HOUSE OF COMMONS

Justice Committee

Oral evidence: (a) Court capacity, HC 284; (b) The future of legal aid, HC 289

Tuesday 9 February 2021

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Watch the meeting

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

Questions 212 - 267

Witnesses

I: Daniel Bonich, Chair, Criminal Law Solicitors' Association; James Mulholland QC, Chair, Criminal Bar Association; Hollie Collinge, Solicitor Advocate, Kelly's Solicitors, Brighton; and Emma Fenn, Barrister, Garden Court Chambers.

Examination of Witnesses

Witnesses: Daniel Bonich, James Mulholland, Hollie Collinge and Emma Fenn.

Chair: Welcome to this meeting of the Justice Committee. I am grateful to our witnesses for coming to give evidence to a further session of our inquiries into court capacity and legal aid.

As those who have been following this will know, we are running the two inquiries together because there is a degree of overlap in the evidence, but we will publish separate reports fairly shortly. We are grateful to everybody who has submitted evidence to us.

Before we start the questions, we have to go through the usual formal process of declaring the interests of the members of the Committee. I am a non-practising barrister and a former consultant to a law firm.

Maria Eagle: I am a non-practising solicitor.

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

Miss Dines: I am a barrister, although I have not taken any cases since my election.

Q212 **Chair:** Thank you all very much. As other members join, we will get them to declare any relevant interests. I do not think there are any others of any significance in any event.

I will ask our witnesses to introduce themselves and their organisations, and then we will go straight to the questions.

Daniel Bonich: My name is Daniel Bonich, and I am the chair of the Criminal Law Solicitors' Association and I am a partner in a firm of criminal law solicitors.

James Mulholland: Thank you, Sir Bob. I am James Mulholland QC. I am Chair of the Criminal Bar Association, a practising barrister and recorder, and I practise in criminal law.

Hollie Collinge: I am Hollie Collinge, a practising criminal solicitor and solicitor advocate with a firm called Kelly's in Brighton.

Emma Fenn: I am Emma Fenn, a criminal barrister. I have been practising and qualified for about eight years, and currently I am on maternity leave. It is something a bit different.

Q213 **Chair:** Some of you have given evidence to us before—I know that Emma and Daniel have—so you will know the form.

I will kick off with a preliminary to all of you. We will look at, among other things, the impacts of Covid on the criminal justice system and some of the other broad underlying issues.

It seems common ground—we have heard plenty of evidence—that the

pandemic has put the criminal justice system under unprecedented pressure. Nobody disputes that—the Government, the judiciary or anyone. We would like your perspectives as practitioners—as people at the coalface—on how it is coping and where it is not coping, and what that throws up.

The logical place to start is with you as practitioners, and then I want to move on to victims, defendants and witnesses. What impacts are you finding?

Daniel Bonich: The starting position is that far fewer cases are completing. There is still a reasonable number coming in, but far less are finishing. The number of trials is down, certainly in the Crown court, by about 75%, I believe, was the most recent stat, and it has led to something like a 60% drop in legal aid spend. That is income for all my members and my fellow solicitors, and I am sure you will hear much the same in due course from the Bar.

On top of that, we have been able to take advantage of some of the Government support such as furlough, but that has the knock-on effect of reducing our own capacity. Those who are not furloughed are working even longer hours—it is more difficult—than they were in an already strained system.

As you and many of your colleagues will be aware, because most of the fee structures for publicly funded work effectively kick in for payment at the end, the fact that cases are not finishing makes life financially very difficult for firms at the moment.

Q214 **Chair:** I notice that the statistics we have had on legal aid payments show a very considerable drop, particularly on the criminal side. Is that because they are not billing them?

Daniel Bonich: Indeed, because cases are not finishing, they are not being billed, although there have been some concessions from the Legal Aid Agency to allow for earlier billing. That is a combination of a fraction of the normal payment in any event and, effectively, it amounts to firms taking up credit on future work, which some are reluctant to do.

The reality is that, until cases start finishing, the figures will be much lower. As I said, it is about a 60% drop in legal aid spend as at the last quarter, although I am told that, in fact, it is up a little bit for the newest figures. We are more like 20% down. I am not quite sure, as I have not seen the data, how that actually pans out.

Q215 **Chair:** What are your member firms saying about the impact that has on cashflow viability? Will they get through this, or not?

Daniel Bonich: It is extremely difficult. The longer this goes on, the more difficult it will be for our firms and our members to continue to operate. We had already lost in the last two years about 15% of contract holders doing legal aid work, and over the course of the last 10 years

about 40% of firms. We are already a system under strain, and firms were operating on a very small profit margin long before any of these difficulties. It is causing real difficulty for the future survivorship of firms. The furlough scheme that I touched on is helping, but when that ends it will be a pinch point for many practitioners, and many firms will suddenly have to make decisions about whether they can afford to take back their staff when cases still are not yet coming through the system. The difficulty, even as the vaccine programme rolls out and infection rates fall, is that there will be a massive lag between normality for most people and normality in the criminal justice system.

Q216 **Chair:** We have seen figures suggesting a decline in the number of firms doing, particularly, publicly funded criminal work. Does that chime with your experience?

Daniel Bonich: It does. We were down. The last legal aid contract had nearly 1,900 firms providing legal aid work for crime, and that is now down to 1,100. We have lost about 40% in six years.

Q217 **Chair:** That is fair enough. That gives me a pretty clear picture.

Mr Mulholland, from the criminal Bar perspective, we have heard some pretty dire stories, particularly among the younger end of the profession. What is your assessment from your members?

James Mulholland: The vast majority of criminal barristers are in tremendous financial difficulties. I am still hearing of numerous individuals who have not had an effective trial for over a year. We understand that somewhere in the region of four fifths of the criminal Bar have incurred personal debt or used savings to support their practice through the pandemic. A substantial proportion—perhaps as much as a quarter, we understand—have taken on personal debt in excess of £20,000.

To give a snapshot, as it were, of the amounts of money involved, it is clear that, between April and September 2020 alone, Legal Aid Agency payments dropped by 40% from the same period the previous year—a saving of £220 million that was not paid to the criminal Bar.

It is a real crisis. It is not always immediately evident because people are struggling on. Some chambers are going to the wall. Many criminal barristers have simply given up on the publicly funded legal aid system. They are moving sideways, and they are being assisted by their chambers to move out of criminal work into other areas where their remuneration is more certain and the future more positive.

Q218 **Chair:** I understand that. It is the same with the fee structure, is it not? Until you have finished the case, which you do normally, with certain exceptions around interim payments, you will not be in a position to put in your fee note, in the old-fashioned parlance.

James Mulholland: That is right.

Q219 **Chair:** That is in both instances. You are covering the risk financially.

James Mulholland: Yes. In any event, even if you were, it is a false saving because you are simply not working. The number of cases going through the system has massively reduced, and we need to get that moving again.

Q220 **Chair:** Perhaps we can come back to that in a moment. I am interested in Hollie and Emma's perspectives from their experience as practitioners. You, Hollie, are in a fairly specialist firm as a solicitor advocate down on the south coast.

Hollie Collinge: That is right.

Chair: Is there anything in addition to what we have heard that you can give us?

Hollie Collinge: I certainly speak for most practitioners that I know in saying that the Covid pandemic is the icing on the cake. The sector has been in desperate need of some form of intervention since way before last March. Solicitors I know, court staff, administration staff, CPS, probation, judges and everybody involved is thoroughly exhausted but is carrying on to do their best to keep going. Morale is at an all-time low. I have been practising for almost 16 years, and I do not think I have ever seen it quite this bad.

Financially, as Mr Bonich described, criminal defence firms are really in a perilous position largely due to cases not finishing in the Crown court. Most barristers I know—and I am sure Emma will attest to this—have not done a trial for quite some time. I certainly have not since last March. For small criminal defence firms, like the firm I work for, if, for example, a couple of fee owners have been furloughed, it is falling to others to pick up the work and make sure that we are compliant with our contract obligations under the legal aid contract—in essence, just doing more for less.

It is not just the pandemic. We have seen a decline in the number of firms in the local area in the last few years, some completely disappearing, some merging with others.

Q221 **Chair:** In Brighton, your area, what is the difference in the number of firms?

Hollie Collinge: Not only are some firms in such difficulty that they are either on the brink or have had to stop or perhaps combine with others, but there are practitioners who think, "I have been furloughed. Do I really want to carry on at this stage?" I worry for the number of people coming in at the more junior end. Certainly, there will be very few duty solicitors in my area before long. All the overheads are there for running a firm. The phrase you hear very often is "cut to the bone, can't cut any further."

Q222 **Chair:** What is the average age of a duty solicitor in your area?

Hollie Collinge: I think it is 50-something. I am 41. I think there are two younger duty solicitors on the rota. I do not think there is anyone below the age of 35, which is very troubling.

Q223 **Chair:** Young people are not going into it?

Hollie Collinge: That is right.

Q224 **Chair:** I understand that. It has been suggested to me that magistrates are now picking up pace, do not have a backlog and are moving efficiently, but from a solicitor's point of view can you make a profit purely out of magistrates court work?

Hollie Collinge: The simple answer is no. Firms are heavily dependent on Crown court work. Some of ours tends to be a little more specialist. In some ways we make up for it, but no Crown court cases finishing in a year is enough to send a firm under, I believe.

Q225 **Chair:** That is just the way the fee structure is—you do not make a lot out of the magistrates court work.

Hollie Collinge: That is right.

Chair: It is the litigator's fee in the Crown court, and that is if you do publicly funded work. Is that right?

Hollie Collinge: That is right.

Q226 **Chair:** Emma, as the junior-ish end of the Bar, what is your experience and the experience of your colleagues and people junior to you?

Emma Fenn: Hollie is absolutely right. It is an area of publicly funded work that has been undergoing a recruitment and retention crisis long before I was contemplating coming into this area of law in 2009-10. This really does feel like the final straw. Most of my colleagues report 70% reductions in income over the last year or so during the pandemic. Many, as Hollie said, have not done Crown court trials for months on end, and that is creating problems for the future. Our training is delayed because we are consistently working on harder cases as we progress through our careers.

Beyond that, there is huge anxiety over the wellbeing of our colleagues, who not only are key workers who take that role very seriously in wanting to keep the criminal justice system going but those in extremely vulnerable categories going to court on a regular basis and dealing with a far greater caseload. If your cases do not conclude, you will be dealing with 30 to 40 cases rather than a normal workload of 10 to 15.

Q227 **Chair:** We talked a bit about the impact on practitioners, but I am interested in the impact it has on the other people to whom it is really important: your clients, defendants, witnesses, complainants in cases and so on. What impact are we seeing there?

Daniel Bonich: The impact of the backlog is that every case takes that much longer to come to court. Average remand times for those who are not lucky enough to be on bail drag on and on. We are hearing now that we are starting to tip into 2023 to fix new cases. There seems to have been some unofficial pressure, as I understand it, not to list cases in 2023 if we can avoid it, so lots of cases are not being fixed. I have a case where we have been trying to fix a trial date for four months on a serious charge. It is an allegation of murder. I do not even have a trial date because, whenever it will be, it will be a long time away, and that defendant will spend probably another two years awaiting trial having already spent the best part of nine months waiting for one.

For the defendants, it is a long wait. It is the same for witnesses, complainants and police officers. It causes difficulties. Memories fade. People lose confidence in the system. The CPS is reporting a massive increase in the number of witnesses who suddenly change their mind and want to back out at the last minute. We are upwards of a two thirds increase, which is marked, and that is a difficulty for all the people who are waiting. It is not just my members and my members' clients. It is all the other participants, ranging from witnesses, interpreters, experts, the judiciary and victims.

Q228 **Chair:** Sometimes, if it is a crucial witness, that will be the end of the case effectively. If the Crown cannot persuade them to change their mind, it will drop the case.

Daniel Bonich: That is a particular difficulty the Crown Prosecution Service is having at the moment. It is seeing a number of important witnesses deciding to back out. A criminal trial is not an easy thing to go through whether you are a defendant, a victim or a witness. The more that people have to sit there having that fall over, the worse it gets, and that is why we are seeing people backing out as the cases get pushed ever further away.

Q229 **Chair:** What is your experience of going to court, for yourselves, witnesses and defendants? Your members will, no doubt, have to take instructions if people are on remand, or maybe they will not be produced or whatever. How happy are people now with the arrangement? We heard a lot of concern at the beginning that some busy magistrates courts were not felt to be particularly safe. Has that improved? What is the situation now?

Daniel Bonich: There has been a constant fluctuation. We have seen from the figures that we shifted over the summer, for example—ironically, when infection numbers were falling—to increasing numbers of remote hearings. We were doing about 90,000 hearings remotely at one stage over the summer and 70,000 in person. The pendulum had swung over to remote hearings as much as possible, for reasons that are not entirely clear.

By December of last year, when we had just finished a one-month circuit break lockdown and were about to go into another, we had swung the other way, and we had about 60,000 remote hearings and 70,000 in person. Overall capacity had gone down for some reason, but, bizarrely, we had shifted back to appearing in person at a time when that could have been and ought to have been avoided in many cases. Certainly, I am aware of district judges complaining on behalf of their own staff and court staff about why they were dealing with fines, littering and council tax cases, which were non-custodial, when we ought to be prioritising cases during these unusual times.

James Mulholland: We are noticing very much, and we have done for a considerable time, the difficulties that complainants are facing. The pre-existing problems and the pre-existing delays have caused problems. They are now exacerbated by further delays and further inconsistencies. We are seeing, certainly in shorter cases, a desire to progress them through the system. Witnesses, victims and complainants have to be ready at short notice to attend a court and then find that the case does not go ahead. The mental pressures upon them are increasing dramatically. One is seeing a real fallout. The Home Office released statistics in February this year stating that the overall figure, including all offences and all allegations of victims not supporting an action, is up to 25.4% from 8.7% in 2015. That really gives a percentage that reflects this.

You really have to be there on the ground to see the stress that many individuals are undergoing and have been for years. It really makes you think. I have been in the system for many years, and for many years the system has not done justice to those who participate in the trial process, and often cost is being put in front of witness care, as we have seen over the last decade.

It is also important at the back end of matters, because, as Daniel said, the greater the delay, the greater the problems that the witness has in recall, which has an impact on reliability, credibility and, indeed, the very trial process. They are not seeing justice at any stage of the proceedings, unfortunately.

Q230 **Chair:** That is helpful. Hollie and Emma, is there anything in particular that you would recommend—you go to court on a day-to-day basis—to change or improve security measures? Is there any more that can be done, or is it about as reasonable as it can be now?

Hollie Collinge: I can certainly pick up on a few of those points. On the mental pressures, certainly from the point of view of defendants coming into the court setting, I have noticed enormous uncertainty and anxiety about whether people should or should not be going to court, and, often, we only find out about that at the very last minute or perhaps even on the day.

I saw a man who was due to attend at my local court. He was so worried about being accused of not turning up. He was trying to explain that he might have symptoms. He spent so long on the phone trying to get through, but did not get an answer, so he thought he would have to come along and explain, otherwise there might be a warrant for his arrest. There is real anxiety.

The court administration system is not equipped to deal with the situation as it is with the backlog. Sometimes it is very difficult to get through on the phone. It is fine if you are a practitioner, but if you are a defendant and you have sent an email and the reply says, "We will contact you again within 10 days," it is quite anxiety-inducing.

I would echo a lot of what has been said on the general impact of the backlog. There is a real difficulty for witnesses to remember what happened that far back in the past. I have probably seen more people in magistrates court trials having to refer to their statements as an aide-mémoire than I can remember.

For young people, for youths, it is a particular problem. We have clients who have turned 18 during the process, and, instead of being dealt with in a youth court, they are dealt with in a magistrates court—that can have a different impact; the environment is very different—or they are transferred from a youth offending team to probation, and they might have built up relationships that then act to their detriment in the end. Those are some concerns about the backlog.

As regards the safety measures in court, there is a very mixed picture. I have had some experience of going to different court centres. Generally, there are lots of complaints from solicitors about a lack of sustained cleanliness. There may be people coming in, but not necessarily often enough.

Physical distancing is a really interesting thing when it comes to trying to advise clients, because it goes against the grain to stay away from somebody when you need to try to find out what is going on. I remember that in the early stages, back in March or April last year, I was in the cells at a court with a young Polish man who had some mental health problems. He clearly needed somebody to speak to him with an interpreter present. We were in an incredibly small room. Nobody could really explain why he had not been put on the remote hearing, but he just had to be dealt with.

I know that solicitors are taking risks here and there to make sure that their clients are not disadvantaged. There are a lot of queries about whether defendants might have symptoms or not. It is interesting that there have not been any attempts to test people, which would perhaps satisfy, one way or another, whether certain people should be quarantined, such as cell staff or the people that a defendant has come into contact with. There are a number of things that could be changed.

Certainly, some testing being introduced either at the police station or the magistrates court would help to resolve those queries.

Chair: Testing is an interesting point.

Emma Fenn: Picking up on what can be done, I can report widely varying conditions. Just before Christmas, I went to quite a small magistrates court. It did not have a huge number of hearings, so it was able to do staggered listings, and it had walkie-talkies and security at the door limiting the number of people in the building. Barristers and solicitors were assigned a conference room immediately upon entering the building so as to minimise the surfaces being touched and to minimise people walking past each other. That was one of the anomalies, sadly, in how well things are working.

When you are dealing with a busy London magistrates court, I tend to find reports of really junior colleagues in somewhat more intimidating situations where, although all these positive steps are meant to be taken, it just does not feel like they are when you are there. It needs to be a lot more visible. There is certainly a lot of anxiety reported from them.

Following up on the impacts on young people and the impacts on witnesses, I can give two examples that are not even at the extreme end of my cases. Just as I was about to join this session, I received notification that the trial of a 19-year-old client of mine has been put off until January 2022. It was due to happen mid-January this year. It is a two-year-old allegation. He has no previous convictions, and he was 17 at the time. He will be approaching 21 by the time the trial is heard. I would love to say that that is not occurring day to day. As I say, it is not an extreme example.

Finally, in terms of witnesses, and an illustration perhaps of how Nightingale courts can assist the system, I had a trial in October that was able to take place only because a Nightingale court had freed up some court capacity. In that case, it was a terribly old allegation caused by previous court problems and the charge had taken a long time to happen. The victim had finished counselling a year before the trial. She reported quite good improvement from that counselling. Once the trial process had concluded, no matter how fairly she was treated during the trial process, the victim impact statement reported a huge downturn in her emotions and the impact on her, as you would expect. It is a positive of Nightingales, but perhaps a strong indication of what really happens with delays.

Q231 **Miss Dines:** Regarding the wider recovery plan—and you touched a little bit on it, Emma—could you tell me what your views are on the Government's current approach to expanding the capacity of the criminal courts?

James Mulholland: We have to understand the context of what has been happening over the last few years, and that the period 2018 to

2020 is an anomaly. You have to understand the context before you understand how best to put a recovery plan into operation. If we look at 2019, which was really an anomalous year, it was a year when we had the lowest number of Crown court trials since records began—36,000 trials. In that year, even though we had the least court sitting days since records began of 82,300, from memory, down from 110,000 in 2016, we still managed to deal with 20,332 trials to conclusion. That is effective and cracked trials. In 2019, even though we had very low court sitting days—we only had 210 to 220 available—we managed to conclude 20,332 trials.

Those figures are very important because, if we now get to a point where we double the courtroom capacity by utilising the existing court estate, which is 491 courtrooms, we do not maximise that use, but we also have, let us say, up to 330 trial courtrooms within the existing estate—safely with social distancing and Plexiglass—up currently from 290, and we have 60 Nightingale courtrooms, we should be very close to doubling the courtroom capacity from 2019.

Those figures are really important because in previous hearings we have heard lots of different figures quoted, and we need to be very careful. If I say to you that in 2010 we had 58,974 trials to deal with and we concluded 37,338—greater than the existing trial backlog—it perhaps puts things into context: 2018 and 2019 were anomalies when, for a politically motivated decision of saving money, the Government reduced the effectiveness of trials and cases moving through the system. Interestingly, we concluded 33,282 trials in 2015 and 31,689 in 2016.

Where am I going with this? What I am saying is that we need to calm down. We need to understand that we can deal with this backlog by a starting point of increasing capacity within the courtroom estate and the number of Nightingale courts. If we double that courtroom capacity, we can deal with this backlog in potentially 18 months and even quicker, depending on the number of trials that crack and bearing in mind that a lot of people have been in custody for far too long.

That is the background. I hope you will forgive me for going through it in this way, because it is of great importance to how we progress. As I say, we have 290 courtrooms equipped to deal with socially distanced Crown court trials. Let us increase that by 30 or 40, and let us get to 60 Nightingale courts. By the end of March, we should have 30. When I say Nightingale courts, I mean Nightingale courts for criminal cases. At the moment, not all of them are utilised for criminal cases. We need to get on with that, and we need to move forward. Once we have 30 to 40 in the existing estate and then 60, we will really be able to tackle the backlog.

Why do I say that rather than any other measure? I say that because we have to be alert to the fact that the virus may return. Government predictions are that it will not go away necessarily. It may return in the

summer. It may return in the winter, and, therefore, capacity—physical space and more court buildings—is really important.

We also need to look at this in conjunction with remote hearings. We at the Criminal Bar Association have said for a long time that the default position for non-jury trial hearings should be one of remoteness because we need to keep the court estate and the Nightingale courts free for trials. That is beginning to work very well, although I have seen the recent statistics, and they tend to suggest remote hearings are starting to go down. We need to increase remote hearings. We need to reduce footfall where possible so that multi-handed trials and other Crown court trials can progress through the system.

It is important to bear in mind that we need to stay calm. Once we have increased courtroom capacity, we need to ensure double the number of staff for trials, double the number of courtroom staff, and ensure that there are sufficient barristers and solicitors left to conduct those trials.

The signs are positive. Government are at last making some moves. They have increased the number of recorders. We are seeing positive steps, and they need to continue in that direction and continue with the investment they are making to ensure progress.

Daniel Bonich: I would echo almost all of that. For those who don't know, I have something of an interest in the Nightingale courts because I was one of the four authors of the report in May of last year that recommended the establishment of Nightingale courts and that went to the Edis group. Certainly, Nightingale courts are absolutely part of the solution, but we have to be careful. Everything has to be done with a great deal of consideration.

The truth is that there are very few experts on the virus, for obvious reasons; we are all learning to a degree as we go along. We know from HMCTS's own statistics that for about a third of the last 90 days that it has stats for—25 out of 90—the infection rate among HMCTS staff is higher than the general public, and we have to be cautious of that. The most recent stats until the end of January were about 700 cases per 100,000 court staff compared with 500 per 100,000 in the general public, so it is quite a bit higher.

We have to be careful how we approach this. Reducing footfall absolutely must be part of it.

If I can add a final gloss on the background that Mr Mulholland so eloquently put forward, between 2010 and 2019 more than 50% of the court estate closed in England and Wales. That is where the capacity disappeared to. We closed the courts. The solution is not difficult to see: more courts, as James pointed out, but in a safe and measured way prioritising cases that need to be done in person, prioritising cases that need to be done at all as a priority over those that can be pushed further into the long grass.

The use of video technology is incredibly important at the moment, but we have to recognise that it leaves some people out. It may be very convenient for the lawyers to attend remotely, but if there are witnesses who have to go in person that is difficult. We have to prioritise when we are using that technology.

I touched on this earlier, but I will give you the figures again. In August of last year, there were 83,000 remote hearings and 57,000 in-person hearings, but that is down to about 60,000 in December. It is difficult to see why we are retreating from remote hearings as infection rates go up. I know that in January of this year we had a very helpful note from the Lord Chief Justice saying that the default position should be remote hearings for some of the parties, at least in most cases. Obviously, jury trials are a big exception, as Mr Mulholland has rightly pointed out.

We have this slightly bizarre situation at the moment, certainly in the magistrates court, where they will agree that the default position is a remote hearing, but you have to apply in advance because it needs to be dealt with through a formal procedure. You have to apply in advance and your application will be looked at not by a member of the judicial team at the magistrates court but by a member of the support team who have been told to grant it. We are applying in advance for an application that we know will be granted by someone who is not even in the judiciary. It is a slightly bizarre situation, and it seems to have crept in. I suppose it comes down to removing as much friction as possible to allow the courts to carry on in a sensible and measured way, as I have outlined.

Q232 **Miss Dines:** Hollie, do you have any views on what else the Government could be doing, above and beyond their present plans, to increase capacity without compromising the rights of defendants, witnesses and victims?

Hollie Collinge: I would like to follow on from what Mr Bonich said about the magistrates court in particular. My view is that one way to increase capacity is, without doubt, to put in place a better case management administration system. If there was better communication with the court or availability for that, it would save so much time, court space and court availability.

I say that because I really do not think the administration side is functioning very well at the moment, especially in some of the London courts, where there is a central contact point: you call in, they send an email somewhere else, and it is then painfully slow to get a response.

In one case, I have been waiting for the court to reopen an application since November, despite renewed queries. The people who are answering the phones are under enormous pressure. They are very ill equipped to make progress, and it seems in some cases they cannot really see what has happened before that. It is quite a common complaint among practitioners that you have a trial coming up, for example, in a magistrates court, something prevents it from being effective—it might

be ill health, self-isolation or a lack of disclosure by the prosecution, which is a huge problem—so you send emails, you call the court and there is no response.

You get to the day of the trial, by which time you have probably had to make quite a tough call about whether to tell your client to go or not, particularly if they are reporting any difficulties around Covid. You get to court and the trial is ineffective, which you have known all along, and the consequence is either a wasted morning or even a day's trial set aside. If there was a better way of picking up on urgent communications with the court, it would save so much capacity. It may be staff or it may be training—I do not know. That is one of the answers in the magistrates court and the Crown court.

I agree that there need to be more Nightingale courts. We have had only one case that has been referred as a possibility to be heard in a Nightingale court. There are large buildings all over the country that could stand in. Creativity is certainly an area for expansion. Courtrooms come in very different shapes and sizes, anyway. It is just a case of putting the right people in the right place, and of having the space to make decisions. I would far rather be telling a client that their case could be heard somewhere, albeit it may not look like a traditional courtroom, rather than having to wait for a date—or perhaps not even a date—or, even worse, counter-alternatives, reduced jury panels, and that kind of thing. I do not want to be in a position where I am telling my clients that. Technology has a role to play, as well as extra rooms and administration improvements.

Q233 **Miss Dines:** They are all very important. Emma, do you have anything to add? It is always difficult being at the end of a long list of questions, is it not? Do you have anything to add on how the Government can improve the recovery process?

Emma Fenn: Looking at the recovery plan, we really need to push through a lot of the things that are stated in it. That is in fact one of the problems that we have had. When you look at the HMCTS plan—roll out CVP further—Daniel's statistics show that there has been a retreat. As you heard in your previous evidence sessions, the police withdrew co-operation in relation to CVP remand hearings because of resource issues.

Another rollout is screens. That took many more months than was anticipated, with some courts struggling in November and December, when the recovery plan talks of that starting in July.

Opening Nightingales has been slower than a number of us at the Bar would have hoped, although I know that there are a number of practical issues in finding suitable buildings.

Perhaps most interestingly in the recovery plan is the phrase, "We are going to need more radical action to resume jury trials." From that position of radical action in resuming jury trials, we need to look at more

adaptability and perhaps greater accountability across the different areas that work to get a jury trial off the ground. There have been a number of times during colleagues' jury trials where a single juror is exposed to a family member and an urgent test is needed, and two days of a jury trial have been lost.

Similarly, communication with prisons has been really difficult. They are dealing with a huge number of tests and cases themselves. We could be testing defendants daily in the cells so that the speed of that mechanism is improved, because with the communications between prisons and tests we lose one or two jury trial days at a time, sometimes more.

Those are some ideas, and perhaps some areas of the recovery plan where it is stated as being what the plan is, but it really needs—

Q234 **Miss Dines:** May I focus very briefly, with short answers if possible, on jury trials? This has been very difficult to do during the pandemic, but what needs to happen to increase very rapidly the number of jury trials that can take place without any compromise to the rights of the individual defendant, victim and witness?

James Mulholland: We have, in effect, discussed it. We must retain jury trials. There has never been any problem with securing sufficient jury numbers to have a trial. The problem has been in securing the associated court staff and legal members to be able to cope with the increase. If we remember, HMCTS mounted a campaign pre-Covid of reducing full-time court staff, and court staff generally, and increasing the number of agency staff. They need rapidly to increase the numbers well beyond the 1,600, which they are already in the process of securing, and get that figure up much higher.

We also need a pretty clear response from the CLAR 2 review saying that they are going in the right direction on remuneration for the Bar, because the reality is that, unless that happens, more and more people will leave the profession and you will not have the personnel to be able to deal with the backlog even if you get everything else in place.

As we have said, remote hearings are fundamental to the ongoing position. You have to ensure that safety is paramount. The virus probably has not gone away. It will be with us for a period of time. CVP hearings are fundamental. Ideally, we need a remote hearings protocol nationally across England and Wales. We need that because there are inconsistencies, as you have heard, with CVP procedures and processes. You are having to apply at 9.30 am and still be ready to attend, possibly 50 or 60 miles away, if your application is refused. That has to stop. We need that from on high, ideally being led by the senior judiciary in the form of a protocol. We need consistency.

To be frank, what we probably need is an inspectorate of court administration, which we had at one point and we lost back in 2011. Never has Her Majesty's Inspectorate of Court Administration been so

desperately needed as now, when we see the clear dysfunctionality between all the elements of the criminal justice system—the judiciary, HMCTS, PECS, you name it. If ever there is one drum that needs to be banged, it is to bring back that institution.

Q235 **Chair:** But no remote juries?

James Mulholland: No. Remote juries need to be avoided, unless it is absolutely essential, and we are many miles away from that. We do not want to tamper potentially with the quality of justice administered. The Scottish system has juries in a different place. We really do not need to go down that road. If we get to maximising the available court space with Nightingale courts, we simply do not need to progress down that path.

There is a great danger in eroding basic principles, because often that erosion can never be revoked. That is why I say there is a sense of calmness that needs to be restored. Of course we have incredible delays and we have to work really hard, but we can achieve these goals without compromising the justice delivered.

Q236 **Miss Dines:** Do you have any views on any change to the present jury system? I am against it, but I am very interested to hear whether you think there are any changes that could be achieved in the fundamental jury system, such as reduction in numbers of jurors or something similar. What is your view?

James Mulholland: I am fundamentally against a reduction in jury numbers. We have had 12 jurors since petit juries back in the 1100s, even predating Magna Carta. They have been an institution for 1,000 years. They are very important—even more important now than they were before in a multicultural, multi-ethnic society. We need the individuals who participate in a Crown court trial—complainants, witnesses and defendants—to have a cross-section of individuals from within their community to try their case. It is necessary in assessing the evidence and clearly issues such as the state of mind of defendants, state of mind of complainants, and the factual matrix, but it is also massively important to undermine any bias or discrimination, as the Lammy review pointed out. It is necessary to have that composite number of a cross-section of society to eradicate bias and discrimination that may otherwise exist.

There is simply no reason for it. As I say, we have never had a problem with getting 12 jurors. There is no point doing it in the pandemic because, hopefully, with vaccination there will be no need to do so. By May, when vaccinations substantially increase and we can open up a greater number of courtrooms, we will be able to proceed to tackle this backlog, as I say, without interfering with the quality of justice delivered.

Daniel Bonich: I have four points. First, there should absolutely be Nightingale courts, and the more of them the better. We have vast buildings that are not being used at the moment because of lockdown.

We know that we can build a Nightingale hospital in three or four weeks, but we have not managed to do too much with courts in more than a year.

The second is to recognise that we cannot continue, as has been the position of Governments of all shades, sizes and colours, to view all the parts of the criminal justice system in their own little silos. That simply does not work. The CPS, the police, the courts and legal aid are all interconnected. You cannot look at it in siloed arrangements. It simply does not work.

The third is about being proactive with cases, and, as you have heard, managing cases better. The jury part of a jury trial is often the very last part or one of the last parts. There is a lot of work that goes into getting them to that situation—lots of hearings often—and that needs to carry on happening by having hearings taking place safely by using video, as we have heard. That is, in reality, the only way we can make progress.

The fourth is vaccines. As we move down the groups and priorities, we perhaps have to start thinking about those who are most at risk of catching the virus as opposed to those who are most at risk of dying from the virus. Those might well include jurors who have been called to do jury service. They have sufficient notice generally. There are court staff, lawyers on the frontline and those who are engaging with the public. When we get through the most vulnerable people, serious consideration needs to be given to whether that is the next obvious step: to identify those most likely to catch the virus and spread it, and give them vaccines. That would suddenly make jury trials a hell of a lot easier to get off the ground again.

Hollie Collinge: The right to trial by jury is of paramount importance. It would be a slippery slope to move away from that for what may be a relatively short time in history.

I would echo the requirement for testing. It is available in so many other areas of life, and it would be such an important factor in allowing trials to take place in all courts. That is the philosophy behind it.

As far as the practicalities are concerned, if you reduced the jury panel number, you would still have to accommodate large numbers in one place. I do not know the statistics, but I doubt that would allow very many more trials to take place for what would be a relatively short period of time. Certainly, I would not want to be in a position where I was telling my clients that the situation has changed, the law has changed and they cannot have a trial by 12 of their peers. It is not the right way to proceed.

Q237 **Miss Dines:** Emma, do you have any concerns about the way jury trials are being dealt with at the moment? If you had the choice, what would be the one reform that you would put into practice in this field?

Emma Fenn: One thing in relation to jury trials is that sometimes we tend to focus—because that is their name—on the problems with the jury itself, but, from my experience of conducting jury trials throughout the pandemic, while not huge numbers, juries have been committed and have followed the rules to the letter. Things that have prevented jury trials tend to be other areas, whether it be joined-up testing, access to testing or simply the number of defendants who can fit in the dock. We tend to find that it is things not about the jury that seem to be putting blocks in place of resuming lots of them. Sometimes, there is a focus on juries because it is in the name.

On the question of reforms, it is difficult to answer that. It is something that I was anticipating you might ask in the context of an area of the justice budget that has been attacked over a hugely long period.

One thing we would certainly be looking at, as James said, is having some form of independent review, whether that be independent pay review boards for solicitors and barristers or focusing on the system itself—the court inspectorate—to try to bring together some of the areas of lack of accountability. A number of times we have judges breathing huge sighs because they simply cannot affect problems that come from the prison end or from other areas of communication or administration. It is not just them. It happens across the system as a whole. We tend to find that we reach a brick wall where we get to somebody who simply cannot affect something else in the system.

Q238 **Paula Barker:** Good afternoon to all our witnesses, and particularly to Emma for spending time with us while on maternity leave. I know it is a difficult time, so thank you for being with us today.

We have talked a lot about the courts and technology. Are there any additional views on how successful the use of technology has been in criminal courts over the pandemic for those that have actually been able to go ahead?

Daniel Bonich: It was a slow start. In my own practice, we have a family law department. They adapted much more quickly to remote hearings, and in fact it seems like business as usual but now by remote. It picked up very quickly. It has taken us much longer to get there on the criminal court side.

Putting aside the difficulty of jury trials, it should not have been a reason why the other courts could not have adapted. To be fair, to get up to 90,000 hearings in a month was quite an achievement in the summer. That should not be ignored. We must resist the backsliding on that that we saw towards the end of the year.

There also seem to be some practical issues that I hear from time to time: courts not having enough microphones, or not having enough licences. I was told of a Crown court that had only six licences for CVP. It asked for six more and was told, "Forget it." It just seems daft. It is so

important to get these. We have managed to keep the system ticking over in the most difficult of circumstances, but a lot of that has been through the hard work of people individually.

It is worth saying that a lot of it was done through co-operation. I know it is not the courts, but you may have heard about changes at the police station—the police protocol. That was agreed between the defence community, the police and the CPS, and that allowed the wheels of justice to keep turning. It can be done.

Unfortunately, with the courts, there has been less engagement, it is fair to say, as to how we see the best way forward. If we can learn some lessons from what happened at the police station, I would say speak to us more, and we can tell you what we would like to do remotely and what we would not. There are many sorts of hearings that we would not like to do remotely if we can avoid it. They are just not suitable.

I would say it is a mixed picture. It was a slow start; they did well and are starting to backslide a little bit now.

James Mulholland: To echo what Daniel said, it started slowly. The problem that remains is lack of consistency. It took the Kent variant for real changes to kick in and more people to understand that it was the default position. Prior to that, we were having real problems. A barrister, for example, might be in Manchester one day and Birmingham the next, and they need to know what the protocol is, and it was causing real pain.

I will say two things about CVP because it is very important. Short term, it is absolutely essential to tackle the backlog—not just because it frees up trials, but because it allows us to crack through the case backlog. If you have to physically go from Woolwich to Lewes to Maidstone to Birmingham, you cannot do it in one day. You cannot have all those hearings.

If you crunch them into remote hearings, you can deal with multiple hearings from your own home, and that makes a massive difference in progressing through the system. Of course, there may be cases where you need to attend in person because, if you are defending, you may need to speak to the defendant and gain that trust, which is not always possible with a remote hearing. There will on occasions be a tension. Certainly, it needs to be improved and increased.

The second point is that, long term, it may well have a significant impact on retention. We have a lot of people with caring responsibilities who leave the profession very early. We have people who simply cannot cope with a job that involves vast amounts of travel for hearings of 10 to 15 minutes. This can really tackle that in a significant way, particularly for those with caring responsibilities and women, and that is massively important at the moment. It is a very important tool to help us, as long as it is used sensibly. Keep jury trials in person, keep sentences in person wherever necessary, but utilise CVP to the full.

Hollie Collinge: Perhaps I could say something about the defendant's experience of virtual hearings. It has been very helpful, particularly in administrative hearings involving lawyers. In the Crown courts, it has worked incredibly smoothly, and cases are set up so that they are heard at certain times, and that has worked very well. There are improvements to be made, and perhaps that requires more investment in the future.

I would encourage protocols because I have seen some very varying techniques in the way CVP is granted for witnesses and defendants. In one court, it may be in line with the Lord Chief Justice's message about the default being people attending remotely. In another court, I had a trial in London and the defendant was in Wales experiencing illness, and he was told that, under any circumstances, he must go. It is a varying picture.

To highlight a few issues on the ground, as it were, communication can be tricky. I have certainly experienced that making a contested submission to a judge or a bench from a screen on the wall is sometimes less compelling and effective. I have seen that from being sat in a courtroom watching people speaking from home and trying to get my point across. Bail decisions and sentences that are on the cusp of one thing or another can be affected. I am not saying they are always, but it is certainly possible.

From the defendants' point of view, the feedback from my clients is that they sometimes feel at a distance—so much so that they will come out of the hearing having attended remotely and ring me and say, "What happened there? What was that all about?" It has happened on a number of occasions. It is taken for granted sometimes that these people always have the equipment and the wherewithal to participate. We are sometimes talking about people with chaotic lives. They might not have a phone. They might not have an internet signal. Even for those with a good understanding, we solicitors are often left to act as IT support for them. We will be given the link by the court. We then provide it to our client, and if they are not there for any reason, it falls to us to explain why.

I had a couple of cases in the last few months where the defendant was in court in person, and I had been given a link to join remotely. I was waiting to be let in to the hearing. My client phoned and said, "Where were you?" It turned out that the court had conducted the hearing without linking me in. It happens. It was a mistake. Fortunately, it was an administrative hearing. There are lessons to be learned. You can be waiting for a significant time to connect to a hearing. There are time inefficiencies sometimes.

One thing I would encourage is that there is a facility to negotiate. When you join a hearing, quite often you may be ready to go, but something changes at the last minute and you do not have the option of speaking to your client in the dock to discuss a change of plea or a change of position

from the prosecution, and those are things that happen very subtly in a very nuanced way during a hearing, and it can achieve a lot. Sometimes, that means the case has to be adjourned. Sometimes, you will not have a response for several weeks or even months. Facilities to negotiate need to be improved. There are pros and cons, certainly.

Emma Fenn: One thing that has been hugely working in the CVP sphere is that case ownership has been so much easier to manage. We are so often in trials and struggling to accommodate case management hearings or pre-trial hearings to check that other trials are ready to go. Having that grasp of your cases and being able to deal with them yourself via CVP, despite having other cases to do, has been huge. From my perspective, it has meant cases have been resolved that would have been a lot harder to resolve otherwise. Certainly, in those hearings where you do not necessarily need the defendants on the link, you would have had conferences with them otherwise.

Beyond that, prison conferences via CVP have been transformational. Barristers have to cancel so many prison conferences because the trial that they are currently in has overrun by days or weeks, or it simply does not work. It is difficult to fit them in at 9 to 11 in the morning when a lot of the legal visits can be. Those have changed hugely how much input you might be able to have in defendant conferences when someone is remanded. Those things are a huge positive.

The negatives have been covered, and I do not say much. The protocol James talks about is so important. There is a huge drop-off in women remaining at the Bar when they have children. CVP has been positive for that, but there are also negatives in being told that you need to explain to a judge privately why you want to appear by CVP. It does not work. I said to James that perhaps 10 to 15 judges knew I was pregnant before my family did, and that is a stark illustration of why it does not work. It does not matter if I am telling a judge privately. There are often very good reasons why people want to appear remotely, and that simply does not work in practice.

Q239 **Paula Barker:** Daniel, what do you think other agencies such as the police, the Prison Service and the CPS need to do to help address the capacity issue? May we look at the impact of the cessation of video remand hearings being undertaken by the police? Emma mentioned a lack of capacity, and I think you were wandering into this as well.

Chair: Before Daniel starts, I will hand over the Chair to Maria Eagle because I have to go and speak in the Chamber, equally remotely, and it means I will swap to a different link. I will disappear for a bit. Thank you all very much.

[Maria Eagle took the Chair]

Daniel Bonich: Starting with video remand hearings, I am in probably something of a unique position because my practice is in Kent. We were

one of the longest lasting pilots in the history of HMCTS, with video remand hearings going on for the best part of a decade. It was hugely unpopular at the time, I have to say, because it had been brought in as a money-saving exercise and at the time put great strain on the police. In times of pandemic, it was essential, as most of our members have reported back. It allowed the wheels of justice to continue to turn, and to have the police remove that was a huge regret. It is as simple as that. It takes away capacity from the system and adds expense of moving people around.

I do not want to trespass on precisely why it was revoked. My understanding is that some police forces became aware that others had extra money to facilitate the arrangements and others did not. I would have thought that could have been fairly easily resolved, but regrettably it was not. That has made it difficult.

You asked about the CPS. From very early on, many regional CPS branches at least took a decision that their advocates were not going to appear in person. They switched very quickly to remote, sometimes from within the court building. They were in the court building in the CPS office but did not want to appear in the court. That did not always work. Like many things, we have all adapted very quickly to that.

Arrangements with digitalisation meant that receiving papers in evidence is easier now that we are working remotely than it was historically when we would have expected huge reams of paper. That must still improve, I am afraid. I am sure you have heard this before. It is not uncommon, as I had earlier in the week, for a request for papers to go out before 9 o'clock, and I am still waiting at half past 1. Although it has been confirmed from a fairly senior level at the CPS that they are happy for their advocates in court to share papers using a secure CJSN account, many agents on the ground do not believe that to be the case and will not, so you are still waiting for the centralised system. I think those are the main two.

There was certainly a period where some of our members were reporting that they felt that the CPS had sought in some ways to take advantage of the difficulties with furloughed staff and the speed at which things were happening by suddenly remembering their duty to engage, and were really keen to engage when they knew it was far more difficult for the defence to do so. There were lots of chases for defence statements that were five minutes late and things of that nature. That was just a training exercise, and, for the most part, we have managed to get into arrangements where we are able to make pretty decent progress.

The only other issue in relation to the CPS and police, which was part of the original protocol for police stations and was particularly important at the very start of the pandemic and became very important with the more infectious variants, was simple decision making on the ground in prioritising cases. You may have seen the flow chart effectively saying,

"Do I really need to arrest this person? Can it be dealt with in another way? Can I street bail them to come back?" There was a difficulty with voluntary attendances, for example, where sometimes quite minor offences were being dealt with, or with voluntary attendances that could have been put on pause. As the pandemic has dragged along, unfortunately for all of us, most of those problems have started to go away. You get the odd piece of bad practice.

Perhaps the biggest lesson to be learned that my members talk to me about is—and this goes for CPS, the police and HMCTS—where is the national response? Why is there so much variation between different courts, between different police forces and between different CPS branches? As Hollie said, if I am going into a court area that I am not familiar with, I may not be familiar with a protocol that is unique to an area. It is a bit bizarre when the problems at the moment are problems we are all sharing—we are all in the same national arrangements—to have some courts not wanting ever to grant remote attendances, for example, and others taking a different approach.

Communication really needs to improve. The magistrates court is probably the worst. That is a fair criticism. The Crown court tends to be slightly better. It is not uncommon to hear about communication difficulties.

I was made aware of a case just before Christmas where counsel had applied to appear via remote hearing for an administrative hearing. Effectively, it was for a progress report and nothing more. He applied to appear remotely. He was told by court staff by email that it had been refused by the judge, so he travelled from London down to Canterbury, which at that stage was one of the areas where infection rates were quite high, and on arrival was somewhat puzzled when he could not find the prosecutor or, indeed, which courtroom he was supposed to be in. Upon making inquiries, he was told, "The judge did not even know the case was listed. He is at home, but he is happy to appear by CVP if you are." It was apparent that the judge had not refused the application, but somewhere in an administrative office someone had made the decision. Those mistakes will happen—a bit like Hollie spoke about earlier—but we need to get better at making sure that they do not.

James Mulholland: The key to increased capacity is safety in the courts. It is at the heart of everything. The agencies that need to take a lot of responsibility are HMCTS and the Prison Service, because key problem areas are the public areas of court buildings and the cell areas, which often have problems with ventilation and are not always safety compliant.

We said that HMCTS need to ensure not only that they are saying their policies are in place and that if they are followed everything will be safe, but they need to marshal those policies, because we are hearing throughout the country that there are breaches in magistrates courts and Crown courts. Barristers, solicitors, defendants and witnesses are

forgetting at times to follow the rules. The reality is that, despite people saying it is not a close-contact setting, it is, because you have people who are trying to share confidences between each other and ensure that nobody else is heard. We need marshals to ensure that measures are properly followed in court areas. We need that from HMCTS.

We need lateral flow testing. Lateral flow testing kits have been made available by Government to commercial companies. We need it now across the system. That is hopefully being done. There is a pilot scheme in Manchester, but we need it rolled out across the major court centres as soon as possible, and we need it done really quickly. Those issues are important.

We also need vaccination prioritised, not for everybody, but for juries to make them feel secure and for court users at high risk. I had a very old eight-week case dating back to 2013 adjourned in January because I had a defendant who was at high risk of Covid. To get that individual a vaccination quickly would have saved an eight-week trial. Instead, the amount of money wasted was massive, so that needs to be done.

In relation to the Prison Service, we need lateral flow testing. We need to ensure that every prisoner leaving a prison to go to a court has tested negative for the virus. We are hearing problems all the time of longer tests taking place and there being a delay before the result, and of Covid-positive individuals having meetings with their barristers in poorly ventilated cell areas, with the barrister discovering that they have just tested Covid positive when the result comes through. That really needs to be tightened up.

HMCTS must produce evidence that our courts are safe rather than simply say that our courts are safe, showing us the investigations of Covid-positive courts where HSE or Public Health England have come in and said that a court is safe. Otherwise, you will have outbreaks such as happened at Oxford before Christmas where 17 court staff and court users contracted the virus. You are just leaving us in limbo. There is not sufficient information. Lots more needs to be done not only to ensure that our courts are safe but to prove to court users that they are safe.

Q240 **Paula Barker:** Do any of our witnesses believe that video remand hearings should become the default position?

Daniel Bonich: Not the default position, but they should be made available certainly. There are some cases where they are not suitable. We learned that in Kent.

Paula Barker: Absolutely.

Daniel Bonich: Early on in the Kent scheme, all kinds of cases were considered not appropriate, but over time that eroded until it became the default position. I caution against the default position, but I certainly think they should be made available again.

Hollie Collinge: Any technology that makes things easier and faster and allows for more capacity has to be encouraged, but there has to be flexibility in any model like that, and it has to take into account whether particularly the defendant and wider participants have the ability to participate in the right way. If that system becomes too rigid, you risk excluding key participants, and that can affect the quality of decisions. I know there are a lot of different decisions going on about how those choices are made. Flexibility is probably the key.

Emma Fenn: In the past, we had some really odd situations where court cells would have a "last orders" almost. If someone was not in the building by 3.30 pm, they could not be dealt with that day. The future for remote hearings is fantastic for things like that, and, also, where hearings are in effect gateway hearings to the Crown court and nothing is really going to be done in the magistrates court and it is just an entry to the process. Clearly, there is a big future for remand hearings remotely, but, as the other two have said, flexibility is key.

James Mulholland: In the absence of a remote hearings protocol, we need, in my judgment, to err on the side of caution, but not for jury trials. For jury trials, you must attend in person. There may well be sentences where, for example, the family is going to attend as well as prosecution and counsel, and other areas where attendance is required. In the midst of a pandemic, for administrative hearings, the default position has to be non-attendance because otherwise you have chaos. Counsel receives the case the night before, and they are making an application the following morning or they may not even be allowed to make an application because in certain courts the time limit was 2.30 pm the previous day. You have absurd situations where counsel receives the brief at 5 pm, and the time for making the application has passed.

We have to err on the side of caution. The default position means non-attendance. Flexibility means that you then engage as a unit—counsel, judge and defendant—and say, "We need a hearing in this case," because it will advance the interests of justice. I would take it a slightly different way. While we need flexibility, the default position should protect all those in the midst of the pandemic.

Q241 **Chair:** I would like to come on now to some issues about court capacity before the pandemic and whether what we are seeing with the pandemic is an exacerbation of a pre-existing problem, or whether the pandemic has caused a problem where there was not one before.

A number of our witnesses have argued that the capacity of criminal courts to deal with the cases before them was a significant problem before the pandemic. We have already heard from some of you about the number of courts that have been closed over the previous 10 years or so. Are there particular issues that were there before the pandemic that perhaps have been exacerbated by it, but not caused by it?

Daniel Bonich: The loss of more than half the court estate has caused difficulties. It was always going to. At the time, most of us were concerned—in the data that was looked at—about travel time to courts and how far people would have to come from to get to courts. In the midst of the pandemic, the further someone has to travel the less desirable it is. I suppose that has fed into the pandemic.

Because of the closure and rearrangement of court estates, certain courts have become more specialist. You have local listing arrangements where some court buildings are only used for trials, others are used for road traffic and further ones for first appearances. That has meant that some of the courts do not have the equipment they may have historically had that would have made this much easier. CVP took longer to get off the ground because a lot of courts had lost all the equipment they previously had or could have had available, which would have made it much easier.

It is an exacerbation of an underlying issue, which is a lack of capacity going in. Perhaps the most concerning is that we were promised a £1 billion court reform programme that was going to modernise our courts, but the moment the pandemic hit what was clear is that the modernisation had not stretched far enough to allow the courts to adapt quickly enough with, for example, remote hearings. In areas like my own in Kent, because we had the pre-existing arrangements, we were able to adapt quite quickly, but other areas, as you have heard, took much longer to come online.

James Mulholland: It touches on what we dealt with before, which is that 2018 and 2019 were an Executive-created crisis. If you look back to 2010, we had 37,338 concluded cases. You could call that a backlog. Actually, the number of trials—let us put it that way—that were listed to take place during 2010 was 58,974. The backlog is not the problem. It is the capacity to deal with the backlog. Although we had 58,974 trials, the period from allegation to completion was 391 days on average.

Come forward to 2019. In total, we had 36,733 Crown court trials due to be heard in that year—far less than 58,000 nine years earlier—but the period from offence to completion had increased to 511 days on average. The reason for that was that the Government realised there were far fewer trials but they decided not to deal with them expeditiously. They decided that it would be better to make financial savings rather than ensure the timeliness of participation in a trial through the criminal justice system.

They reduced court sitting days. They stopped judges sitting in courts and hearing trials. That was a deliberate decision. While complainants, witnesses and defendants waited years to be heard, they decided to do that. They reduced the number of court sitting days from 110,000 in 2016 to 82,000 in 2019-20.

It was a created, manifested political decision to do that. We are dealing with a politically generated backlog. The Government were fortunate

because they had the lowest number of Crown court trials to deal with since records began, and they made sure that they took as long as possible. Just imagine how bad this would be if we were dealing with the number of trials that we had in 2010—58,974 in one year—which is more than the entire case backlog now.

The lesson to be learned is: do not tamper with the justice system. The justice system is about human beings. It is about ordinary people, often with severe vulnerabilities, going through a tremendously emotional process. Do not try to make financial savings at the cost of ordinary human lives. That is the key message to be learned.

Q242 **Chair:** Hollie Collinge, in your experience, was there a big problem with capacity before the pandemic? Can you identify what particular issues were causing it?

Hollie Collinge: I would have to draw on the figures mentioned by Mr Mulholland. They speak for themselves. Yes, without a doubt the backlog existed beforehand, and any suggestion to the contrary is not looking at the situation as it has been evolving. Defendants are waiting longer and longer for trial, whether on bail or on remand, locked up for 23 to 24 hours a day. That was increasing beyond what seemed reasonable years ago. Complainants are not able to move on with their lives, but that is nothing new. That has been evolving for many years. Youths are turning into adults before they are tried.

For all the issues that have already been mentioned, you can almost take Covid out of it and say that they all existed beforehand. It is only going to be one answer: there has been insufficient investment into every area of the system to make it work together efficiently enough, and that has been allowed to get out of control.

That is the feeling among people working in the system, who, as I said to start with, are thoroughly exhausted, and it has got to the point where something has to give and something has to change. Something on the ground is that often small firms or really good lawyers are leaving practice. There is no sign of any new blood. Young criminal solicitors do not exist. Trainee solicitors are virtually non-existent. It is a situation that has been developing over at least the last 10 years. In answer to your question, yes, it has been a problem for very much longer than the pandemic has been around.

Emma Fenn: I echo what the others say. One discrete example that has exposed the lack of capacity is video links. These were heralded within the last decade as something that would transform how the justice system operates, to save having to transport defendants for unnecessary hearings or for very necessary hearings where they could participate properly. Very quickly in the pandemic, you found that solicitors trying to get a single conference with their clients were taking three or four months for availability. It immediately exposed this heralded system as being completely under-capacity. In serious cases, we would normally

have tens of conferences that solicitors may conduct. Even getting one was taking them three months and they were not able to book multiples. They had to have that one conference before they could book another. A handful of prisons in November and December had some expanded video link capacity, but we are talking about undersized booths. That is one illustration of where immediately the system was exposed as not having adequate capacity before.

Q243 **Chair:** How can the technology be used to expand capacity without compromising on quality and fairness? You have all said that there are issues about accessibility and understanding with remote hearings. One has to make sure that those issues are taken into account. Is it possible to use technology to expand capacity without compromising the quality and fairness of the system? Is that one way of tackling the backlogs and dealing with more cases more expeditiously?

Emma Fenn: Following on from what I have just said, it can be, but it has to go hand in hand with proper access to your legal team. A lot of the time, we are finding that defendants simply do not know what is going on in their hearings when they appear remotely or via video link because they are in a vacuum. They are struggling to get proper conferences because of the problems that I mentioned before about such long waits. It could be, but it has to go hand in hand.

If you are having active chains of communication with your legal team, you will be able to participate in short hearings that can be easily conducted by video link much more easily. That frees up the court system for in-person defendants to reduce the footfall going through the court system and to allow the jury trials where people need to be in person to happen much more smoothly.

Daniel Bonich: In direct response to the question about how technology can be used, one of the things that has fallen out of fashion over the years is what used to be called case management hearings or pre-trial reviews. There used to be lots more of them in the magistrates court, for example. It would be in front of a clerk alone and it would be, "Is this getting ready? Are we making progress? Is this going to be an effective trial?"

They stopped largely in the magistrates courts. There would be two hearings: the first hearing and the last hearing. That is what you are told over and over again. Of course, that was never going to be the case, but that is what we were told. Remote hearings for those types of administrative hearings are fabulous opportunities to make sure that cases that are supposed to go ahead will be ready and we are not wasting the capacity that we have.

Secondly, what constitutes a courtroom is up for grabs with technology. It does not have to be the same sort of building that we have always had. We are one of the last to have an adversarial system where, for example,

we still have a defendant in the dock. There are all sorts of options once you can appear remotely.

We have touched on remote hearings. Emma spoke about access to legal teams. In fact, in some prisons—some of my local ones—I can get more visits than I have ever had before. It is really quite good. I can request one in two or three days, and I will have an hour-long visit, which I could not have had for weeks, and I have had many more, which is great. For some visits, you need to be in person, but to have some of the others remotely is tremendous.

One final area is what used to be called—I am not sure if they are still called this—access to justice laptops, which were provided to prisoners. In a world where there is lots of electronic evidence, sometimes they need to access it on a computer. Those are still in incredibly short supply, and that causes difficulty. In one of my local prisons, for example, we wrote to the governor asking for one for our client and were told, "There is one. Someone has put a password on it, and no one knows what it is." Therefore, that was the end of the access to that laptop.

The more that we move to digitalisation, the more that we need to have the facility for those who are in custody, but also for those who are on bail but do not have their own equipment, to access electronic material.

If you combine those, you have a massive opportunity to increase capacity at far less cost than having the grand, expensive buildings that we have had for so long.

Hollie Collinge: I want to reiterate the key points about using technology. Yes, for the right hearings. Yes, keep it flexible, and bear in mind the users.

Your question also reminded me about new systems coming into place. I heard recently about a new system that is being introduced for screen sharing to show whatever you are using on your screen to the court. It is a good example of something new that is being developed and used in the Crown court initially and then the magistrates courts. It has not necessarily been very well flagged up.

There needs to be maximum opportunity for engagement with people who are about to use any new form of technology. We also need to take into account the fact that a lot of defendants do not have the wherewithal—I really cannot emphasise that enough—and may not be represented. As things stand with less opportunity for legal aid, there are more unrepresented defendants, and they cannot participate without a lawyer-cum-IT support in those situations. A lot of people will not be able to engage with that. That is why it is good to be asking the right questions early enough to make sure a new system does not fall flat. It can be fantastic if it works for everybody.

Chair: Mr Mulholland, do you have anything to add or shall we move on?

James Mulholland: No, I would simply be repeating what the others have said. Technology is very important in its place.

Q244 **Chair:** Mr Mulholland, you said earlier that you would like to see the courts inspectorate come back, or some new version of it. When I was the courts Minister, we had such a thing, but it was then abolished. What role would it play and how would it help? To what extent would it be able to make an impact on some of the causes of delay and capacity issues that have developed?

James Mulholland: The interesting thing about the Inspectorate of Court Administration was that its central purpose was to support the carrying on of the business of the courts and the services provided for those courts. Never have such words been so important as in the midst of a pandemic, because what we are seeing is the dysfunctionality of the system unfolding as this crisis develops. HMCTS is responsible for the safety of the courts, but there are tensions with the judiciary on occasion, as was recently seen in Bournemouth Crown court, about whether to close the court. The judiciary said, "We are going to close it," and HMCTS countermanded the decision of the judiciary based on safety.

When complaints are made, we have ensured that HMCTS institutes a proper complaints procedure and escalation process. But when we make complaints to them about the safety of the court and the safety of the cells, they say, "That really is not our domain. You must go to PECS," or, "You must go to the Prison Service."

You have a vague, loose structure where everybody passes responsibility if it suits them. One needs an overriding body to gel together these diverse elements, which really are not functioning in the manner in which they should. That was the responsibility of the inspectorate.

We need something akin to what the CPS has. The CPS has a tremendous inspectorate, which analyses and scrutinises the decisions taken by the Crown Prosecution Service and submits a report, where necessary, and points out the deficiencies.

Do we have such an organisation for HMCTS? We have the National Audit Office, but we need something far more analytical. We need someone to say to HMCTS, if we do not get any joy: produce your evidence, show us how that works, and show us how you interconnect with PECS and the Prison Service. That degree of oversight is absolutely essential, in our judgment.

Q245 **Chair:** To what extent does the leadership structure and administration of the courts impact on capacity? Do local areas have enough power and flexibility to make decisions about what works best for them in a way that would increase the efficiency of the use of time and court capacity?

Hollie Collinge: Yes, the courts have quite a high degree of autonomy in what they can and cannot do. One of the biggest problems is that there is

no consistency across the board. One of the key ways to increase capacity is to increase court administration—not individuals in the service; they are all doing a fantastic job, it has to be said—as there is a huge remit for improvement and consistency in the processes. We simply get different answers from different court centres.

In every area of the system—CVP access or applications to do one thing or another—there will be a different process, a different form and a different way to go about doing it. There is a need for consistency and some investment in ways to ensure that can happen more effectively.

Emma Fenn: I echo what Hollie says on making sure that there are some ways to ensure cross-accountability. I cannot tell you the number of times that I have had early hearings in the Crown court during the pandemic take four times to happen effectively. It is not an individual's fault but a lack of video link availability, failure of the technology or failure of an interpreter to be booked. Those things, and the fact that there is not a joined-up process, often cause such inefficiency that could release capacity elsewhere.

I agree with Hollie that you have to strike a careful balance between making sure resident judges still have discretion to make sure their court centres work efficiently alongside the users of the system so that barristers, clerks, solicitors and administration employees are able to react, because sometimes if they are dealing with 50 or 60 courts, and they each have their different rules, different deadlines, different forms and different email structures, it can be really difficult and it can definitely free up capacity elsewhere.

Q246 **Chair:** We have talked about a number of things: increasing investment; better and more active case management; and appropriate use of technology once it has been invested in. If I were to ask each of you what in your view is the most important solution to this entire issue of capacity, if you were to pick one thing, what would it be?

Daniel Bonich: It is the one answer that Governments often do not want to hear, I am afraid, which is money. It is investment. You cannot deliver justice on the cheap. It is just not possible. It is the most downstream of all public services. It is affected by decisions of every other Government Department almost. We are constantly left having to deal with the consequences of a new law that has been passed, additional police officers or new charging practices. We have to be in a position to respond to those challenges, and that will need investment, which has unfortunately been sorely lacking over many Governments over many years. It has been an issue. It is an ongoing issue, not a new one. It has become particularly bad since 2010, but it is an ongoing issue.

Q247 **Chair:** I saw you nodding, Mr Mulholland. Do I take it that you agree, or is something else more important?

James Mulholland: To echo the words of the Lord Chief Justice, funding and reinvestment in a system that has effectively been abandoned for over a generation in every single area is essential. You cannot allow a system to stagnate and then expect to do tiny investments effectively, because you will never get it back to its former level of operating.

In absolutely every area, we the practitioners see the problems daily, and have done for a generation: the lack of retention; people leaving the criminal Bar; women at the lowest level—38.2% of the Bar compared with 50.2% in the workplace out in the community; and 25% fewer pupils this year, and the number is going to increase next year. Some 45% of full practice criminal barristers are 45 years old and over. You have an ageing system. The CPS has had a £1 billion cut in real terms, with little financial plasters in recent times.

Invest in absolutely every level and understand that the system is symbiotic. You cannot just invest in the police and not invest in the CPS. You cannot just invest in the CPS and not invest in the Bar and solicitors' professions. Everything has a knock-on effect. Everything is intertwined. If we could get that understanding to Government, we would really succeed.

Hollie Collinge: I know it is probably not the most creative answer, but I have to echo that the only way out of the problem is more funding right through the system—not a bit here or a bit there, or an idea about a new form of technology. If there was an idea that had not been thought of, it would have been aired by now. It is certainly doing serious damage to the criminal defence firm sector. If the situation continues as it is, I worry whether they will still exist. It is a public service, it has to be done, and there simply will not be the people on the ground to do the job.

The well of ideas is empty, and it really is about funding. There are possibly some ideas to apply at the police station end of the system. Whether or not there is—and it may be touched on later—the possibility of looking at alternative disposals so that fewer cases come into the system may be something to consider.

As far as what we already have, my focus would be on improving the administration within the courts and within the CPS, and funding firms to ensure that they can do what needs to be done.

Emma Fenn: I know it is never a popular answer, but it would be doing a disservice to witnesses and defendants, before we even talk about those working in the system, not to answer as the other three have.

A "stagnating" system is the word James used, and perhaps it is the most perfect word. This pandemic has brought into stark reality what it took to get the court buildings clean enough to satisfy Public Health England that they are a satisfactory place for us to operate in. That is huge in highlighting the lack of funding—the number of toilet locks that have

been fixed and taps that now work, which we have been dealing with for the last decade or more.

Beyond that, it is making justice not a political point-scoring exercise but an apolitical thing that holds up our democracy. This Committee knows that better than we do. It is the most important thing around and is worth far more than funding, although funding is the answer.

Q248 **James Daly:** I could take up a long time with the questions I want to ask, but I will try to be as brief and succinct as possible when talking about legal aid. Hollie, how many cases would your firm have before magistrates courts on a normal day at the moment?

Hollie Collinge: It certainly varies from day to day. It very much depends on whether we are acting as duty solicitor, in which case the numbers have fallen dramatically from where they were in the last few years. We have a steady own-client base. Probably every day we are in court somewhere throughout the country, but if it is going to court, as a duty solicitor, maybe a handful, if not just a couple of cases, which is far fewer than there ever were.

Q249 **James Daly:** I do not know how big your firm is—please forgive me—but criminal solicitors are facing difficulties. You are a higher-ranked advocate, if I am not mistaken, and you have not done a trial since March. If that is the case, it is a frightening statistic for the future of the profession. For your firm, like every criminal firm in the country, to make any money, they have to be billing Crown court cases on a regular basis. So that the Committee has the full picture, in the magistrates court there is a much reduced amount of own-client and normal work. When we say, "duty work," people should know that you are getting paid not a separate fee but an hourly rate to cover it.

If I have understood correctly, your Crown court income has also dropped off the edge of a cliff. Would that be right?

Hollie Collinge: Yes. It is virtually non-existent at the moment. Every trial we had coming within the last few months has been shifted forward, either with a date or to a warned list, where it does not have a particular date, or to a holding date. Many now are in 2023. I have to think where we are. They are at that point now. I am unlikely to do a Crown court trial any time soon, and there were a number in which I would have been acting as advocate in the next few months.

Q250 **James Daly:** I cannot underline enough how startling what you have just said on the future of the profession is. It is very difficult to see a sustainable future if that were to continue as we came out of this pandemic.

James, I do not think you meant it in these terms, but the junior Bar in particular is facing some real challenges. One of my concerns is the lack of trials and the lack of work in the magistrates courts. I appreciate the

point Emma made, but I also think that the extra use of remote technology is going to mean that eminent QCs will be able to keep most of the work for themselves, while the junior Bar are going to struggle. Certainly, during my time in practice, many of the junior Bar existed on work that, shall we say, more experienced lawyers could not do. Is that a concern or a fair point?

James Mulholland: It is always a fair point, James, but it is not necessarily happening in practice. What is happening in practice is that the courts are trying to react to the pandemic by listing short cases very quickly. It is not helping complainants and defendants, but cases are likely to bounce around, because once this gets moving there will be conflicts and there will be returns and the young Bar will pick up some of these cases. The reality now, not necessarily in the future, is that we have a criminal Bar in crisis, with many heading for the exit because they simply cannot afford to stay. They all have massive debts having arrived with educational debts of £20,000 to £30,000, and a lot of them are simply leaving. We have not even got to the point where they can sustain themselves, because they are heading for the door; they have had enough.

Emma Fenn: I can understand why you say that, Mr Daly. If somebody is able to cover all their own hearings, juniors are not exposed to the new solicitors that they otherwise would be. Having said that, we are currently dealing with the lowest charging rates on record, with hugely low numbers going through the Crown court. At a time when we were processing 100,000 trials a year, when I was at the junior level that you talk about, the caseload was completely overwhelming—five or six cases a day, sometimes finishing a trial and being slightly fearful that if you called the clerks at 4.30 pm you would be given a Crown court trial to pick up immediately the next day.

If the capacity returns to somewhere near that level, I would not have the concerns that you have about junior barristers. But, as things stand, it is difficult because the number of trials is so few that when solicitors are offered replacement counsel, as things bounce around, the range of seniority that they have is hugely greater than what they normally would have when senior—

Q251 **James Daly:** I am sorry, Emma. I have concerns regarding the ongoing use of remote technology in court hearings after the pandemic comes to an end. I do not think that is a healthy thing for the profession on a personal level.

The hugely significant thing that you touched on is the throughput of work. This discussion has only been about the amount of work you have now. Everybody who knows the system of release under investigation—I can only speak for myself—thinks it is an absolute disaster. I never thought I would hear such tales from colleagues. One solicitor told this Committee that he was in the custody area of a police station. A

defendant walked in, punched a police officer and was released under investigation, even though there were witnesses and it was on CCTV.

Daniel and Hollie, how are we going to improve the throughput and charging of work? What happens at the pre-charge stage, in my view, is just as important, by increasing work, as the rates for work in the system.

Daniel Bonich: I just want to add to the question you raised with Hollie about Crown court work in particular. The last figures showed that spend was down 75% on Crown court work, to give you an idea of quite how much work has disappeared. It is about £600 million a year normally, so a lot of money has come out of the system.

Your example about pre-charge is not atypical, I am afraid. Perhaps with an eye on capacity at the other end or with an eye on statistics, the police and the CPS between them seem to have conspired not to want to charge people at the moment. The person who is under investigation is probably thinking that there is enough evidence to go to court at least. They are not necessarily going to stand up and shout that from the rooftops, but they probably think there is sufficient evidence to charge, as in your example, and it is just not happening. It is difficult to do other than to remind people of the basics. If there is sufficient evidence to charge somebody and it is in the public interest to charge them, you should charge them.

Q252 **James Daly:** I am sorry to interrupt, Daniel, but one of the things that I keep banging on about is that the vast majority of cases that I dealt with when I was in practice were very simple, straightforward matters, and for reasons I do not understand the pre-charge advice process seems to release people and then, even if they are charged, they are charged without any further evidence being sought than what happened in the first place.

Daniel Bonich: I am sorry to interrupt, but I think it is worse than that. What I am often seeing is that they are bailed initially because the conditions are necessary and you have a short bail period, and when that 28 days is up they are released under investigation as if the requirement for bail conditions has evaporated in the last four weeks. It is a classic case of the law of unintended consequences. The idea was a good one in so far as there was a concern that the police were taking much too long and restricting people's liberties, sometimes for years, with stringent bail conditions, but the moment you took away any deadlines at all you were always going to be left in a situation where no progress is being made. That is where we have ended up. It is perhaps somewhat ironic.

Another difficulty is that the police were consulted at the time, and their response to the consultation was that they needed, on average, about 60 days to make a charging decision and were given 30. Perhaps it is not a surprise that what is actually happening is that nothing is happening and cases are going on to shelves. We were told at a lot of meetings that my

association attended that in some police forces there existed what was called a shadow Excel spreadsheet on which they recorded the details of cases so that they were not completely lost in the system. The description in itself is worrying—to have a shadow system that no one is really overseeing. It is a great worry, and the quicker we can get back to making the police make decisions quickly, as they do in other jurisdictions, the better.

Q253 **James Daly:** I have two very brief questions. Hollie, you made reference to non-court disposals of certain offences, I think. If you did not, please forgive me. One of the things that I am concerned about is that a lot of the work that traditionally criminal solicitors dealt with in the magistrates courts, which would be considered, I suspect, low-level offending, in wider society is having a huge effect, such as shoplifting, assaults on retail workers and suchlike. Have you seen a downtrend within the court system in those offences being charged? When I started out there were many, many cases each day of that level of offending.

Hollie Collinge: I can honestly say I just do not know what happens to some cases. They seem to disappear. I could not agree more about the difficulties with release under investigation. There used to be a time when, as you say, the officer goes out, collects the evidence, comes to a fairly sensible decision about being in a position to charge, nobody is surprised— we are not surprised, our client is not surprised—and he or she may find themselves in court the next day or perhaps within the next couple of weeks. It progresses through the system. Okay, that may be some years ago now. But, no, in answer to your question, I honestly do not know what happens to cases.

Of course, the idea with RUI was to prevent people from being bailed indefinitely without any progress being made. I remember being concerned that, if the idea was to avoid long-term uncertainty, RUI could have the opposite effect, which it has. It has been a perfect storm because it came along at a time when there is more data to examine. Everybody has a mobile phone, a tablet and a laptop, and so many more devices. That is another spanner in the works that makes the process even longer. Rather than RUI being the exception to bail, it turned out to be the default position including, ironically, in some of the most serious cases, which must be a concern and of course makes the headlines sometimes. So, yes, I entirely agree.

Q254 **James Daly:** I have a very quick question to finish off. I am old enough to remember the day when the means test was abolished in criminal legal aid. Do you think we should have a means test in criminal legal aid?

Daniel Bonich: No.

Emma Fenn: No. I would echo that.

James Mulholland: No; I would say it is pretty horrendous. What is it? It is £3,000 disposable income or thereabouts, and you do not get

representation in the magistrates court. Above that amount you have to pay contributions. There are examples of people paying vast amounts of contributions—far more than they would ever pay if they paid privately. The means test was set about eight years ago, in 2013, so we are talking about £37,000 of disposable income, and above that no legal aid whatsoever. In terms of access to justice, that is appalling. It is a complete contradiction in access to justice. It is called denial of justice in reality. We should get rid of the means test.

Emma Fenn: As you know, it is combined with an inability to recoup your costs if you win. The two acting in tandem are just extraordinary.

James Daly: Absolutely.

Hollie Collinge: May I reiterate how strikingly easy it is to fall the wrong side of the means test even with quite a small net income, which might be because of a very small amount of savings, for example? If the idea is genuinely that somebody should pay because they can pay, then why do we find ourselves in a position where, if one of our clients fails the means test and is no longer eligible for legal aid, as soon as we talk about the very reasonable private rates at which they could pay, they are unable to and they say, "No, thanks. We will represent ourselves"? That happens very often.

The point I am making is that something is not working if that happens too often. Yes, I also remember there being no means test, and it was dependent on the interests of justice. It was clearly introduced to save money, but at what cost? It would be interesting to know what the impact has been on the courts with unrepresented defendants who have not been able to be funded and the knock-on cost that that has created. I do not know whether there are any statistics or way of calculating, but it would be interesting to know.

Q255 **Kenny MacAskill:** We have heard of the impacts of the use of remote technology on bail hearings. What might be possible in the use of remote technology that would be of assistance to defence agents in their work both currently and potentially in the future? I do not know who wants to take that. Any volunteers?

Chair: I am going to pick somebody if no one volunteers.

James Mulholland: I can start. We have been over this ground to a degree. Remote technology has incredible possibilities as long as it is done in a balanced way and does not deny access to individuals, particularly the defendant. Physical presence is so important in establishing trust, and that must never be resiled from. We must never go to a system with this Orwellian vision of remote technology dictating; in-presence hearings will still be very important post pandemic.

It helps to develop matters. Prisons are often many miles away from solicitors' centres. They are often many miles away from barristers'

chambers. Facilitating conferences, facilitating access to defendants on a more regular basis as well as physical contact, is immensely important and can only resolve issues as one progresses towards whether the trial cracks or proceeds. It has its place. Technology always has its place.

It is very important to say that jury trial hearings really do need to stay and are a fundamental part of our justice system. But, looking at the use of technology in other areas, of course, will inevitably assist us in our day-to-day work.

Q256 **Rob Butler:** I will take us back to legal aid, where we were a moment ago with James Daly. The Government, as you will be aware, have announced the establishment of the independent review of criminal legal aid. I have two or three questions on that. First, if you could recommend just one reform to that review body, what would that one reform be?

Hollie Collinge: As somebody who works for a provider, every day it occurs to me that the system is incredibly difficult to work with. I say that because it is complicated, at times heavily bureaucratic and really quite inflexible.

Listening to some of the previous sessions, I heard one of the speakers talking about a concept of earned autonomy. It is quite commonly said that providers are very highly regulated. To hold a legal aid contract, a criminal defence practice has to have either a Lexcel or a specialist quality mark, Lexcel being the gold standard. If you have that, there are many forms of audit. There is an annual audit at which there is a request for random files. Peer reviewing takes place every two years. Random file requests can be made at any time.

We file review each other's work within the firm, and that is on top of quite heavy scrutiny of our bills by the agency. If I may say so, they are often inaccurately assessed. They go to and fro for unbelievable reasons. I think it would make sense to look at the work that is generated by the Legal Aid Agency to audit files, when firms are operating on the smallest of margins and there could be some earned leeway after a long period of very good practice. I think it would help, and it would save funding as well.

Emma Fenn: I think I revealed my hand when asked about court capacity. I would recommend some form of independent pay review board looking at difficulties and taking it out of the political spectrum. We work in a system that does not have any method of incorporating inflation. We go for decades at a time without any adjustment to the rates. The last adjustment was in 2018, if I am right—scheme 10, as it was called—but there has been nothing since. That was the first time in a huge number of years that any inflation linking had happened at all.

Daniel Bonich: I want to give you variety from the other witnesses, but I will accept entirely what Emma is saying. I think an annual review of pay rates is essential. We have a system that no doubt was wondrous

when it was set up, but if you do not do anything with those rates for decades, which is what has happened, over time it fades into nothing. Absolutely, an independent annual review of pay rates and schemes, please.

James Mulholland: My overriding concern is bringing a structure of fairness and sense back to legal aid. That incorporates pretty much everything that has been said: bringing up to date pay schemes that have fallen far below the rates, 40%-plus since 2010 in real terms; de-politicising legal aid; this necessity to engage constantly on almost an annual basis in a struggle with Government, which obviously means having an independent payment review body such as the dentists have to take it out of Government hands and to have it calmly and sensibly addressed. At the moment, it is a massive bugbear, which is so negative for every aspect of the justice system.

Q257 **Rob Butler:** The Government have said that the review should report by the end of this year. What effect do you think that timescale will have on them?

James Mulholland: I am worried. It is a tremendous irony, but it is the criminal Bar all over the place and the criminal solicitors all over the place. We waited from its announcement in December 2018 and started the CLAR two years later in the midst of a pandemic when the Treasury has expended vast sums of money. There is a sense of irony there. I hope that Sir Christopher Bellamy QC, the chair of the review, will see that the criminal Bar is vastly under-remunerated. That was clear from the Jeffrey review, and that was six years ago. I hope he will see the need for diversity, the need for retention of carers and women within the profession, and the importance of remuneration.

I really hope that he sends a message soon that keeps people on board, because I fear silence is not an option in relation to this review. I hope that, within three months, he indicates the direction of travel and that he is going to recommend significant increases in rates that have fallen far below their previous incarnation. If not, I think there is trouble ahead.

Daniel Bonich: The same as those that have been already said. In the last two years we have lost 15% of providers, and 40% in the last six years. Bear in mind that we are, in reality, nearly three years into this review at this stage, as far as we are concerned. I appreciate they keep relabelling it, but the criminal legal aid review was first announced, as James said, in 2018. At this rate we will have lost probably another 10% at least of providers by then, if not more. The last significant drop was pre-pandemic. We did not have that to exacerbate the situation.

My concern is that, although we want the right conclusions, the time is just so far away. I would urge Sir Christopher and those involved in the review that, if they can reach expeditious interim findings along the way, they should quickly move to publish those so that any obvious quick wins can be jumped on by the Government and the situation resolved quickly.

We do not necessarily need an entire, all-encompassing report until much later. Any quick wins along the way would be most welcome.

Emma Fenn: I have nothing much to add, apart from the fact that we had already waited a long time since its announcement. We felt as if we had been waiting for that for a number of years before, so we do not want rushed conclusions. It needs to be properly done. We certainly do not want to be forgotten about as a profession, because we all feel passionately about the criminal justice system and keeping it going during the pandemic and after it.

Hollie Collinge: Equally, the review is an important step. It really cannot come soon enough. One big factor is that when the furlough or the flexi-furlough scheme ends and grants are not available to firms, they are going to feel the pinch. There is going to be additional financial pressure at that point, and it could result in redundancies if firms cannot stay contract-compliant or they have to give up altogether.

It is not a question of cutting costs to get to the next step, because everybody will say that the situation has been cut to the bone. Firms have sold offices; others have had to merge or they have been taken over. After so many years of cuts, there really is nothing left.

Q258 **Rob Butler:** We heard suggestions from a couple of other witnesses that things should perhaps happen in the interim. Is there any action that you think should be taken to ensure the sustainability of criminal legal aid before the report is published?

Hollie Collinge: I think I would agree with Daniel. If there are any additional steps that can be taken in the meantime, that would be incredibly helpful to get us to the step where the entire system can be considered more collectively. I am not sure anything springs to mind specifically, but anything that makes our lives easier in the interim while we are struggling to keep up would be helpful.

Q259 **Dr Mullan:** Thanks, everybody. I have listened carefully to all the evidence. I want to explore the issue of fees and payments. We have talked in quite black-and-white terms about the concept of access to justice and adequately funding legal support for people. I am by no means disagreeing with your assessment that perhaps what we might consider a basic level of justice is out there, but I would like to challenge and get your thoughts on describing it in black-and-white terms.

I think you would all agree that, in the private sector, some barristers and some legal teams will charge considerably more for their services than others because they are more effective, have a better track record and people expect, in blunt terms, to do better in a legal case under their watch. While we talk about access to justice in black and white, would you agree that, if you put it in black-and-white terms, you could argue that anybody should be able to access the very best legal team in the country in the same way as a private person? That is obviously not

tenable for the taxpayer. What the taxpayer can afford has to be part of our considerations. Would you agree?

I do not know who wants to consider that. Mr Mulholland, you talked quite powerfully about access to justice as a black-and-white concept.

James Mulholland: Access to justice is ensuring that those in the most deprived sectors of society, those who are facing some of the most challenging aspects of life, are entitled to the best representation possible. There should be no distinction between those who cannot afford to pay for justice and those who can. There is the cab rank principle, which still applies in many instances, and there is the need to ensure that sufficient rates of remuneration attract the best; otherwise, as you rightly say, you are going to have a two or three-tiered justice system, which is probably what you have now. As you rightly identified, those who can pay reasonably large sums get barristers with tremendous track records. We must try to avoid that. We must ensure that the rates of remuneration are sufficiently high to ensure that the best remain to conduct publicly funded legal aid work.

Q260 **Dr Mullan:** You would argue that whoever can identify themselves as the most successful can charge the highest amounts. Is that where we should set the bar for legal aid?

James Mulholland: No, absolutely not. You must set fair and appropriate rates of remuneration for the work performed. Legal aid rates are set by Government, not by the individual. What we are saying is you have had a 40% drop in legal aid rates from 2010. Increase them back to previous rates. Allow and ensure that the best come to the criminal Bar and stay at the criminal Bar, and work for those rates. There should not be any bargaining in legal aid, "I will do it for 10 times that amount." Legal aid is about access to justice at proper rates to ensure the best representation.

Q261 **Dr Mullan:** You just said, "the best." Let us accept that "the best" charge the highest amount in the private sector. Are you saying that you would not accept that some people can make considerably more in the private sector and that the rates provided by the Treasury would not cover their costs and they would not participate? I am just trying to get an understanding, but you must accept that there are limits.

James Mulholland: You have to understand that the best do not always demand the highest amounts of money. There is such a thing as vocation, and people who come to the criminal Bar are among some of the most brilliant barristers and solicitors I have known. They have not gone to the commercial Bar; they have gone to the criminal Bar because they believe in fighting for the vulnerable. They believe in justice for all. Not everything is about money, but everything should be about being paid properly and fairly for the work you do. At the moment, the criminal Bar is nowhere near that stage. It is very important.

Q262 **Dr Mullan:** I totally agree with you. Very many people are motivated in a different sense. Is it your argument that there should not be a taper on what is affordable to the taxpayer?

James Mulholland: Forgive me for saying it, but we are talking about pretty small amounts of money in the context of global spending. The justice system is among the most poorly paid and has been for a generation. It has been massively underfunded, and really it is an insult, is it not, to the complainants who need to have the support of a really good barrister that they are being offered such poor rates of pay? It is really an insult to the defendant who is innocent, who has been charged wrongly with a criminal offence, that his barrister is reluctant to do that work because the funding is so poor. We need to protect rights by increasing rates, not so it is unfair to the taxpayer but so it is fair to all.

Q263 **Dr Mullan:** Indeed, and I said at the outset that I recognise that we might be far away from what is considered reasonable. I just wanted to hear an articulation of the understanding that there is a consequence to the taxpayer paying for all this stuff, an acknowledgment that it cannot be an endless amount of money to deliver what you might consider to be the very best justice. It is a reasonable effort to support people.

James Mulholland: Everybody should be entitled to the very best justice. Everybody should be entitled to proper and fair, and the best, legal advice and legal representation that can reasonably be given, albeit not at ridiculous rates of pay. Nobody is suggesting that criminal barristers should be paid hundreds and hundreds of thousands of pounds a year. We are talking about fair pay. Juniors in certain cases are doing a PTPH for £126, which is lower than the minimum wage.

We are talking about really, really low rates of pay, and that is what needs to be examined. Nobody is saying that the taxpayer should be somehow ripped off. The reality is that people in this position, and those who represent them, deserve fair and reasonable remuneration for the work they do.

Q264 **Dr Mullan:** I would agree.

Hollie, you commented on how legal aid works as a bureaucracy and how you bill it. You mentioned the fact that you are quite regularly audited in a more proportionate way, versus the line-by-line approach of the Legal Aid Agency. You gave examples of where they would make mistakes and there would be a lot of back and forth. Could you give more direct examples of the kinds of things that they query that unnecessarily cause additional bureaucracy from your point of view?

Hollie Collinge: Happily. My key observation about that area is that we as practitioners spend so much time outside our core hours of business, if you like—being in court dealing with clients—dealing with the administration of legal aid applications. In the past that might have been

a job for a paralegal or a trainee, but those posts are few and far between. We spend so much time on the administration.

One reason why it is so time-consuming is that we receive such a high number of rejections for plainly inaccurate reasons. I have concerns for the administration team processing the applications, who do not necessarily have the adequate training or perhaps have a limited understanding of offences: for example, failing to appreciate where there is a genuine risk of imprisonment or there are 10 qualifiers under the interests of justice test. There is often an assumption that only if you are at risk of imprisonment should you be given legal aid, but in fact there are nine others to consider.

There is no consistency in the processing. For example, if we have two clients charged with the same thing, their applications are almost identical and they will qualify on the means test, one will be rejected on the interests of justice test and one will not. I do not know whether there are any quotas or targets, but it certainly feels like it.

If you call the Legal Aid Agency, it is clear that there is no system for the person picking up the phone to check what has happened beforehand. We used to be able to run inquiries by the national crime team, who deal with the more complex applications. But that, as I understand it, has now been restricted to the main administrators, who act as a go-between.

In one recent example we made an application for a woman with two very low-paid part-time jobs. She was well under the threshold. The application was rejected because the person processing it misread that the figures were weekly and not monthly. They returned the application asking for more detail, but with additional requests for information that were not required. It went to and fro for so long—for a period of months—that eventually it came to the day of trial and, had the trial not been adjourned, she would not have been represented. It is an example of how something can run away into a system that is so heavily bureaucratic.

I have many more examples of difficulties we have had, but I think it is a real area that needs consideration, and the prospect of saving money by investing is a perfect example.

Q265 **Dr Mullan:** Will the other witnesses contribute on their experience of day-to-day engagement with the agency?

Emma Fenn: I will happily say something brief, which is that often our dealings with the agency feel confrontational rather than co-operative. That drains morale when you otherwise have such a huge caseload to deal with but you are directing valuable hours towards challenging things. It is sometimes as simple as them saying you did not actually attend court that day, and you have to send your attendance note and your notes of the hearing to prove that you were at court that day. Could we

have a more co-operative system where it feels as if it is about finding the right payment rather than just being knocked back?

I have never, and I do not know anybody who has, had the Legal Aid Agency come back and say, "You missed a day there. You actually should have submitted this from the court log." But, yes, on the other side, they raise huge numbers of mistakes. It strikes me that there would definitely be things that they would spot that would justify payment, given the number of times they spot things in the alternative.

Q266 **Dr Mullan:** You have both spoken well about errors that are made. Do they ever pick up mistakes or incorrect billing that make you think, "Fair enough. That was not the correct thing to have billed," or does it happen sometimes?

Emma Fenn: On occasion, of course it does because there is human error in the process, but I would say it is a small minority. That is why I highlight that I have never had them come back and point out something that I have missed that would be to my benefit and to the budget's detriment. So I am suspicious of that, putting it bluntly.

Dr Mullan: I am conscious of time, but are there additional points to what Hollie and Emma have said? Perhaps we can just accept that you are in agreement, Daniel and James.

Q267 **Chair:** We have been going for some time. I am conscious of the fact. Finally, is there anything that we have not covered so far, either about court capacity or about legal aid, that any of you would like to mention? Is there anything that you are desperately keen to say that you have not managed to fit into the session?

Daniel Bonich: Perhaps just to put all of this in context, Dr Mullan was asking about affordability and fairness to the taxpayer. I would emphasise that, in relation to legal aid spend, for every £100 that the Government spend, they spend about 10p on criminal legal aid. It is a fraction of a fraction of Government spend—0.2%. Put another way, four weeks of giving people £10 off their takeaway food would fund the criminal justice budget for a year. That is how small it is.

When we ask for a review of rates, it is not disproportionately unaffordable. It is a relatively small amount. It is an efficient spend of money. Such a tiny increase in overall Government spend would make a massive difference on the ground.

James Mulholland: We were promised a law commission in relation to the criminal justice system, and we are still awaiting it. It is a system in desperate need of a properly structured plan. Certainly, I would advocate a five-year plan to bring it out of this current low point. It really needs somebody, whoever it is—an inspectorate or a commission—to look at the justice system, understand the problems and seek to resolve them,

rather than it always being a cost-cutting exercise where we have to justify every single ha'penny. I think that is really important.

Hollie Collinge: Can I just say a few words about the future of the profession? I am really very proud to be working in a system, and I want to continue working in a system, where if you are charged with a criminal offence you are entitled to the same level of skill and expertise as the next person. I think it is essentially important. My fear is that, of my peers who started doing this kind of work 15 or so years ago, I have seen so many good lawyers leave the profession, often employed by the CPS, after a very solid training in private practice and being funded by private practice.

Many older solicitors have perhaps been furloughed and are thinking now about either going part time or retiring. Career prospects are just not there as they are in the same way for other parts of the public sector or the private sector. If nothing is done about criminal legal aid, and about barristers and solicitors being paid fairly for the work they do, those professions will continue to look equally unattractive to passionate newly qualified lawyers. It is essential for the future to make sure that we are able to offer legal aid to people charged with criminal offences.

Emma Fenn: Following on from what Hollie said, when I came to the Bar in 2010 I was basically told I was mad to do criminal work. That has continued, and it is worsening and worsening. The chambers that I work out of is a multidisciplinary one. Every year, out of three or four pupils, we virtually never get a chance to retain them in crime because they get a taste of it and the fees, and they immediately want to work in one of our other areas. I cannot emphasise enough to the Committee how many of my colleagues are on the brink, having taken out bounce back loans of tens of thousands of pounds. Legal aid rates as they currently are, if court capacity returns, are unlikely to get them out of that near-financial ruin caused as a result of the pandemic and previous low rates for many years, if at all, and we will continue to haemorrhage the talent that we have managed to get foolishly to come to the criminal Bar and to criminal solicitors' firms, and we will continue to haemorrhage them.

Chair: Thank you very much. May I close by thanking all our witnesses who have given us their time today? It has been a long session but an illuminating one, and I am sure your evidence will help us in preparing both of the reports that we are contemplating.