terms of unintended consequences, I am sure the immigration system has to be incredibly mindful of signals that it sends in encouraging applications for asylum. Are there countries where we can confidently say that everyone who applies gets asylum, and what would be the consequence of that if people suddenly sought asylum at volumes that are not sustainable?

Dr Wilding: That is a huge question. There are certainly countries from where the overwhelming majority of people who apply get asylum: at the moment, Libya, Eritrea, Syria, Sudan and South Sudan, and a large percentage from Iran. If you have a triaging system where you ask, "Is there genuinely a serious reason for thinking this person should not be included?", and reroute them back into the mainstream asylum system, you would take out quite a chunk of the demand. This is very much not like the old detained fast-track system. This is a system for triaging cases that should be able to be decided without too much effort positively.

The suspicion is always that people in other countries have this vast knowledge of how our asylum system operates and that there is some kind of thinking going on, "How can we get around this system?" The evidence from people like Heaven Crawley, who have researched this in more depth than I have, is that people do not come here with that level of knowledge. They have all sorts of reasons for where they choose to go.

There is also always the suspicion that people pretend to be from a country with a high grant rate when they are not really. Again, the level at which that happens has been much exaggerated or overestimated. But that is what the system is already doing. It is looking at people's claim and saying, "Do we accept this or not?" If we don't accept that that person is from Eritrea, for example, you reroute them back into the mainstream asylum system and you look at it in more depth.

I think it is all positive in the sense that it reduces the massive inflation of demand. We have an absolute explosion of that coming up with the new asylum rules, which are going to generate vast amounts of demand for legal advice, which really needs thinking about. You cannot look at legal aid costs until you look at where that demand is coming from.

Q211 **Dr Mullan:** I have just done that. If you don't mind me asking you from the perspective of someone who works in the sector, we get inquiries from constituents who have a lower threshold for expecting the taxpayer to fund legal aid on immigration claims, and that relates to perhaps the broader social contract that people expect in terms of taxpayers and being a citizen of a country. There is this kind of sense, argued by some, that we provide all these things for people on the basis of nationality a lot of the time, and by default if people are claiming immigration or asylum; and particularly if their claim is not ultimately accepted, they have had taxpayer support when they are not a citizen of this country, they have not contributed taxes and ultimately we do not grant them a place to be there.

As someone who works in the sector, what are your arguments around that, and how do you view those perspectives?

Dr Wilding: We signed up to the refugee convention a very long time ago on the basis that you should not have people being sent to face persecution in the country that they have come from. Inevitably, there will be some people we end up denying protection to in the same way that, inevitably, there will be some people we end up saying are guilty of a crime; they have had a different solicitor but actually they were guilty, or they have had a solicitor for some other area covered by legal aid and in the end we do not agree with them. That is not a good reason for saying they should not be represented.

Ultimately, I do not think it necessarily saves money if you deny someone adequate and good-quality legal advice—

Dr Mullan: Early on.

Dr Wilding: —because they stay in the system for longer. Whether that is asylum support, housing or detention, those are all necessarily great things for the person who encounters them, but, equally, having someone in detention is not a good use of my taxes. It is an inhumane way of looking after them. Not giving someone good-quality legal advice to put forward their case in the best way they can, even if ultimately the answer is, "Sorry, you don't qualify," is not a good and effective use of money. It is a very short-sighted way of looking at it.

Part of the problem has been that you get this impression that there are vast numbers of bogus asylum seekers, partly because people do not get good-quality legal advice, they do not get a fair hearing through the system, or they do not get legal advice until it is too late and it ends up with these last-minute claims against removal, which creates an

impression that there is far more abuse of the system than there actually is.

Chair: I thank Dr Maclean, Dr Kemp and Dr Wilding for their attendance and their patience in waiting to be our second panel in the evidence session today. I thank you very much for your time and your evidence.