HOUSE OF COMMONS

# Justice Committee

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

Tuesday 23 February 2021

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Watch the meeting

Members present: Sir Bob Neill (Chair); Rob Butler; Miss Sarah Dines; Maria Eagle; Andy Slaughter.

Questions 268 - 332

### Witnesses

I: Jane Russell, Committee Member of the Employment Law Bar Association, and barrister at Essex Court Chambers; and Simon Mullings, Co-Chair of Housing Law Practitioners Association, and lawyer at Edwards Duthie Shamash.

II: Chris Minnoch, Chief Executive Officer, Legal Aid Practitioners Group; and Ian Townley, Director and Head of Costs, Broudie Jackson Canter.

# Examination of witnesses

Witnesses: Jane Russell and Simon Mullings.

**Chair:** Welcome to this meeting of the Justice Committee, and welcome to our witnesses. This is a further evidence session in our two inquiries into court capacity and legal aid. We are holding the two evidence sessions together, but we will publish separate reports. There is a lot of overlap of the material, so we are doing the two together for convenience.

Before I ask our first panel of witnesses to introduce themselves, Members have to make a declaration of interest at the start of each meeting. It is just a formality.

I am a non-practising barrister. We will go round the other members of the Committee.

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

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

**Andy Slaughter:** I am a non-practising barrister.

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

Q268 **Chair:** Thank you very much, everybody. Can I ask our witnesses to introduce themselves very briefly? Welcome to both of you.

***Jane Russell:*** Good afternoon, everybody. My name is Jane Russell. I am a practising barrister at Essex Court Chambers. Before that, I was a solicitor in various areas. I specialise in employment and equality law.

***Simon Mullings:*** Good afternoon. I am Simon Mullings. I am a housing law caseworker with Edwards Duthie Shamash solicitors in east London. I am also co-chair of the Housing Law Practitioners Association.

Q269 **Chair:** Thank you both very much for coming to give evidence to us today. I would like to start briefly, Simon, with the housing situation and the position for housing law and housing practitioners. Let's start with the short term and the immediate impacts of the pandemic. What impact has it had on your specialism and cases in the housing arena?

***Simon Mullings:*** Forgive me if I am going over history, but this Committee will be aware that housing possession proceedings were stayed from March last year due to the pandemic crisis and opened up again in September 2020. Since then, the start-up has been very slow. The courts have taken time to get used to the new arrangements. It is only from January this year that possession proceedings have started up again in earnest.

They are going at a slower pace than they were pre-pandemic. A busy court might have heard 40, 50 or 60 cases in a day on a possession list.

They are now limited to 10 cases a day. There is significant holding back, as it were, of the backlog at this stage.

Q270 **Chair:** Is that limit of about 10 cases a day simply to do with social distancing within the court?

***Simon Mullings:*** It certainly is, Chair. It is assumed that the cases will take place in person, and therefore you need not to have people milling around in the waiting area and time for the court to be cleansed between cases.

Q271 **Chair:** That is what we have seen in your evidence and the evidence of a lot of others. In housing law—possession actions and so on—you have to have the parties present, certainly the defendant or the person who is liable to be evicted. You have to do it in person wherever possible.

***Simon Mullings:*** Yes. It is unthinkable in the normal run of things for people to lose their home at the end of a telephone line. Judges have baulked at that in the past, and quite rightly so.

I want to mention one thing. Some courts locally have taken a decision on the form; there is flexibility to hold remote hearings in possession cases. Some courts in east London are doing that at the moment. There are other areas as well. I think it was necessary because of the huge post-Christmas spike in the infection rate. It is hoped that it will be a very short-term measure for the reasons we have said.

Q272 **Chair:** You are thinking of places like Bow, Ilford and Romford county courts.

***Simon Mullings:*** Absolutely, Sir Bob. Sadly, Bow county court is no longer there, but sittings—

**Chair:** Has it gone now?

***Simon Mullings:*** Yes, sadly. It is a very sad state of affairs, but it is sitting in Stratford magistrates court so it is very close by, as you will know.

Q273 **Chair:** I have fond memories; that's why I was asking.

Does that include even doing the final hearing remotely—the final possession order—or everything up to that, if they can?

***Simon Mullings:*** Everything up to that. It is possible that people have found possession orders over the telephone. As I say, it would be good if that does not happen any longer. We hope that those courts will be able to open up. The vast majority are in person at the moment.

Q274 **Chair:** It is very much in extremis.

***Simon Mullings:*** Indeed.

Q275 **Chair:** You talked about the delay. We have seen some figures showing that the delay is growing. In terms of your own clients and the people

that you and your members deal with, can you give us an idea of the real-world impact that has on people?

***Simon Mullings:*** Yes. From the landlord side, there will be a great deal of frustration at not being able to get cases before the courts. Tenants have been protected from proceedings this year, and to an extent from evictions as well, by the regulations putting in place an evictions ban. There are exceptions to those bans. It is, again, sadly the case that people will be evicted for coronavirus-based reasons.

My own preference, if I can express it, would be for the stay to have been longer, and certainly for the eviction ban to have been more comprehensive. What everybody must appreciate is that there is a balance to be drawn between the landlords' side of things and tenants.

Q276 **Chair:** I suppose there is a big difference between the individual landlord who might be highly leveraged on their own borrowings and the big property company.

***Simon Mullings:*** That is certainly the case, yes.

Q277 **Chair:** I get the sense that these problems are not something that have just occurred because of Covid. There were delays anyway. Can you help us around that?

***Simon Mullings:*** Indeed. There were significant delays in processing proceedings, particularly on the enforcement side, pre-Covid. Landlord groups, prior to the pandemic, were very dissatisfied and called for reforms to the possession procedure.

My own view is a partial view because I represent tenants. The procedure is, and was, fine, but the enforcement side at the other end takes a very long period of time. That caused, certainly in landlords' minds, great injustice when they had achieved their possession order and had proved to the court that they deserved possession back, but it was not happening for some considerable time.

The court bailiffs would say, "Our numbers are down, and we are serving ever greater areas." It is certainly the case that the court bailiffs are working very hard, but they can only do what they can do.

Q278 **Chair:** You mention "ever greater areas." Is that in part because we have seen about a third reduction in the number of county courts?

***Simon Mullings:*** There has been a great winnowing of county courts. Tenants have to travel longer distances to try to save their homes, which is again a very difficult thing. With the closing of Bow county court, which we were talking about, it was very fortunate that Stratford was on hand to mitigate that. With the closing, say, of Lambeth county court, people from south-east London now travel to north London, to Clerkenwell, to try to defend their homes. That is quite a distance for some people, and certainly for vulnerable people. That seemed to me to be very regrettable.

**Chair:** I can quite understand that. I will hand over to Andy Slaughter, who probably remembers Bow county court as well.

Q279 **Andy Slaughter:** I remember them all, Chair. I think that my constituents are now being sent over to *[Inaudible]* so we're keeping them busy.

Good afternoon, Mr Mullings. Housing law has probably been mucked around with more than a lot of areas of law by LASPO. A lot of it went out of scope. The housing possession duty scheme has been doing quite a lot of the heavy lifting for the last few years. We also have the mediation scheme in the mix.

In the round, where are we going with the duty scheme? What is going to happen to it? What is going to happen generally as we come out of lockdown, when the eviction ban is lifted? What can you see happening there? Where does the mediation scheme fit into that?

***Simon Mullings:*** The duty scheme is a real boon, it seems to me, to the current situation. The housing possession court duty scheme, funded by the Legal Aid Agency, covers virtually every county court in England and Wales. There are some small gaps. The Legal Aid Agency is trying to fill those. There is a handful of informal schemes that probably need to be checked again to make sure that they are still running properly, but virtually everybody facing possession proceedings ought to be able to get advice under the duty scheme.

The Legal Aid Agency has been responsive to the pandemic in relation to the duty scheme in a way in which, I would respectfully say, it has not been in other areas of legal aid law—the normal run of legal advice and assistance and legal representation. Duty advisers have been very grateful for that, while noting that unfortunately we have not had very much on the other side.

The duty scheme remains in place. It has been enhanced by the efforts of Sir Robin Knowles—Mr Justice Knowles—from the Master of the Rolls Office and his working group. Sir Robin Knowles has done incredible work over the last year, and it continues, to reopen possession proceedings and put in place very sensible and workable arrangements to make sure that they happen safely.

The duty scheme is in good order to provide advice and assistance to tenants. I am not very often heard praising the Legal Aid Agency, but the assertive work that they have done to promote the duty scheme and make sure that it is running and contracted across all the courts has to be applauded.

You asked about mediation. That pilot is commencing now. First of all, as a declaration of interest, I am sceptical about mediation in the housing context; however, I recognise that my personal view is my personal view on that. It needs looking at. It is very early days. Although I am on the steering group for the pilot, the operational model is still a bit opaque to

me. I am looking to get more information about how it works. At the moment, referrals are very slow, because, unfortunately, take-up of advice on the duty date is slow. We can talk about that in a minute, if you would like. The opportunities to make referrals to mediation at the moment are very limited. I am conscious of talking a lot, so I will pause there.

Q280 **Andy Slaughter:** That is very helpful. I know exactly what you mean by mediation having limited value by the time you have got to the possession stage. It may be too early to say, but do you think the resources would be better allocated to the duty scheme?

The final part of my question is this. We have this brinkmanship whereby the evictions ban has been extended and extended, sometimes by quite a short period. Given that we now have a timetable for emerging from lockdown, it is going to end. As far as you can predict it, what is going to happen then in both pressure on the courts and in the way that the eviction processes are being carried out?

***Simon Mullings:*** Forgive me, I am a bit prone to metaphor, but what with the rainfall and the floods recently there has been a lot of talk about leaky dams and holding back floods.

At the moment, the courts service is a leaky dam. It is not leaking very much, so cases are being held back quite considerably at the moment. With all the financial pressures on tenants and borrowers, and with the huge backlog, that leaky dam is going to leak more and more, and the water flow is going to accelerate and accelerate. At some point—I don't know about a tsunami—we are going to get a flood of cases coming through, which will inevitably lead to a large number of evictions that sadly will inevitably lead to a large amount of homelessness. When exactly that happens is very hard to tell. Of course, it is a dynamic system where Government, as you said, Mr Slaughter, are responding perhaps in short-term measures, but there have been responses. At some point, it will accelerate to a point where you just cannot put any stops on it. That is a bit of a frightening prospect, I have to say.

**Andy Slaughter:** Thank you. Others have questions, so I will leave it there.

Q281 **Chair:** Thank you, Andy. One thing that just struck me, Simon, is this. Have you noticed any difference in courts suspending the possession orders? That used to be a fairly regular thing when you thought there was a chance that people could get back on track with their finances and start to make inroads into their debt payments. Has that changed at all? Is it worse now because people cannot realistically do that, or are judges still trying that?

***Simon Mullings:*** Under the new arrangements, certain kinds of cases are prioritised. Those are cases with very high rent arrears, or cases of antisocial behaviour, trespass and domestic abuse in the background. Those kinds of cases are the ones that are coming through at the

moment. Those are the ones where it is difficult for landlords to contemplate a suspended order because the arrears are so high.

There are also a number of mandatory grounds for possession. Again, those are the cases that are coming through, so there is not much in it for landlords to consider a suspended order at the moment.

Q282 **Chair:** Not the sort of case that lends itself. We have just had a letter from the Lord Chancellor to the Committee confirming the extension of the moratorium until 31 March. Do you have any observations, from your experience, around that?

***Simon Mullings:*** The extension is welcome again, as was the last one. This is the third regulation. There was a change to the first regulation to bring the threshold for arrears to six months and that it did not matter when those arrears came about. It meant that people whose arrears had come about purely because of the pandemic crisis were now in a position where they could be evicted. I cannot help but note that that was something that it was said would not happen, but I am afraid it will be happening now.

Q283 **Chair:** That is an area of concern to you.

***Simon Mullings:*** It certainly is, yes.

Q284 **Maria Eagle:** Many moons ago, when I was practising—I ceased practising in late 1996—I used to do a lot of housing cases, both prosecutions and civil claims. It strikes me that the current situation is very different.

If most of the money goes into the housing possession court duty scheme, one of the things that strikes me is that the very last moment at which somebody can seek to get help is just as their house is about to be repossessed, and they are about to have their legal right to live there removed from them. I always used to try to get advice to people well before they were at the door of the court. Is it not difficult, if you focus all your money, time and effort for people to get support on that very late stage? There is a limit to what can actually be done to help people by then, is there not? Is that still as true now as it was in 1996?

***Simon Mullings:*** It is absolutely true. In 2013, legal aid for debt and welfare benefits was axed by LASPO. Debt and welfare benefits are one of the key drivers to possession proceedings and ultimately to eviction. There was a real false economy about that, because people were not getting the early advice about debt and welfare benefits that had previously been available.

If housing lawyers get hold of a case early, we do that work anyway. It matters that we are not getting paid for it, but you cannot leave that work alone; you have to do it and accept it as part of the job, as part of your pro bono commitment. Unfortunately, that makes delivering legal aid very hard to sustain. We have seen a massive drop in suppliers. I

think it is in our evidence to the Committee; in 2010, I think there was something in the region of 370 providers, but by July last year it had gone down to 260. That is a massive drop, and it represents people not getting advice that could potentially save their home. I couldn't agree more.

Q285 **Maria Eagle:** In the old days, I used to try to prevent people from having suspended possession orders because their right to stay was already gone. Then it was just a question of whether they could meet the obligations they had taken on to have the suspension. In effect, the legal right to stay in the home had gone. Presumably, that is still the case, is it not? Do you have any more success these days in trying to prevent even suspended possession orders being made? By the time you get to the door of the court, certainly my impression used to be very strongly that things were stacked against the tenant or the person who was having their home repossessed. It would be much better to stop things getting so bad at an earlier stage.

***Simon Mullings:*** As soon as you get two housing lawyers in a room, even if one of them is an ex-housing lawyer, you suddenly get into very technical discussions about housing law. I will perhaps try to avoid that.

It is certainly true that there is much work that could be done before the door of the court that would mean that the case need not go to the door of the court, or that at the door of the court some kind of resolution could be reached. The mechanisms for doing that have, unfortunately, been taken away.

Mr Slaughter mentioned the mediation service. That seems like an intervention that might help at that stage. Actually, prior to all of this some form of crisis navigation service would be much more effective, in my respectful opinion. With respect to people who are doing really good work on the mediation pilot, my strong feeling is that there are many better ways to prevent things from getting to court or, if they get to court, they are dealt with quickly, swiftly and they are out of the justice system again.

Q286 **Maria Eagle:** Post LASPO, to what extent do you think advice at a very late stage has an impact on access to justice in housing law? Housing law is the difference between having somewhere safe and secure to live and being on the street. It is a pretty fundamental aspect of justice. One would have thought there would be a priority on focusing on that in a legal aid system. To what extent does this new world impact on access to justice, in your view?

***Simon Mullings:*** There is an irony in that the rented sector had been deregulated from 1988 but then re-regulated from the '90s onwards. Housing law is incredibly complex. In some ways a lot of housing lawyers would say, "Look, we want to do away with ourselves. People ought to be able to understand these processes and fight for their rights in a much more straightforward way." Unfortunately, you need lawyers now to

navigate your way through the complexities of housing law. Housing law is also massively affected in some sectors by the benefits system and by finances as a whole. For many vulnerable clients, the care system is something that impacts on their housing situation as well.

Early advice is extremely important. We have seen that the absence of early advice leads to negative outcomes for vulnerable people. There has been a lot of talk about boosting early advice, and I could not be more supportive of that. I urge a little caution with that. Early advice works because it is part of a larger legal ecosystem. Early advice is effective because it indicates where a legal case might go if a settlement is not reached. You need that expertise and you need all of that to still be in place, but at the moment we do not have the early advice and there is a pauce amount of later advice as well.

The duty scheme is good. I would not say that lots of money has been poured into it. It is just that it has been contracted very assertively. That is the boon in the current situation. The Legal Aid Agency and the Ministry have assertively said, "Okay, we are going to grasp the duty scheme and make it work." That is why it is effective.

People do get to us. Aside from the mandatory cases that I was mentioning to the Chair, we can do really good work. There are pretty good statistics on the benefit that duty advisers provide to tenants. The mandatory cases are another matter, I am afraid. Again, that is something that has been legislated for, and there is not a lot we can do about that. Duty schemes are effective.

Q287 **Maria Eagle:** What could be done within the existing legal framework to improve access to early advice, and do you think that that would improve the situation for tenants and those who are at risk of losing their home? Perhaps we need to change the system and there is nothing that can be done with the existing arrangements, or perhaps there is. What do you think?

***Simon Mullings:*** I think the ability to do early work with tenants is not currently there. We pretty much have to wait for a notice of possession to be granted before we can work with tenants. There may be problems bubbling for quite some time, and legal aid is not available to advise people. There are earlier forms of advice through Citizens Advice and other advice agencies, but with respect to those organisations they struggle for capacity and also struggle to have specialism in housing law because of its complexity, so that is not always as effective as it could be.

The savings down the line in the justice system from being able to intervene at an early stage are reasonably clear to people, I would have thought. There is a sort of literacy about renting that needs to be engendered. Part of the aim of early legal advice could be the educational aspect, so that people understand what it means to rent property and what their rights and obligations are.

Q288 **Maria Eagle:** Earlier, you made some reference to doing work that is no longer billable against legal aid in related areas like debt and welfare, which are connected to subsequent difficulty with housing tenancy. It strikes me that it is difficult enough to make a living as a legal aid solicitor without having to do lots of extra work that is not billable. Do you have any ideas about what could be done to improve the sustainability of the profession in respect of housing work?

***Simon Mullings:*** There are a number of areas. One is rates of pay. You are always going to get legal aid lawyers talking about rates of pay. As an illustration, since the last increase in legal aid rates my daughter has been born and has gone through nursery, primary and secondary school. She has done her A-levels, a four-year masters degree in Scotland and a postgraduate degree as well. It is nearly a quarter of a century since the last rate increase.

There are other areas as well, though. If you look at the Law Society's 2018 analysis of housing law provision across England and Wales, it is really shocking. I am sure the Committee is familiar with it. There are vast areas of legal aid deserts in housing and community care. When that report was produced in 2018, there needed to be an assertive piece of work to see what was going on and to try to mitigate it immediately. Unfortunately, there has been nothing until relatively recently. Now we are getting pieces of work about sustainability. In my sector, we talk about a culture of refusal at the Legal Aid Agency, which is to do with decisions on granting legal aid to people who need it. We could talk a long time about that, but I think the title sets it out.

If I can come back to it, the work with the possession duty scheme was both assertive and flexible enough to make sure that it worked. As I say, that has not been the case in the other areas of law where people can get early advice through the legal help scheme or later advice to be represented in court proceedings. It is entirely missing from those two areas. Where the obligation is on the lawyer, and their organisations are really clear, it is relatively easy to do that work and make it work for the organisation. I would like to see that kind of thinking across all areas of legal aid.

Q289 **Maria Eagle:** Finally, what do you think the Legal Aid Agency could do differently to enhance the sustainability of the profession and enhance access to justice in the housing area? You have already made reference to their culture of refusal. Clearly, they could change that. Culture change is quite difficult, but is that the only thing? Is there anything else they could do?

***Simon Mullings:*** I think the agency could look at its practices and see how it is impacting the sector. Knowing I was coming here, my colleague at work texted me to say, "Look, would you tell the Committee that people who do legal aid are certainly not doing it to get rich because the rates of pay are very poor? They are doing it because they want to help

vulnerable people mostly." The legal aid cohort of clients is generally at the most vulnerable end of the sector.

It is hard to maintain that sense of mission and purpose when the rates of pay have not increased; and when decisions about legal aid are refused and are almost hostile in terms of granting legal aid. It is hard to maintain that mission, but we do. The trouble is that organisations are going to the wall. If there is not a turnaround, we are going to reach a critical point where it could not be said that there is any form of access to justice for the vulnerable, basically. It is as simple as that.

**Maria Eagle:** Thank you very much, Chair.

Q290 **Chair:** Thank you very much, Simon. That is very helpful.

Jane, can we turn to you and ask about the situation on the employment side? What is the position with the tribunals? It is the same point as I started off on with Simon. What is your evidence as to the impact the pandemic has had on employment cases? There are other underlying issues that we will come back to later, but what key things have happened there? Has it coped or has it been under strain as well?

***Jane Russell:*** The short answer to that is both. The effect of the pandemic has been that the challenges that the employment tribunals have faced have become even more difficult in terms of case load. What you have to remember about employment tribunal cases is that their number runs countercyclically to the economy. When there is a recession in the economy, cases in the employment tribunal are very high, with people's employment coming to an end, redundancies and so on.

Previously, in 2009, there was a huge surge in cases—around 36,000—following the crash. After that, even before the pandemic, the case load had crept up. There are reasons for that, which I could go into, but the case load had crept up to about 30,000 or so.

The effect of the pandemic has been that, immediately after the pandemic happened, the employment tribunal presidents in England, Wales and Scotland issued a flurry of guidance, practice directions and frequently asked questions. They kept in touch with the profession and the practitioners. They stayed all in-person hearings for a time, but they came back on stream, effectively, at the end of the summer.

Of course, that has meant that the backlog of cases, which was already pretty huge before the pandemic, has now got even worse. One of the big problems that we are facing as employment lawyers and people working in the employment sphere—judges, solicitors and barristers—is that we do not have enough physical space to conduct the hearings that we need to. That is partly because of social distancing. There was one tribunal judge who said, in a professional talk for a professional group, that there was only one tribunal room in his hearing centre that could accommodate the three judges that you need for a discrimination or whistleblowing case. We lack physical space and we desperately need investment in that.

We need more judges. We need more admin staff. We need better infrastructures, especially IT infrastructure. One of the difficulties we face at the moment is that the employment tribunal IT system can only be accessed from within the building. That means that the workers who are currently working at home cannot access it. That is putting a brake on the system and makes the administration of justice really difficult for us at the moment. Of course, where you have a difficulty in administering justice you cannot deliver it properly. You cannot access it. That is hugely problematic. That is a very long answer to your question.

Q291 **Chair:** I notice that the Employment Law Bar Association talked about the tribunal being slower to introduce virtual hearings and not making as much use of remote technology. Was there also an issue around the rules governing procedure and so on that made it harder than, say, in the High Court or something like that?

***Jane Russell:*** I will get back to you on that. I will do some research, but my personal experience is that there was no problem with the employment tribunal regulations that govern the hearings. A short decision was made to delay in-person hearings. When they came back online, there was a combination of using CVP—the cloud-based system that the tribunal and courts system are using—and a mixture of in-person hearings.

As Simon was saying, the problem in employment law with having remote hearings is that you cannot have somebody going through their traumatic experience of racist abuse or whatever remotely. It is so not the best way to administer, experience or access justice. Obviously, part of what we have to do as cross-examiners, and what judges have to do, is assess people's credibility and demeanour. You cannot do that kind of analysis or assessment if someone has a poor connection.

Like housing clients, a lot of the people we deal with may be litigants in person. They do not have access to the technology. With CVP, the remote hearings are fantastic for very straightforward case management, but for anything to do with sensitive issues of discrimination or whistleblowing they are not ideal. The tribunal judges and staff have coped brilliantly in a very difficult situation. My practice is completely as normal. It is just in a slightly different way at the moment.

Q292 **Chair:** I understand that. You talk about getting more judges. Is there an issue about getting sufficient lay members to sit on the tribunals?

***Jane Russell:*** I might need to get back to you on that. My understanding is that there is a lack of resources generally. There was a particular lack of employment judges.

Q293 **Chair:** Some non-employment judges were proposed to be deployed, I think, in some cases.

***Jane Russell:*** No, that is not my understanding. When you say non-employment judges, I am not quite sure what you mean.

Q294 **Chair:** There was a suggestion from the Courts and Tribunals Service that, where appropriate, non-employment specialist judges could be deployed.

***Jane Russell:*** Yes, but that is not a new thing. I have been before judges who are not necessarily specialists in employment cases. I have been before them in the employment tribunal and in the Employment Appeal Tribunal. That is not necessarily unusual. Judging is a skill. It is not necessary to have the content.

I imagine that it has been difficult to recruit and get on stream more lay members. Of course, there was a huge diminution in employment work following the fees order. That has now obviously been abolished, because it was held to be unlawful as it impeded access to justice, in the Unison case in 2017. Between 2013, when fees were installed, and 2017—that five-year period or so—cases reduced by about 80%. What might have happened as a consequence is that there was less need for judges and lay members.

The tribunals have had a double whammy. They have had fees abolished and cases coming on stream again, and they tripled. Then they have had the pandemic. They have coped admirably in the circumstances, but it is very difficult.

Q295 **Chair:** I understand that. You had that huge dip, as we all saw, and then a big pick-up when the abolition occurred.

***Jane Russell:*** Absolutely, yes, and then the pandemic.

Q296 **Maria Eagle:** Yet again, employment is an area that I used to practise in many years ago, but not since late 1996. The experience was somewhat different in those days.

To what extent do you think that the Government's approach to the recovery of the courts is helping with respect to employment cases and the backlog, which is not necessarily caused so much by Covid as by things like fees being abolished? We have an increasing backlog, but to what extent is the Government's recovery plan going to make an impact on that? Are employment and other tribunals a forgotten bit of the system?

***Jane Russell:*** It is difficult, because employment tribunals sometimes appear not to be at the front of the queue for roll-outs of new technology and so on. I was talking about the difficulties that we have at the moment with the lack of cloud-based technology for our case management system in the tribunals. There is a pilot at the moment, but it is not in our bit of the system; it is in another bit of the system.

I can do some more research and find out exactly how the Government's recovery plan is going to affect us, but I am not aware of any direct plans that the Government have that will affect us. What is very clear to us is that we lack resources.

Q297 **Maria Eagle:** Are any of the Nightingale courts being used for employment tribunal cases?

***Jane Russell:*** Yes; that's right, particularly last year. There were some hearing centres that were part of that system. In fact, what the tribunals are able to do, in my experience, is a combination of CVPs, which are remote hearings, and in-person hearings. I have even had cases where we had a timetable for dealing with each other remotely and in person.

I have never been to a Nightingale tribunal. I have only ever been to the normal tribunals that I normally go to, but I understand that there has been the possibility of Nightingale courts being used in that way. I am not sure that I know of anyone who has actually been to one.

Q298 **Maria Eagle:** Obviously, with the employment tribunal process you have ACAS and a built-in conciliation effort that goes on to try to prevent cases having to go to full hearings. To what extent can other agencies like ACAS help to reduce the pressure on tribunals?

***Jane Russell:*** Not only do we have ACAS, which as you say is built into the system somewhat, but there is also the facility of judicial mediation. That has been a fantastic thing, where judges get involved and they themselves handle a mediation. That has been very successful in the areas where it was piloted, and now rolled out. That is one way to reduce the pressure on the system, but I am afraid there is no way around properly resourcing the system so that it has more space and more judges.

At the moment, it is very difficult to see what else can be done to get ways around it. As I said about housing claimants, you cannot do sensitive hearings remotely. There was a proposal to extend working hours in the system, but we are very much against that because we know that it will impact very badly on parents. We also know that the majority of caregivers to children are women, and we are really concerned that that is going to lead to a terrible slide back in diversity, which is already a huge issue in the upper echelons of the profession and the judiciary. It is not brilliant for the wellbeing of everybody working in the system or for anybody who is trying to access the system as a participant non-lawyer, as one of the parties or witnesses. Everybody is going to be badly affected by that.

Those are the other possible ways in which system pressure could be reduced, but the best way would be to get more hearings done by having more hearings in hearing rooms, with more judges, more admin staff and a better IT system. I think the one used in the Crown court is called the common platform digital system. That sounds pretty good.

Q299 **Miss Dines:** I want to ask first about discrimination cases, Jane. I have done a few cases in my practice at the Bar, but very few and a long time ago, so I need updating. How does the current legal aid framework affect the ability of individuals to bring that sort of case?

***Jane Russell:*** It is very difficult. I worked in a legal aid practice myself when I was a solicitor, and it is difficult. Legal aid does not really apply to employment law. You get early legal help, which, when I did it about 15 years ago, was paid at the rate of about £50 an hour. It is probably still the same, given what Mr Mullings said about the increase in legal aid rates over the past 20 years. You get legal help but that will only help the solicitor prepare your documents for you. It stops when you get to the hearing. There is no provision for legal aid, as far as I understand it, for tribunal cases.

You get legal aid when you take an appeal to the Employment Appeal Tribunal, the Court of Appeal or the Supreme Court, but that is several steps further down the system. What you are left with is being almost stranded at the door of the court by the system, in the tribunal. There are a couple of pro bono organisations that you can approach to give you help for free. There is a fantastic one—the Free Representation Unit—which is very busy and does a lot of work in the area. There is also the Bar Pro Bono Unit, but that is your only option.

Q300 **Miss Dines:** Do you find that people resort to alternative methods of funding, such as crowdfunding online or other charities, other than FRU?

***Jane Russell:*** Yes, they do. That is an increasingly successful way of doing it. I am no social media expert, but what seems to be the case is that, unless you have something rather controversial or eye-catching, it does not tend to get crowdfunding support. Conversely, if you have something very eye-catching and controversial, you seem to get quite a lot of money. That is a terrible way to access justice.

When we think about the important collective role that justice plays in a democracy and the important points of principle that it establishes, I think probably the most important case of the 20th century was when Mrs Donoghue found a decomposing snail in her mug of ginger beer at the Paisley café. It was not just important to her, drinking the horrible ginger beer; it was really important to found a duty on the part of people who make things not to hurt the people who consume them. That was a game changer. It is not just important in discrimination cases. It is not just important to the poor claimant. It is really important in the development of important points of principle.

Q301 **Miss Dines:** Do people fund cases privately as well? We do not always look to the state to fund every justice-type case, do we? Do some people manage to fund it themselves? How do they fund litigation and discrimination cases if they do not get legal aid?

***Jane Russell:*** They have to be rich. They have to be able to fund it privately out of their own pocket. Some of them are able to fund it with insurance. It depends on their insurance policy. A lot of insurance policies have legal expenses insurance written into them, but there are some restrictions on what lawyers they can access. It tends to be the lawyers on a list that the insurance company provides. There is a little bit of an

article 6 issue with that. There is a fetter, effectively, on your right to a fair trial if your access to a lawyer is limited by your insurance company. I think it has been tested a couple of times, but the upshot of all that is that it is not necessarily straightforward if you want to have your own lawyer and your case is insurance funded.

You are at the mercy of the Bar Pro Bono Unit and FRU, or you fund your case from your insurance company, or you pay for it yourself or you do it yourself. Doing it yourself is a really bad idea, if you can possibly not do it yourself.

Q302 **Miss Dines:** There is a trend towards people representing themselves in difficult times. Are you aware very roughly of the statistics in relation to discrimination cases at an employment tribunal?

***Jane Russell:*** I am not. I will submit that to you afterwards. I am only aware of the sad statistic that only about 5% of discrimination cases are successful because it is very, very difficult to prove. I am not aware of how many litigants in person there are.

My estimate is that the figure will rise massively following the difficulties in the economy because of the pandemic. I have done a little bit of research on what HMRC has noticed. The research that I found is that there were 832,000 fewer employees on payroll between February and November last year. The Office for National Statistics identified that in the three-month period between August and October last year there were 370,000 redundancies.

My assessment is that no matter what proportion of litigants in person there are at the moment in the system, there will be an awful lot more as the shock effects on the economy work themselves out. We know that always results in a massive increase in workload for the tribunals.

Q303 **Rob Butler:** I have a few more questions before we wrap up the session. I wanted to start with technology, but I think, Miss Russell, you have already answered questions about technology. Mr Mullings, do you have any views on the role of technology in helping to deal with the challenge of court capacity and, indeed, on access to justice?

***Simon Mullings:*** I think that technology will certainly have a really important part to play. The pandemic has meant that the technology is out of the bottle now. We can hold this Committee meeting by Zoom, which is wonderful.

There are lots of notes of caution, though, about the speed of moving towards it or, if not the speed, then the mode in which we get to the bright future of a digital justice system. The Master of the Rolls recently gave a speech to the Law Society. The new Master of the Rolls is a great proponent of technology and wants to move very quickly to a digital justice system. He said: "We cannot devise a system purely for the digitally disadvantaged, ignoring the digitally advantaged who will probably be 90% or more of the population." It would be wrong to

disagree with that in its entirety, but I think it is quite a difficult way of looking at things if you are leaving 10% behind in relation to access to justice.

My view is that, yes, we should definitely be moving ahead with technology. It can have a very positive force for access to justice, particularly in the context of the vast deserts where there is not advice available for people, but it seems to me that it needs to be a very orderly transition from where we are now to that bright future. It needs to be very careful not to leave anybody behind.

The happy thing is that there are some very good resources for the Government to draw on, not least from the Legal Education Foundation and their report, "Digital Justice". I am sure the Committee is aware of it, but if not, it is well worth reading in full. It sets out what is needed to make sure that a digital justice system adequately has access to justice at its heart, does not leave people behind and takes into account vulnerability in relation to what it needs to do to get where it needs to be.

Q304 **Rob Butler:** This is slightly tangential but it is relevant to technology. Do you have views about whether better central data collection or a better case management system could improve things? I have the same question as well to Miss Russell, but I will start with you, Mr Mullings, while we are with you.

***Simon Mullings:*** Yes, absolutely. There is no doubt that the paper-based information systems that have been run by courts for years have been entirely inadequate. There are delays, with papers getting lost and that sort of thing. It has become a bit of a standing joke in the justice system. It absolutely needs to be resolved; there is no doubt about that. The justice system could be more outward facing in giving information to people at the time when they want it and need it, rather than them waiting for the justice system to send a piece of paper that tells them when their hearing is going to be, and that sort of thing.

To make a digital justice system work, there is a lot of data needed about how digital justice systems work. We know far too little about, for example, how judges interact with witnesses in a video-based court system. We know very little about how vulnerable people can adequately get across their cases on a factual basis through digital technology.

I am afraid at my end of the legal sector it is always about the money. Because we have not had investment for so many years, we are pretty poorly provided for in technology. I would make a plea for investment, certainly for legal aid providers, to be able to use new digital technologies in order to provide access to justice. If access to justice is kept at the heart of things, it will pretty much go in the right direction.

I am concerned at the Master of the Rolls's statement. I am sure I have taken him out of context, and I am sorry if I am being unfair to him

about that, but it seemed to me that his statement did not have access to justice at the heart of it, and I think that is important.

Q305 **Rob Butler:** Miss Russell, do you have anything to add briefly on the point about data collection and better case management, and the prospects for an improvement of the situation via that route?

***Jane Russell:*** I totally agree with what Simon said. The system needs to be thoroughly modernised. The paper-based system has huge numbers of problems, and we desperately need a centralised digital case management system.

Q306 **Rob Butler:** To what extent do you think the administration generally, and perhaps the leadership structure more specifically, is affecting court capacity, and where would you like to see improvement? I realise that is a huge question and that we are running slightly over time, so perhaps I could ask you both to be relatively succinct, but not to cut the thrust of what you need to say.

***Jane Russell:*** Your question is to what extent the leadership—

Q307 **Rob Butler:** The leadership structure and administration of the courts affect court capacity.

**Chair:** The structure rather than the individuals.

***Jane Russell:*** The leadership structure is that we have presidents of the employment tribunals and we have regional heads. Below that, we have employment tribunal judges. There is a sort of three-tier system. In terms of court capacity, I am not really sure how to answer it.

Q308 **Rob Butler:** Is there a level of bureaucracy? Again, we are not talking about individuals. Are people making decisions close enough to what is going on? Is there anything structurally that you think would make things more straightforward?

***Jane Russell:*** No, I do not think there is a problem with the structure, in that it is not too complicated. It is relatively simple. In fact, the pandemic has shown how effective it is at communicating things in a time of crisis. Immediately what happened—the next day, or even that day—was that we had joint presidential guidance from the employment tribunal presidents in England and Wales and Scotland. They adopted a joint approach, and we have had clear, consistent and regular communication.

The structure that we have, of presidents, regional heads and then tribunal judges, appears to work well. I would say it is facilitating rather than impeding justice. It is not complicated, and the communication appears to be good.

Q309 **Rob Butler:** Excellent. Mr Mullings, would you go along with that?

***Simon Mullings:*** I would go along with that. I would briefly add that in the court reform programme there had been a headlong rush to the future without thinking about transition. That was what the court reform

programme was before the pandemic. The pandemic has now left us regretting perhaps the number of court buildings that have gone. I think an orderly transition would have put us in a better position there.

I personally think that an independent commission looking at this, with access to justice at its heart but still making good progress towards where we want to be, would be the way forward. It needs reform. There is no doubt about that. It needs to be done in the right way and not leave people behind.

Q310 **Rob Butler:** One idea that has been suggested by other witnesses in this inquiry is for there to be an independent courts inspectorate, which is not quite the same thing as a commission, of course. What would you think of that idea, Mr Mullings? Do you think that an independent courts inspectorate would be a good idea?

***Simon Mullings:*** Yes. I am afraid I am not sure what the difference between the inspectorate and a commission would be, but what is important are the principles behind what it seeks to achieve. If that inspectorate had—I keep going on about it—access to justice as its primary remit, alongside the other advantages of digital technology and a digital justice system, I would be all in favour of it, yes.

Q311 **Rob Butler:** The other thing an inspectorate would do is check the effectiveness of processes and procedure. If we think about the inspectorate of probation or the inspectorate of prisons, there is a suggestion that perhaps there should be a similar model for the courts.

***Simon Mullings:*** That is really helpful for me in my understanding of it, and I completely agree, Mr Butler.

Q312 **Rob Butler:** The last word to you, Miss Russell. Is an inspectorate a good or a bad idea?

***Jane Russell:*** I agree that, if it has access to justice at its heart, it is a good idea.

**Rob Butler:** Thank you very much indeed.

**Chair:** Thank you very much, Jane and Simon, for your evidence and for making time to come and talk to us this afternoon. We are very grateful to you both. You said you would come back to us with a few little bits. If you could send them to our Committee Clerk, it would be much appreciated.

***Simon Mullings:*** Thank you, Chair, for the privilege.

**Chair:** Thank you.

## Examination of witnesses

Witnesses: Chris Minnoch and Ian Townley.

Q313 **Chair:** We now move on to our second panel. Mr Townley and Mr

Minnoch, it is very good to see you. Thank you both very much for coming. Could you please quickly introduce yourselves and your organisations?

***Chris Minnoch:*** I am Chris Minnoch, CEO of Legal Aid Practitioners Group. We represent legal aid practitioners across the sector, across England and Wales.

***Ian Townley:*** I am Ian Townley. I am a director at quite a large legal aid firm, Broudie Jackson Canter. We are primarily based in Liverpool but also have offices in the Wirral and Manchester. We do most categories of legal aid work.

Q314 **Chair:** You do crime, family, civil, right across the piece.

***Ian Townley:*** Yes. It gives quite a good overview of what is going on in the system.

Q315 **Chair:** Thanks very much. To start with, I am interested in your take, from your perspective and experience, on how the current civil aid framework—we have had a look at crime, so this is concentrating on civil—affects access to justice. It might be easier to say that it gets in the way, but what are the impacts in your experience?

***Chris Minnoch:*** You have given us a chance to think about this in advance, Chair, so thank you for that. We should be able to provide the Committee with some balance today. I can sit back and give you more of a system-wide opinion from our contacts with our members, and Ian can certainly talk very much from the coalface as a frontline practitioner and as someone who has interface between the Legal Aid Agency and the clients who need a service.

In describing the current framework, some of the words that come to mind are disjointed, back-loaded, and one that is developed inorganically rather than organically without any real systems design thinking behind it. Much of that comes down to LASPO. You will probably hear Ian and me talk about LASPO a lot, not that the system that existed pre-LASPO was perfect, but that the policy intentions behind LASPO were not thought through.

The overall global intention of LASPO was to cut the cost of legal aid, but it was not done in a way that thought about what would be left in legal aid, how it would be organised as effectively as possible, how what was still in scope would be delivered in the best way possible, targeted to the people who need it, and how the providers delivering it would be able to sustain their organisations. It was just a slash-and-burn approach to policy development.

It is now back-loaded in the sense that you have heard witnesses already talking about, with clients needing to wait until they have reached a crisis point in many cases before they can get assistance. It is disjointed in the sense that you have the ability to fund one aspect of a client's case, when

we have decades of experience and research telling us that problems cluster and one problem leads to the next, but practitioners do not have the funding to deal with them. It is inorganic in the sense that it has developed in the opposite way that you would expect a publicly funded service to develop. Parts of it spring up, and then the Government decide to cut them, and they do not think about the consequences. That has been happening for decades.

If you started with the legal aid budget that you have now and a blank slate, what you came up with would not resemble the current legal aid system whatsoever. It facilitates access to justice for people who can access the system, but there are huge question marks over the very many more people who cannot.

Q316 **Chair:** You talked about the back-loading of the system when it gets to a crisis point. Are you able to take any view as to whether bringing it forward—front-loading the system more—has impacts, or has had in the past, not just in fairer, better outcomes for individuals, claimants in the system, but in efficiency and perhaps even value for money? It is sometimes suggested to us that you save money in the long run. What is your take on that?

***Chris Minnoch:*** Do you want me to go on that, Ian?

***Ian Townley:*** It is probably better for you to speak on this one, Chris.

***Chris Minnoch:*** It is a really important point, Chair. At the moment, when we talk about trying to improve the justice system on a policy level, we are constantly told that there needs to be a cost-neutral solution. I don't think that is correct.

If we front-load the system, we would only front-load it in part; there has to be a back end to the system as well, and a middle and some side ends, and it needs to be properly thought through. You would not take your existing resources and only put them into early legal advice and some sort of intervention that you think would resolve problems at an early stage, because it will not in some cases. We will need to escalate some cases, and some clients will not get access at that early point and will only access it at, say, Mr Mullings's desk at the duty scheme, and that is at crisis point. You have to see how the system works as a whole, and that is what we do not have at the moment.

We do not have a strategic approach to commissioning advice services across England and Wales. The consequences are the knock-on effects that we talk about in terms of the costs elsewhere in the state and the unsustainable business practices that have to bend and stretch themselves around rather impractical funding models to try to deliver a service, and that means that the lawyers sitting around Ian and other practitioner groups and other advice agencies need to do a lot of things that they do not get paid for. Not only are they working at incredibly low rates for the things that are covered by the cost assessment guidance,

for example, but they have to do a lot of other things because of their ethical duties and their commitment to their clients just to make those cases work.

Front-loading would work, but if we now put resources into the front of the advice process, that would just fix that part of it. We would not want to take it out elsewhere because there needs to be a more strategic approach to how it is funded.

Q317 **Chair:** This may seem an odd question, but I think you will get the sense of it. In your experience, does the way legal aid is provided at the moment have impacts not just on the parties and the providers but on the courts themselves, for example, in the capacity of courts and, perhaps even more, the efficient utilisation of courts? Is there anything you can help us with around that?

***Ian Townley:*** From the scheme perspective and in the operational issues at the Legal Aid Agency, there is certainly no consideration of solicitors' duty to the court. For example, if we need to amend a legal aid certificate to take the next step for a final hearing, or if, in a judicial review, we are limited to a paper application and permission is granted, we need to respond to the court in 10 days, but it takes the Legal Aid Agency three weeks to make the amendment to the certificate. That side of it has an impact. As Simon mentioned, people come to you at a very late stage. Often, people who are within scope of legal aid, with issues that are in scope, may have quite chaotic lifestyles.

A lot of people, as soon as they had a letter from their landlord, for example, saying they were in arrears, would try to sort it out; they would speak to the landlord, and would do it. Often, we find, similar to what Simon said, that people just come once they have the court date, and that can be the next day, so it is very difficult for providers to plan their work and to be able to act in time. Often, we send the client to a hearing to tell the judge that they are trying to get legal aid, and the judge will vacate that hearing and re-list another one. There is a knock-on impact from some of the policies and processes that have been put in place in the legal aid system.

Q318 **Chair:** The needless adjournments and wasted hearings and that kind of thing.

***Chris Minnoch:*** There is a well-documented impact on the family justice system from the removal of most parts of private family law from legal aid. There was a huge reduction, therefore, in the referrals that were made by family legal aid providers to mediation services post LASPO, and a resulting increase in litigants in person. That is all well documented. You have had evidence on that.

As Ian says, it is the practicalities of running cases as well. If a housing provider cannot resolve the welfare benefits and debt and other underlying problems that led to the rent arrears that triggered the

possession claim, they cannot necessarily resolve that case even when they grab it at the duty scheme or even when they come to the office. It results in a repeated cycle of people being involved in the justice system when they do not need to be because they cannot get the wraparound support they need.

Q319 **Chair:** That makes sense. That is a systemic issue, and it has been for some time, as both of you say. Are there particular impacts that have come along, from the provider's point of view, with the pandemic?

***Ian Townley:*** A couple of issues have come out of it, some good and some bad. The Legal Aid Agency has shown what it can do. One of the really big benefits is to allow us to accept digital submissions. Previously, under the contract, that was not allowed; we had a justice system that was moving to an online basis yet we would have to get a client into the office, sit down and fill in a complicated form with them. That has shown what can be done when they are pushed—I think that is probably the best word—when they need to. One of the bigger concerns for me is the absolute huge drop in expenditure over the first six months of the pandemic.

The Legal Aid Agency publishes quarterly expenditure figures. Between April and September 2020, case expenditure across the board was £224 million down from what it was in the same period in 2019. That represents, on an annual basis, a 26% reduction in expenditure, presuming it carries on over the next six months. Clearly, there may be some changes. Most providers are turning a profit, if we are lucky, of 5% to 10%. I am really concerned about that. We were talking about court capacity before, which was very interesting, but there is also the idea of provider capacity.

From the Legal Aid Agency perspective, if they have a provider in a certain procurement area in a certain area, in many ways that is a box ticked. They do not need to look at it again, but actually there needs to be some consideration for the provider's capacity and ability to assist and take the work on. I don't think anyone is looking in that area at the moment. I am very concerned that, once furlough stops and once the pandemic is over, that massive reduction in expenditure will have a negative impact on the number of providers. We are already in, I would argue, a substantially underfunded area, and to take out, potentially, 26% of case expenditure could really cause some damage going forward.

Q320 **Chair:** I suppose, in a nutshell, delays in the system mean that cases are not completed, so they cannot be billed. That is the cash flow for firms. They get completely shot.

***Ian Townley:*** Yes, 100%.

Q321 **Chair:** I understand that. Do you have a sense as to how many firms are having to use furlough?

***Ian Townley:*** I can only speak for ourselves. It is quite difficult because we are a disparate group. To some degree, we are supposed to be competing against each other, but that does not really happen a great deal. The message I am getting is that quite a lot of crime firms have used furlough quite a lot. There are a lot of areas where we have not been able to take advantage of furlough, although we have not been having money coming in. In many ways, it is a perfect storm. Clients still want advice and assistance, and we are still there to help them. We already have existing cases in the pipeline that we cannot stop working on. There is no ability to bring a great deal of money into those areas, so it is quite difficult at the moment.

Q322 **Chair:** That is fair enough. Chris, do you have any sense from the broader legal aid practitioner perspective as to the impacts, financial or otherwise, of the pandemic specifically on legal aid practice?

***Chris Minnoch:*** We know that the Legal Aid Agency recently conducted a survey of providers and tried to gather together as much information as they could about the uptake of financial relief pandemic measures. They have that information and are using it for their planning purposes. As Ian referred to earlier, one of the fringe benefits, one of the potentially good aspects over the last few years, is that the Legal Aid Agency has tried to be as agile and flexible as possible, within its quite strict regulatory regime, to try to free up payment processes, to try to speed up payment processes, and to try to introduce new processes to enable people to bill work where those did not exist before to take account of blockages, particularly in the courts and tribunals system. Those things are happening in civil. I would not say that they are necessarily happening in crime.

Crime is an absolute crisis area, but you have heard evidence on that. Whether or not firms or departments have utilised furlough probably depends on the nature of the work to a degree. On housing cases, there is an absolute moratorium. Nothing is coming through, apart from a dribble of cases on housing—you see that in the official statistics—outside homelessness work and a little bit of disrepair work, but that is already very limited under legal aid now anyway, whereas the bread and butter work for most housing practitioners is possession and eviction cases. You can furlough your staff, but you will still have some case load to maintain. You have to maintain as many people as you can. Furlough covers the personnel costs, but it does not cover your other overheads, most of which have not reduced at all during the lockdown periods. There will be a reckoning, and we know there is already a reckoning coming.

Our members are already telling us that they have started redundancy processes. In fact, each time they think the furlough scheme will come to an end, they have to start a redundancy process, and then they might pull it. Business planning is absolutely impossible at the moment—I know that is the same across the economy—but in particular for legal aid lawyers because the ability to control the work coming is completely

outside their control. They cannot control whether or not the courts reopen, and they cannot control whether or not social landlords begin a campaign of evicting people who are in rent arrears, but they have fixed costs. Many of our members tell us that they will be trimming their staff, if they have not trimmed already.

One of the problems we have, which relates back to one of your earlier questions, Chair, is about data. We do not have a lot of data. We are about to conduct a survey to try to gather some data about the legal aid workforce, because nobody knows. The Government do not know how many people do legal aid. They have some bare statistical information about the number of organisations and the number of contracts, but who is delivering the work, and to what degree, and how much they are delivering, as opposed to privately funded work or grant-funded work in the not-for-profit sector, nobody knows. You have policy making going on that cannot, by definition, be driven by the data, which, as we heard on Monday evening, is apparently quite important.

**Chair:** That is very helpful, thank you.

Q323 **Maria Eagle:** The Government's review of the legal aid means test is due to consult in the spring. What are the problems with the current legal aid means test and what changes would you like to see as a result of the review?

***Ian Townley:*** There has not been any review of the eligibility limits since 2009. Even then, they were only slightly tweaked and uprated with inflation. We now have a bizarre situation where a pensioner whose only income is the state pension is no longer eligible for any form of civil legal aid, and where a couple who are both working 35 hours a week on minimum wage are ineligible for legal aid as a result of the gross income limit. It is quite frustrating; these issues need to be dealt with an awful lot quicker than they are being dealt with. I understand there is a review, but in terms of the time it takes for that review to report back, there are an awful lot of people who should be eligible for legal aid but, because the limits have not been uprated, will not be.

There are also issues with the complexity of the means test itself. A lot of it is delegated to providers. We have two layers of legal aid. We have our legal help as the initial layer, and then we have the legal aid certificates. In all the legal help work, the decision making is delegated to individual providers. I can regularly spend an hour with a colleague trying to calculate whether somebody is eligible for legal aid and whether the information they are able to provide us is sufficient to meet the requirements of the Legal Aid Agency, and that can be on a housing case that we have not even started where we will recover a total of £157.

We have an incredibly complicated scheme that puts a lot of onus on the provider, but we do not actually get paid for doing the work, so it is very difficult to do that. That ties in again with the Legal Aid Agency's understandable desire to have less than a 1% error rate in payments.

These areas of work are audited intensively. There are 14 different types of audit we can go through just for that work. It makes things very difficult just to allow somebody to access it. I feel we do everything we can to prove someone's eligibility. I genuinely feel we probably turn down more people who are eligible but unable to prove it than miss people who are ineligible and let them into the system. That is one of the battles that we have on a daily basis.

Q324 **Maria Eagle:** Mr Minnoch, do you want to add anything?

***Chris Minnoch:*** If you ask me what is wrong with the legal aid means test, my answer is everything. Everything is wrong with it. I am not exaggerating. The legal aid means test is, as Ian suggested, illustrative of a scheme where the administration bureaucracy risk, which is a really important factor, is transferred to providers, and auditing is completely disproportionate to the remuneration levels. A fixed fee case of £157 means that firms have to put layers and layers of administrative staff or paralegals in place to do hours and hours of checking. All of those processes have a cost attached to them and they all eat into the fixed fees or hourly rates that were set 25 years ago and have not changed since, apart from going down. There have been no inflationary increases at all in the meantime. How on earth are providers supposed to deliver those services when those two things are completely out of kilter?

With regard to the mean tests itself, we have to give the Ministry of Justice some credit because they are thinking through the means test in great detail, and I anticipate that the spring public consultation will come up with a range of very sensible proposals. What it will not do is restore the legal aid means test to the point at which it truly captures the percentage of the population who cannot afford to pay for legal advice, which is almost everybody when you think about the cost of legal services. That is not because legal services are inordinately expensive; if you want a professional service and somebody's expertise, you have to pay for it. It is about the ability of people to access those services.

The people who are subject to the types of problems that are within the current scope of legal aid, which is a whole other conversation, do not have the means to access those services. We are probably now widening a much bigger group of the percentage of the population who are subject to those types of problems—employment, discrimination, special educational needs—because of the economic impact of the pandemic, which means that there is going to be an even greater demand from an even higher proportion of the population for legal advice but with a reducing ability to pay for it privately. That gap is widening, and the means test has to address it somehow.

Even if you increase the percentage of the population eligible for legal aid, if Ian and his colleagues and every other legal aid provider in the country work to capacity, and if the business model is so fraught that you cannot afford to take on more staff, who is going to provide the service to the higher percentage of the population who are in theory eligible for

legal aid but in practice will not be able to access it? The means test is great. The review of it is necessary, but if it is not done in conjunction with tackling all the other fundamental structural weaknesses in the civil legal aid scheme, it is an illusory right.

Q325 **Maria Eagle:** You talked about other difficulties of the civil legal aid scheme, and I want to ask you a little bit about the sustainability of civil legal aid. It has been a repeated theme that people have raised during our evidence sessions. The Government have said that they might conduct a review of the sustainability of civil legal aid, which is obviously a good thing. Do you have any views about the nature and form of the proposed review and how they should do it?

***Ian Townley:*** From my perspective, there are four elements that need addressing in legal aid. We have discussed financial eligibility. There is no point having a scheme if the vast majority of people are ineligible for it. In fact, the people who are paying for it through their taxes are not able to access it.

There is also the complexity of the scheme. We have an incredibly complicated scheme. Post LASPO, there are over 1,700 pages of statutory instruments, Lord Chancellor's guidance, Legal Aid Agency guidance, and contractual documentation that you need to be aware of and conversant with to operate the scheme. It is not just one individual within the firm. Anyone who is picking up any item of work needs a good understanding of that work to make sure that it is in scope and that they are acting correctly.

In addition, we have operational issues, I would say, about how the Legal Aid Agency itself operates the scheme. I have some sympathy with that because, as we have said, it is an incredibly complicated scheme. Not only is it complicated for the providers, it is also complicated for the Legal Aid Agency and Legal Aid Agency staff to interpret.

The fourth pillar is remuneration. This is the area that it seems to me that no one is interested in. Simon made some really good points, as has Chris. We are operating at a lower rate than we were in 1997-98, nearly 25 years ago. Everything else has increased. In order to continue, firms like our own have moved. We used to be 90% legal aid and were able to operate reasonably well on that. Over the last 10 years, we have moved it. We now do about 35% to 40% legal aid, with the majority of it private, and, in effect, subsidise our own legal aid work. We don't mind doing it, but there comes a point when you think, "Why should we be subsidising it?" It is a decision that needs to be made at ownership level to do that, to commit to it.

The remuneration aspect in terms of sustainability is probably the key to all of this. We struggle to retain staff. We are quite lucky being based in Liverpool in that we have two universities here. We have law schools here as well. We can attract paralegals who are keen and will come in, and we can offer them a training contract and get them qualified as solicitors.

Then they get to a certain point and move to a commercial firm down the road or move from claimant work to work for defendants.

There is also the ownership aspect of things. Who is actually going to put their head on the block and say, "I will put my house on the line to own a legal aid firm"? This is what we are seeing. There were predictions of a cliff edge of a drop-off of providers post LASPO. I personally thought that would happen, but, actually, looking at it a bit more, we have seen a gradual erosion, and that will speed up due to the pandemic.

A lot of the businesses are partnerships. The owners, the partners, are individually liable for all of their debts. They do not always have protection from that. We see a gradual erosion of people—owners particularly—going out of the legal aid system. There is not really anybody else who is either able or willing to replace them. Generally, when you start a business, there is a balance between risk and reward. As things stand, that balance is completely out of kilter. Over the next few years, as they retire, there will not be anybody to replace them. We will see that across both crime and civil.

Q326 **Maria Eagle:** Thanks. Mr Minnoch?

***Chris Minnoch:*** I am as much a fan as anybody else of a formal structured review for making things public and transparent. If we take as a recent template the criminal legal aid review that was announced in 2019, by the end of 2021 we might have some recommendations that might then find some parliamentary time that might lead to some changes. If you do the same thing with the civil legal aid review, by the time it reports, it will be a decade post LASPO. What happens to those clients in the meantime? Nobody is able to track that. Nobody is doing any research. The Government committed to a post-implementation impact of LASPO, when it was going through Parliament, within three to five years. It reported closer to six. It then reported in a way that failed to acknowledge that over £3 billion had been saved on legal aid since LASPO came into place, and £8 million was committed to be reinvested, and most of that was for litigants in person support services, so not actual advice services anyway.

In that time, the best estimate, if we take the numbers of clients in the system for the legal aid scheme post LASPO, which were dropping year on year from the peak three or four years before that anyway, about half a million people are failing to get advice every year, year on year, since LASPO. If we take that forward to the end of another structured civil sustainability review, which I accept is probably the only way we will make progress, that is another million and a half people who have not had a service. What are the consequences of that? Nobody is asking that question or is able to answer that question, but we can probably guess.

Probably, the conclusions of a civil sustainability review will be that they should have listened to the people who have given evidence to the Justice Committee inquiries over the last couple of years and

implemented their recommendations. You will come up with the same answers, but you will have fewer providers. My big concern is that, when we talk to providers who are considering leaving legal aid or who have left legal aid, the chances of them taking the risk to come back are zero. We may have reached that tipping point now; even if you increase fees and reduce bureaucracy and take the risk away from providers and stop the public attacks on lawyers who are trying to do this sort of work, you may not have the critical mass of people who are willing to take on the work again.

In some sense, the Government have to prime-pump the legal sector even more than they would have needed to do if they had done it in a managed way, just to get people to come back, just to get people to take on new staff to expand into new areas where they know there is demand, where they know that the poverty that drives most of the demand for civil legal aid exists. Yes, let's have a formal structured civil legal aid review. If we can do it in about the next three weeks, it will probably be appreciated.

Q327 **Maria Eagle:** In view of that answer, what action should be taken or could be taken now to ensure the sustainability of civil legal aid in the short term while the review does its work?

***Ian Townley:*** I am not sure there is a great deal. I have thought on this issue, and I am not sure there is an easy answer. The Legal Aid Agency, in effect, has been given or has created competing objectives. Reading from the last business plan—I do not think they have published a new one—there are four items. The main item is timely and reliable access to legal aid. The next one is value for money, which is less than a 1% error rate. In many ways, the two are incompatible to some degree. We are all taxpayers as well as legal aid lawyers. I do not want to see money wasted in the system. It is right that public money should be spent appropriately and should be accounted for. No one would argue with that.

What we have now is an incredibly complicated system, with very low rates of pay and remuneration but with really high rates of audit and requirements, and pressure placed on providers who are simply trying to do their job. In many ways, it is the perfect storm. Within the current framework—I am talking LASPO and all the statutory instruments that are attached to it, plus the requirement for the Legal Aid Agency to keep a less than 1% error rate—I cannot see how you can loosen the taps in any way without looking at remuneration.

My understanding is that every proposal we put forward needs to be cost neutral. We have managed to work with the Legal Aid Agency since LASPO to iron out the majority of the ridiculous decisions and impediments in the system. There are still issues in terms of the culture of refusal. These are duties that are placed on them, and regulations that are placed on them, as well as us. I do not see that there is an easy solution at all.

Q328 **Maria Eagle:** Thank you. Mr Minnoch?

***Chris Minnoch:*** There are a few low-hanging fruit. I agree with Ian that there are people in the Legal Aid Agency working hard to turn the tanker around from the National Audit Office implications and qualified accounts. Previous CEOs had one job and did it quite well. There are people there who are trying to change the culture of refusal and trying to improve the relationship with providers that is so critical for an adult relationship between the Legal Aid Agency and the people who are there to deliver the scheme. I also agree with Ian that there is not a cost-neutral solution, and there should not be a cost-neutral solution when the Government saved over £3 billion in the last seven years and have not reinvested it anywhere in the civil justice system, and only marginally in other places.

If you look to the north, across the border, there is probably a useful template from the Scottish Government and the recent measures they have put in place: a fee increase to try to relieve some of the pressure, and a crisis fund for people to call upon to deal with the impact of the pandemic, specifically in the areas you can target quite easily, the areas of legal aid where there have been absolute stops in work—housing and some areas of crime and other things like inquests where the work just has not taken place or has not been able to be billed. It will be great if we get back to the point where the Government recognise the important pipeline of people coming into the profession and start funding training contracts again. I think the MOJ are actually considering that.

I would say you are a bit optimistic in saying that a lot of legal aid firms are operating on a 10% profit margin; they will be lucky if they are operating on a 10% profit deficit and subsidising that through other work. They cannot afford to bring people through. There is no pipeline of people coming through. There are students and junior lawyers who want to do this work, but they do not necessarily see either the opportunities coming up or a long-term future in it. There could be if firms were given specific and direct help to bring people in and train them, much like the scheme that is run by the Legal Education Foundation.

In the medium term, you need an independent fee body. The decision over who sets the fees, what the fees are, and how they relate to the cost of delivering services has to be done by an independent body, and I would look to the model in the NHS advisory body on that. I know they are two very different systems, but the principles are the same in that you need a level of independence over the people who are managing the relationship with the Treasury to see realistically what you need to do, and where you need to set the fees so that firms and NFPs can be sustainable. There are some things that we could get done in the next three-week window before we finish the civil legal aid sustainability review.

Q329 **Miss Dines:** This is a question about the existing system. How could the Legal Aid Agency reduce its own costs and the bureaucratic burden on

legal aid lawyers without increasing the risks to the public purse? Perhaps Chris can answer that first.

***Chris Minnoch:*** I don't know. I thought Ian was lining that one up. He is licking his lips

***Ian Townley:*** I am not sure I can answer.

***Chris Minnoch:*** I am happy to go first. Ian hit the nail on the head earlier. We have primary and secondary legislation. We have the Lord Chancellor's guidance. We have internal guidance. Within the Legal Aid Agency, there are reams and reams of guidance as well, because its own staff struggle to understand the inner workings of the legal aid scheme. I know this is something where the Legal Aid Agency is working on an alternative system now, but the digital interface between civil legal aid providers and the Legal Aid Agency for applications and billing, which has been in existence for eight years, from system testing through to being a mandatory system, is not fit for purpose. If the Legal Aid Agency can soon bring forward the alternative to that system and take away some of the headaches for providers in trying to interact, submit their applications and submit their bills, that would be good.

There is a big question mark at the moment over the bill assessment process and who is responsible for it. One of the things that could reduce some of the bureaucracy, because of the cycle of improvement and learning that could come from it, would be an independent appeals process both for decisions at the outset of the legal aid application process and for decisions about bill assessments. At the moment, if things head the way they probably will head, if a provider is dissatisfied with those sorts of processes, they have internal review and appeal processes within the Legal Aid Agency that the vast majority of providers that we surveyed a year or so ago thought were not fair and not transparent, and were too long and too costly, or they have to judicially review the Legal Aid Agency. Those two things are not good outcomes; they are a waste of money and a waste of everybody's time, so let's have an independent process for dealing with those sorts of disputes.

***Ian Townley:*** From my perspective, I appreciate that we have guidelines, but there appears to be a complete lack of commerciality in the organisation. For example, I have seen this on numerous occasions; we want an expert, they will not operate at legal aid rates that have all been codified, but we need a particular expert, a judge has approved the expert, we do an application for prior authority to get the expert, it gets refused, we appeal the refusal, that gets refused, and then we go on. There is no idea of the money involved. The expert—I have an example in mind—was only charging £10 an hour more than the legal aid guidance. He was not prepared to do it for less. He was quite clear. He said, "Why should I? I don't need the work. That's my rate." We spent £300-worth of time, which we actually got remunerated for on that matter, arguing over £100 for the expert. That is what we are often up against.

Another example was when the National Audit Office did its review—this is going back a good few years, so things may well have changed. It said there was a potential, and I stress the word potential, £20 million over-claim. That is where providers at legal help level do not have the correct evidence of means. It was not to say that people were ineligible; it was just that providers did not prove it correctly. In the next year, in the LAA accounts, staffing costs had gone up by over £20 million. We are in a scenario where we have an organisation that, in order to keep a less than 1% error rate, will spend more than the 1% error rate, if you understand what I mean. They are throwing resources at it because they are so focused on that. I understand why it is important, but there needs to be a more commercial operation, and a bit more financial savvy in the decision-making process. That goes through everything.

Where there is a judgment call to be made, for example, on an application for legal aid—they are not all straightforward—the first thing you get is a refusal. It gets refused, then we appeal it, and it goes to somebody more senior who may well grant it. That whole refusal and appeal costs money in administration and costs money in our time and our fees when we actually are successful. As I said earlier, the two competing priorities clash against each other and it becomes very difficult to get out of a cycle of almost Kafkaesque decision making at times.

Q330 **Miss Dines:** How could relations between the Legal Aid Agency and the profession be improved?

***Ian Townley:*** On our level, with our contract manager, we have very good relations. We always try to have them. We do not feel you will get somebody on side by shouting and screaming at them and blaming them for everything. You will hear throughout out what I have said that I have a lot of sympathy for the Legal Aid Agency. The regulations are complicated for them as much as for us, and they are being given competing priorities: speedy access to legal aid, but don't spend a penny over what you should. I have a lot of sympathy for them.

There may need to be a little bit of culture shift. When I talk to people at more senior levels, there is a good relationship, as maybe Chris would agree. We get it, but there is an underlying culture where we, as providers, are the enemy. We are the ones who second-guess their decisions. We are the ones who challenge them. But we only do that for our clients; it is not because we necessarily want to. We only do it because the system is so complicated. Anyone now left doing legal aid has a pretty good relationship with most of the people in the Legal Aid Agency. I certainly do not look to blame individuals, as I say. The system is as complicated for them as it is for us.

Q331 **Miss Dines:** Do you have anything to add, Chris?

***Chris Minnoch:*** It is changing for the better, Miss Dines. Changes in leadership over time have changed that. The distance since qualified accounts and the National Audit Office criticism has helped. We will see

the next version of the Legal Aid Agency annual report give more of a focus to access to justice and the pivotal role that the Legal Aid Agency plays as a cog in that machine. The language is changing, and the communications that the agency is putting out towards providers are trying to be more sensitive to the needs of providers and the pressures they are under. They are working within a complex and rigid system. There are some things they can do and there are some things they cannot do.

We have to take into account that LASPO took the policy analysis and development role away from the Legal Aid Agency and into the policy team at the Ministry of Justice. Quite often, the Legal Aid Agency is tarred by the brush of decisions made by other people. They have no control over them. They are administrators of a scheme that is decided on and set by other people. For example, when we carried out the widespread survey in 2019 about decision making, which we submitted as evidence to the Committee's request for written evidence, where problems are identified around decision making, delays, and lack of transparency for review and appeal processes, they have actively engaged with us to try to address them. They are working through multiple workstreams in the agency to try to improve those processes, to try to put more quality control in place, and to try to put more internal learning processes in place so that they can identify and reduce errors.

In saying that, our members still come to us with, or put on social media quite often, absolutely ludicrous decisions or decisions that have no basis. One of the things they are particularly frustrated about is that those decisions tend to be at the sharp end of casework that challenges the state, where there is a risk from providers and some subjectivity about merits, and providers think the Legal Aid Agency takes, effectively, a quasi-judicial role in deciding whether or not a case will succeed or not, or sometimes whether it should even be litigated—not even whether it will succeed—when that is the court's responsibility. The regulations have required the Legal Aid Agency to make a determination, or the Lord Chancellor to make a determination delegated to the agency, about merits.

You have to take into account that the legal profession is one of the most heavily regulated professions there is. There are entirely separate complaints processes that clients can make—ombudsman processes and tribunal processes for dealing with poor conduct. Does the Legal Aid Agency really need all those additional layers of contractual enforcement procedures in place as well when you are really dealing with quite a tiny percentage of practitioners who are acting in a way that the agency is not happy with? In some respects, we can say we are making progress, but in other respects, the agency has to give more trust to practitioners that they are taking the cases that have merit, and running them with merit, and if they routinely take cases to court that do not have merit, there are consequences for practitioners. That is for the judiciary to deal with. That is for the profession to deal with. It should not necessarily be for the

agency to deal with. If we saw more trust and less second-guessing of the professional expertise of the people who are making the applications, there would be a much better relationship.

Q332 **Chair:** Thank you very much, gentlemen. That has been very helpful. You gave us a pretty clear overview in your written evidence as well of some of the issues that you have amplified in the course of your oral evidence. Unless there is anything else you want to pick up on, do you think we have covered the ground satisfactorily?

***Ian Townley:*** We have covered most of the ground. The one thing that needs to be borne in mind—I am sure the Committee does—is that, post LASPO, only the most serious aspects of work are within the legal aid system: if, for example, you are going to lose your home, or the state may take your child from you, or the state has imprisoned you. Some of those aspects do not have a means test attached to them. I reiterate what Chris said. I am really concerned that, at some point, we will get past when we could fix this. With the impact of the pandemic as well—I do not want to sound like I am scaremongering—that is a lot closer than maybe is appreciated at Government level.

**Chair:** Chris?

***Chris Minnoch:*** Nothing further from me. We have covered it all, Chair. Thank you very much.

**Chair:** Thank you both very much indeed for your time and for giving us your evidence today. It has been extremely helpful. The evidence session is concluded.