HOUSE OF LORDS

Select Committee on the Constitution

Corrected oral evidence: The constitutional implications of Covid-19

Wednesday 1 July 2020

10.20 am

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chair); Baroness Corston; Baroness Drake; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Howarth of Newport; Lord Howell of Guildford; Lord Pannick; Lord Sherbourne of Didsbury; Lord Wallace of Tankerness.

Evidence Session No. 8 Heard in Public Questions 91 - 104

Witnesses

I: James Sandbach, Director of Policy and External Affairs at Law Works; Carol Storer, Interim Director at Legal Action Group; Cris McCurley, Partner, Ben Hoare Bell LLP.

Examination of witnesses

James Sandbach, Carol Storer and Cris McCurley.

Q91 **The Chair:** This is the Constitution Committee of the House of Lords. We are conducting an inquiry into the constitutional implications of Covid-19. We are looking today at what has been happening in the courts. Would our three witnesses introduce themselves?

Carol Storer: Good morning. I am director of Legal Action Group. I am formerly a practising solicitor, now a non-practising solicitor. Legal Action Group is an access to justice charity. We publish a magazine and books, and we run training on social welfare law.

James Sandbach: I am director of policy and external affairs for LawWorks, the solicitors' pro bono group. I am an unregistered—that is to say, non-practising—barrister.

Cris McCurley: Good morning, everyone. I am a partner in the firm Ben Hoare Bell, which is a large north-eastern practice. I am a High Court advocate and I sit on the Law Society's Access to Justice Committee.

Q92 **The Chair:** Thank you very much. It is sometimes difficult with three witnesses if everybody wants to give long answers to every question, so use your discretion. We will not hold it against you if you feel that someone else has covered an answer in a particular area.

We will get into some of the detail later, but, in general terms, what do you feel the impact of Covid-19 has been across different jurisdictions and in courts and tribunals? We have had some evidence already, but if you could give a brief overview of what you think the situation has been, that would be helpful.

James Sandbach: There has been very significant disruption to the way courts and tribunals have to operate. In some respects, it felt at the end of March that the system was a little underprepared, in the sense that back in September 2016 the Government announced a big modernisation programme for the courts, including a commitment to a single platform to do remote hearings and remote work. That had not been rolled out, so it had to be rolled out very rapidly.

How it works has differed a lot between different jurisdictions, with the judicial leaders of different jurisdictions often having to reach for off-the-shelf, bespoke packages and solutions. If you look at the judiciary's guidance and advice across all areas of the different jurisdictions, there are 124 different documents covering practice directions, procedural changes, et cetera.

It is very different across different courts and tribunals, so it is very difficult to give a general overview of what the impact has been, although the default position is that remote is the normal for now, with physical hearings in only more exceptional circumstances, with the court and tribunal centres and court-operating buildings operating at about 50% of the capacity they were before the lockdown.

Cris McCurley: It is hard to overstate the impact that the anxiety caused by the virus has had on court proceedings, in particular on lay participants. Going to court is always a very stressful experience for lay parties, but they have the additional anxiety that they are scared about the virus. They are living with that anxiety. They might have lost loved ones. They are worried about the children they are not seeing. It can add to an already volatile situation. That is something we have been having to get to grips with. Hearings can be much more emotional now.

Carol Storer: Briefly, the court staff and judiciary have, in many cases, responded amazingly well. They started off with infrastructure that was below where one would have hope it would be. They have dealt with as much as they can in the time available and learned very quickly, but they were hampered. I would hear in meetings, for example, about the problems practitioners had trying to find out what was going on in courts. Of course, court staff were often unable to work from home because they needed security on laptops. I understand that there was a programme to dispatch laptops to court staff. Across the sector, with professionals and all the people involved, there has been an awareness of the need to keep the justice system going, and tremendous efforts have been made.

The Chair: So tremendous efforts, but from a very low starting point.

Q93 **Lord Pannick:** I certainly associate myself with what Carol Storer just said. We have heard evidence from other witnesses about the difficulties in obtaining systematic information about what is going on. Nobody seems to be collating national statistics, or eventually publishing them. From your perspective, is this a problem? If it is, what are the solutions?

Carol Storer: Yes, it has always been a problem. I have been involved in this sector for decades now. Obtaining good evidence from the Courts Service of what is going on is a constant issue in the regular meetings I attend. I would also like to point out that the Civil Justice Council and the Legal Education Foundation have produced a wonderful report, as has the Nuffield Foundation. They have looked at the impact of the crisis in civil courts and the family courts. There is a very good set of recommendations in the civil justice report about what needs to be done to gather information and evaluate it, and what priorities there should be for research in the future.

The Chair: Cris, I saw you nodding. Did you want to add anything?

Cris McCurley: No, I was just nodding in support of what Carol was saying. I completely endorse what she just said.

James Sandbach: This is a historical function of each of the courts and tribunals being different jurisdictions. Therefore, each works and operates in a slightly different way. Therefore, we are unable to have consistent practice in how things are reported. Even knowing how many people are going through the process of being litigants in person, what support they are able to access and where they come into the system is difficult evidence to know. All we get on the MoJ's courts statistics is the very basic throughput data.

Q94 **Lord Sherbourne of Didsbury:** I want to ask a slightly more focused question. How have the technical challenges and difficulties of conducting remote hearings in courts and tribunals impacted on the efficient administration of justice and on those people, especially lay people, seeking justice?

Carol Storer: The technical challenges are considerable and they affect people a lot. On the most basic level, does a party to proceedings have a phone, a laptop, an iPad? Is it charged? Do they have credit? Is there good reception? Do they have sufficient notice of the hearing? Supposing they actually managed to join the hearing, will they be able to see everybody, or will the screen on a phone, for example, show them only one party? Will they feel that their participation is still as meaningful as if they were in a court?

wThere is a risk that you feel sidelined and there may be long discussions on technical issues. If, for example, an advocate is speaking and the sound drops out, you have to make sure that there is a protocol: are they going to go back over what they said? Cris has experience of being in court generally. It adds another level of stress. I absolutely understand why the court system uses a variety of platforms in an emergency. It has been challenging for professionals, but also for witnesses or parties who have never used the platform before.

The Chair: Cris, did you want to add anything from your experience?

Cris McCurley: Yes. I think everybody is pulling together very well and the support we have had from the judiciary has been admirable, but we have had quite a lot of changes—we have gone from Zoom to Teams, to Skype, to Skype for Business and now we have the CVP. In between hearings, or in trying to set up hearings with lay parties, we are sometimes having to go back to them and say, "No, it is not Zoom anymore; can you get Skype for Business?" That has been quite tricky.

Carol has already alluded to the risk of people feeling that they are not really part of a hearing when they are on the phone. I have noticed a particular problem with interpreters, who fear butting in. We all have to be very conscious of that, and it is something that judges are taking notice of. You have to stop an eager advocate from butting in with the next question until the interpreter has fully explained or interpreted to the lay client what they need to know. People could quite easily be left completely bewildered if these precautions were not taken.

The other issue is that I have had hearings where people have had a room full of children because the school is closed. It is very difficult to allow participation of a party in those circumstances. It is also very difficult for people who do not speak English as a first language, if they have a physical or learning disability or any mental health issues: it all just adds to the complexity of inclusion.

The Chair: Thank you, I can see those difficulties.

James Sandbach: I would emphasise that the issues are different in different jurisdictions. You will see from the Legal Education Foundation report that within the civil courts, particularly the county courts where there were some significant problems at the early stages, at around 50% of remote hearings there were technical difficulties. But it works differently in different jurisdictions and in many of the tribunals there have not been many video hearings at all. In most, the practice has been either to dispose of cases on the papers or to have telephone hearings. Telephone hearings have slightly different issues from video hearings.

One consistent issue across the piece is that HMCTS has to go through processes and be able to notify parties and their representatives in good time. That is an issue across jurisdictions—unless the notification process happens in good time, you can get situations where the representative is not on the record as being the party's representative.

Q95 **Lord Faulks:** I declare an interest as a practising barrister, and my chambers have had considerable and rather varied experiences of remote hearings and processes. I would like to ask the witnesses whether their experiences tally with mine. For example, I am due to start a case on Monday, a culmination of six or seven years' litigation in which the family is very concerned about what happens. The courts are unable to inform us until 3 pm on Friday, or thereabouts, whether the hearing will be by telephone, which system will be used or, indeed, whether the hearing is going to happen at all. Is that something that is parallel with your experience?

Cris McCurley: I have certainly had that experience and I can concur that I have had that from court officers. I think part of the problem is that in so many individual courts the staff have been furloughed and things are being managed on a national basis. The judges do not know the people dealing with the listing of the cases and what medium is being used. That is certainly something that we could all improve on. As practising solicitors, we are being asked to take responsibility for the type of platform and the inclusion of all the parties, including any witnesses. That seems to be working slightly better.

The Chair: I can understand that if you are involved in a case that must be extremely worrying, whether you are the lawyer or one of the participants.

Q96 **Baroness Fookes:** To some extent, the question I had in mind has already been answered, but I want to concentrate particularly on those who are very vulnerable, are socially or economically disadvantaged or, indeed, have low levels of literacy. The impact, presumably, is greater on them, perhaps particularly in the family justice system. Is there any advice or help that you can give which would make it easier for them?

Carol Storer: I shall start with the difficulty that they face even just seeing their lawyer or getting advice, with offices being shut. The support mechanism that is usually in place for people who are involved in court proceedings has also had to catch up, so there are difficulties even before

they get into court: they cannot just pop in and see their solicitor in the way that they did; there will probably be phone calls and so on. There is also the very difficult position where people have no access to technology and therefore, in some cases, technology is being bought for people who are about to participate in court proceedings, because they would otherwise not be able to participate at all, far less participate effectively.

The Chair: Cris, do you want to add anything from your experience?

Cris McCurley: One thing we have been concerned about in my practice, and I know that colleagues have been as well, is the lack of sufficient IT. For example, anybody taking part in anything that is remotely contested must have a hard copy bundle, because it is very difficult for people participating by phone, a small iPad or something to be able to be taken to documents. We have been preparing as solicitors, or the represented participants have been preparing, hard copy bundles for litigants in person and managing the delivery of those.

It is very difficult when there are people with any disability, because the system is really slow in accounting for that. As advocates, we have to prepare really carefully and thoroughly to make sure that people's Article 6 rights are being adhered to within the court process, for a whole range of vulnerabilities.

James Sandbach: There are particularly vulnerable groups within the tribunal system. There are particular issues where courts are contacting vulnerable people and asking, for example, for a reference number. In social security cases there might be three or four different reference numbers. Will the client know whether the court is referring to their social security number, the reference number for the appeal case or the reference number for the medical assessment? It is those issues of communication that are key, and they go across the piece, really.

Baroness Fookes: Some of those points tax us as well, let alone anybody who is particularly disadvantaged. Does it also mean that there will be a long time lag before anything happens at all? That can in itself be a considerable pressure for litigants or people accused of something.

Carol Storer: Yes, there is a backlog in trials. This morning, a defence practitioner said of five-day trials that you can easily wait nine months for a hearing, and that was before the Covid pandemic issues. There will be a time lag, because not as many cases have gone through. There have been a lot of adjournments; there have been adjournments because cases are not appropriate to be heard at this time, or when IT issues have arisen and the case has not been able to proceed.

The EHRC did a report on how the criminal justice system is failing disabled people. Again, that talks about such basic issues as making sure that the court is aware that the person needs some help with the proceedings. It is about not just timely access and sharing information but about making reasonable adjustments and respecting fair trial rights.

It also suggests training for legal professionals to take this into account more.

The Chair: Lord Wallace, I think that comes to point you are going to pursue.

Q97 **Lord Wallace of Tankerness:** I have a preliminary question that someone raised in one of our previous witness sessions. What is your experience of communication between a litigant and their lawyer in the middle of proceedings? How do you keep it confidential—how does that happen practically? More generally, you have given us a description of many of the challenges and difficulties. Could you tell us what kind of support is available? Perhaps more practically, looking to the near to medium future, what would you identify as the next support that should and could be made available?

Cris McCurley: To go to the last point first, on what needs to be made available, we have a real issue about how witnesses can appear in court when they do not have IT. The family president has released his plan for the road ahead, as he calls it, to develop how we will get back to hearing contested hearings to reduce the backlog.

That absolutely has to happen, but when we have someone in difficulty technologically, as solicitors we are being placed in a position where we are asked to provide accommodation, office and IT availability—for people to come into our offices and give their evidence that way. It is basically just not possible. We have our staff working from home because of the risk to them. In many cases, we have open-plan offices. We cannot provide IT equipment to clients, because that would give them the ability to access confidential documents involving other people and other parties.

That is something we have to get to grips with and get our heads around and resolve. The expectation or the hope that individual solicitors' practices will be able to fill that gap and make the problem go away is not realistic. As much as we want to help, it really is not practical to ask us to do that.

James Sandbach: As to the other questions, there will be different needs in different jurisdictions and different areas of law. It will also depend on how each court responded. For housing possession, for example, which we will come on to later, there has been a complete stay on proceedings. That means that there is a massive backlog and the very significant issue of what will happen when that stay is lifted.

In other areas of proceedings, courts and tribunals have tried to deal with and dispose of cases. Some courts have adjourned, but others have tried to deal with issues at the interlocutory stage. To try to deal with a case at those early stages needs a lot more up-front advice. When you come on to questions about the response of the advice sector, that needs to evolve and be tuned up to all the different practices going on in the different courts and tribunals.

Carol Storer: There was reference to how clients and advocates communicate during the hearing. I will pick up on that, because that has been a considerable problem.

There have been innovative solutions, with WhatsApp groups between various parties. On the Law Society website, a solicitor from I think Lennons Solicitors gives some top tips for conducting hearings and things like WhatsApp groups. You label them very clearly so that you do not share information with the wrong people. It is a challenge. In Zoom, you can have breakout rooms. You need to have quite a lot of trust in the technology to embark on this.

The Chair: Indeed. Lord Faulks wanted to come in. Have we lost Lord Faulks? I think we have covered some of the points about the impact on lawyers, because he wanted to pursue that further. If he comes back in he can ask his questions later.

Q98 **Lord Pannick:** I can confirm what Carol said. If you are arguing a case, it is very difficult to look at a WhatsApp group chat at the same time. It is not an easy thing to do. It is much more convenient to have your solicitor and your client in the same room as you, giving you whatever information you need to respond to the judge. That is one of the problems.

Like Lord Faulks, I declare my interest as a practising barrister. We are all learning as we go along. I do not think that I had ever used Zoom or Microsoft Teams before March. Do you agree that one of the things we are learning is that, when this crisis is over, remote hearings will be a permanent part of the legal system? I suggest that that does not mean that the Old Bailey will close down and the Supreme Court will close its doors—of course not. But would you agree that there will be a permanent role for remote hearings, for example for preliminary hearings? James just mentioned interlocutory hearings. It is not efficient or convenient for everybody to go to a physical court room for a 15-minute preliminary hearing. We can do a lot more to save money to expedite proceedings by doing some of them remotely. Would you agree? If so, which proceedings?

Cris McCurley: In the family jurisdiction, we practitioners are still feeling our way along, as you rightly alluded to. We are learning as we go. Having the telephone or video hearings has meant a much more efficient system. Video hearings are a much better platform, because you can see people's faces. When it works well for non-trials, if I can put it that way, it works very well. We have found as practitioners that we have been much more efficient; you sit at your desk, the phone goes and you are invited into the hearing. You do the hearing. You probably had your conversation with your client beforehand to agree what will be said. You have probably spoken to the other advocates beforehand. The actual hearing time has been minimised, as has all the hanging about and waiting about time. To an extent, a lot of us practitioners have found it surprisingly a very good way to deal with court business.

The real difficulty will come with contested hearings. To begin with, we had no idea how long this was going to last and how long the lockdown would last, so a lot of contested hearings that had been waiting for trial were just adjourned off in the expectation that they would come back in fairly quickly. We have now seen that that is not the case, so we are having to look at opening the courts up, to having parties and judges attending court.

That is opening a whole host of other issues that we have to get to grips with. Presently, it is in the judge's discretion who has to attend in person if a contested case will be heard in court. It is not one size fits all, and we really need some consistency and proper guidance. There are, for example, the issues facing the BAME community, which accounts for 5.8% of the general population. The black African community is something like 3.8%. The incidence of death through Covid is 66% higher than we would expect it to be for that size of population. We do not know why, and we do not know how to safeguard against it. We need some real out-of-the-box thinking about how we manage this for practitioners, so that we can safeguard our staff and our clients. We need to be able to evaluate the risk assessments that have been done by the courts.

I agree that there has to be a balance and we have to get the justice system working appropriately to get this backlog down, but there is quite a lot of concern among practitioners about suggestions for ways to speed up trials. In the president's guidance, *The Road Ahead*, there is a clear indication that there will be an expectation that there will be no evidence in chief. As an advocate, that is how you ease your client into giving evidence before they have to face what might be some fairly abrupt, maybe even hostile questioning from an advocate for another party. It is very difficult to explain to someone who may be about to lose their children to the care system that they will not just be able to say whatever they want to say but will be limited to answering questions from other parties.

The case management that is proposed will mean that we are looking at a limitation on the issues that can be raised and can be tried at final hearings. Of course, that will speed up the process, but those of us who are front-line advocates are worried that it will leave participants who are having extremely important, life-changing decisions, in many cases, made by the court, feeling that they have not had a fair trial. We could see, along with a backlog of cases awaiting trial, cases waiting to go to appeal as a result of people feeling that their cases have not been properly heard, or their rights adhered to. That is a real concern and something we really have to work towards as a community and as a profession.

The Chair: Thank you, that is very interesting.

Carol Storer: I agree that for hearings where it is less contested, where it is interlocutory and particularly where the parties are presented, this is a way forward. I spoke to a solicitor at Philcox Gray yesterday who does family work and care work, who talked about her experience of hybrid

courts in which some people are in court and some are not. Throughout, a point I made earlier, it is really important that there is research, effective management of information and proper feedback from people about what they felt, how the court hearing was conducted and if it was effective.

It is also very tiring. I think you have to say that although there is the advantage of not travelling, it is tiring actually concentrating on the screen for a long time. You need to have proper breaks and a structure to the day. Also, as time goes on, there are the issues we have touched on, but it is like there is a matrix: there is a problem for people who are isolating and the problem of social distancing. As those things change in time, it will shift what the possibilities are with remote hearings.

James Sandbach: Anecdotally, we have had at least some positive feedback from social security appellant clients about telephone and remote hearings. Social security clients are often disabled people who do not find travelling to court easy and find appearing before panels overly intimidating, so certainly in that jurisdiction there has been some positive feedback.

Again, I think there will be different experiences in different jurisdictions. In family law, for example, social cues in proceedings can be very important. It will differ between jurisdictions, but I certainly think that remote hearings will be a part of the future justice architecture.

Q99 **Baroness Corston:** We have had some evidence of reduced availability of access to free legal advice. What is your assessment of the impact of the pandemic on the need for access to free legal advice and on the availability of that advice?

James Sandbach: This segues from the previous question, in a sense, in that there is a lot of unmet legal need. We do not know who the justice system and the advice system are not helping. The question of who is not being picked up is critical. We have seen in the civil system, for example, that most of the cases that have gone through the system have been helped by lawyers, and there have been fewer litigants in person than perhaps might have been expected at this time.

It is the people who have not been able to get legal advice who have then not been able to use the legal system, particularly in its digital form. So for all advice providers there has been a big challenge in being able to operate remotely and deliver advice and legal support remotely. In fact, the sector as a whole has come together very collaboratively and meets on a three-weekly basis in quite a significant roundtable initiative, at which the MoJ and statutory agencies are also present, where we discuss how to get advice to the most vulnerable.

There is still a problem of funding and capacity, problems that existed before the pandemic but that have now come into sharp focus.

The Chair: Cris, I see you nodding in agreement. Do you want to add anything?

Cris McCurley: I do. We are all aware that there has been a massive increase in domestic abuse cases. FLOWS, Finding Legal Options for Women Survivors, which operates from the Royal Courts of Justice, has been doing a brilliant job in linking people who need urgent legal advice with providers of legal advice.

One of the things we asked right at the beginning of lockdown was for non-molestation order applications to be made across the board, just for the period of lockdown—non-means tested and non-merits tested, just an immediate grant—because it is so very difficult for people to provide the evidence they need to provide to get legal aid, the financial evidence, in lockdown situations. Unfortunately, that has not yet been taken up.

One of the other problems that victims of abuse have faced in safeguarding themselves and their children has been the means test itself if they have any interest in any capital property. For example, if they are living in a refuge but in theory own equity in a former matrimonial home which the respondent is living in, they will be deemed to have access to that as money that they can just spend on legal fees and they will be refused legal aid.

Again, that is something that we have been addressing and we have been asking the MoJ and the LAA to address as an emergency, as an urgent issue, particularly at this time when so many people are finding themselves unable to get the protection they need for themselves and their children. That cannot be right.

The Chair: Yes, it is very worrying.

Carol Storer: On the need for free legal advice, even before lockdown people found it hard to find advice because of the reduction in legal aid and financial pressures since the years of austerity. Advice agencies and charities had financial problems. Some organisations have had to furlough staff, even though they have had a huge number of inquiries. I do not know how charities like Age UK and Shelter have managed, because the number of inquiries they have had has been increasing dramatically, yet they have had to close down shops and they have not held fundraising events.

I do not try to speak for them, but from the round-table meetings that I jointly chair with Sir Robin Knowles, we have been hearing about quite considerable problems being faced even by the larger charities that give advice. There are operational challenges at the moment about, for example, the use of home computers and security if it has client work on it. There are also mobile phone issues for caseworkers working from home: how do they ring their client? You do not necessarily want everybody you are dealing with to have your mobile number. There are operational issues. There will also be a lot of new questions about employment law. Citizens Advice is very helpfully providing data from its website, and on the increase in universal credit claims, welfare benefit questions and questions about furlough and redundancy—there is a huge

increase in questions on its site. It is a very challenging environment for people seeking and delivering advice.

The Chair: I now have a queue of people wanting to follow up on this. I will call Lord Howarth first, then Lord Hennessey, then Lord Faulks.

Q100 **Lord Howarth of Newport:** Covid-19 is making its impact on a system that has already been destabilised by the cuts in legal aid following the LASPO Act 2012. Can we take a broader perspective on this issue? The Ministry of Justice said that its purpose in LASPO was "to target legal aid to those who need it most" and "to deliver better value for money for the taxpayer". What are your views on how that strategy has been working out and on the interaction of Covid-19 with it?

The Chair: Who would like to come in on that?

Carol Storer: I suspect we are all being very polite, because we will all have a view on that one. There are quarterly statistics produced by the Legal Aid Agency and the most recent ones came out a few days ago. Legal aid expenditure was at its peak in about 2009, declined before LASPO and then declined massively after the Act came in. Where are all these people going? The intention was that they would go to advice agencies and others, but at the same time those agencies faced cuts as well.

The people who need help most are not being helped. Across the board, in respect of advice agencies and legal aid providers, it is absolutely bewildering for clients seeking advice to try to find out how to get help and what help they can get. I have been involved in legal aid for decades and even now I sometimes have to stop to think, "Is that person entitled to legal aid on that matter?" It is particularly complex in housing cases, for example.

As a society, we should be saying how important it is that everyone can get advice and enforce rights. I do not think that we should be ashamed of that. I feel frustrated at times that, instead of celebrating and building on the structure that there is, it has been dismantled to a point where some people feel that it is now almost impossible to make sure that there is proper support across the country and the ability to obtain representation for those who need it.

Cris McCurley: I agree. Last week we saw the publication of the private family law inquiry, which was led by the Ministry of Justice. One of the judicial comments in it about the family justice system that I read over the weekend is that the family law justice system is absolutely crumbling and simply cannot cope. That came from a senior judge who participated. That was before the Covid epidemic. It is about not just LASPO and the cuts to legal aid but cuts right across the entire court estate. We have had court closures, which we are struggling with now. We have had cuts to local authority children's services and adult services. We have had a tsunami of care cases, of public law cases involving children. We just do not have the resources across the board to provide an effective response.

It is about cuts not just to legal aid but to every part of the system. Covid-19 and the pandemic have thrown all that into sharp relief.

James Sandbach: I have a couple of follow-up points, agreeing with Carol and Cris. It is obviously well understood that there has to be a system of rationing for legal aid and legal support, but it is a very difficult problem when the policy approach has been to take large areas of law out of scope so that there is nothing available within that category of law. That has been the policy problem at the heart of LASPO. We encourage, facilitate and support pro bono projects specifically within the areas of law that are out of scope. Many of the clinics we support are quite small-scale projects. We do not expect them ever to be able to give the sort of capacity that used to be there under the legal aid system.

The second point to emphasise is that legal aid should not necessarily be seen as a silo, but rather as part of a package of support that people need when they interact with the justice system and public services. That includes assisted digital support if you are engaging in any kind of remote process and hearing. It is about not just the legal advice but the other support, the emotional support—for example, support for people in court and, critically, the assisted digital support to enable you to access the systems appropriately. The policy needs to look at legal support in a more rounded and holistic way. That change really needs to happen with the pandemic.

Q101 **Lord Hennessy of Nympsfield:** Am I right in concluding from your collective remarks that you think that if remote is to become the normal, as I think James put it in his first answer, we will be baking in a really intense dose of inequality that takes us a huge step further away from the founding principles of legal aid in 1949?

The Chair: Who would like to go first on that very big but very pertinent question?

James Sandbach: I think the technology has the capacity to both increase and reduce access to justice. It very much depends on the types of support available to people through the legal aid and advice system, but also through the courts service itself, in being able to access and use the technology. That is the critical gap in whether technology can help to level inequality or accentuate the problem of inequality of access to our justice system.

Carol Storer: I agree—we are at the start of such a complex issue. The courts service, legal aid lawyers and advice agencies have all made huge steps forward in the last few months with digital working, but there is a very real danger of people being left behind and unable to cope. I keep going back to the clients at the start of the journey. I did a lot of housing work for tenants and I worked at Shelter. One of the problems was getting people facing eviction to engage in getting any help at all. That is why the housing possession court duty scheme is important: it is a last-gasp effort to help vulnerable people get some help to avoid being homeless. Even for depression and the difficulty of getting to grips with

your problem, technology adds another level of difficulty. The technology could be a force for good in some cases, but we need to do a lot of thinking about it.

It is the third time I have made this point—I am sorry—but we need to keep monitoring and assessing how people with particular vulnerabilities feel about how the process is helping or not helping them.

The Chair: We have already mentioned the need for better information on all those things. Cris, do you want to come in on this, with your experience?

Cris McCurley: As a family practitioner, I think I speak for the majority of my colleagues when I say that when major, life-changing decisions are being made by the court or tribunal for a particular family, for the children, there really is no substitute for appearing in person. That is why I struggle with the idea of hybrid hearings or contested hearings by video link. It is a long, historic truth that we live by that judges need to see people to assess their credibility and the quality of their evidence. I know from when I have represented very vulnerable clients who have had to appear by video link that I have felt, they have felt, and other professionals involved in the case have felt that they did not come across as they would in person. I worry about the safety of decisions made in those circumstances.

As a practitioner as well, when you are able to see a client in person, you can give them a reassuring look or a "please shut up now" look; you can say, "Wait, I am going to ask that question". That was very difficult when we were doing things remotely.

The Chair: Yes, I can see that. If Lord Hennessy does not want to come back on that, we will move to Lord Faulks, who wanted to come in. Is this an appropriate moment?

Lord Faulks: It is. I am sorry that I missed some parts of the evidence session for technical reasons, but I want to pick up on what Cris and Carol said about the client. We are, of course, concerned about the constitutional implications of Covid. The right to a trial and a hearing in front of a judge, to feel that your case is being heard in a way that you like even if you do not like the result, seems to me to be very important constitutionally. We have all had to console clients who have lost, or who have not got the outcome they want, in terms of family law. It is much more difficult to do that, I suggest—and I would like the panel's comment—if they have not had the hearing they wanted, if it has been a hybrid hearing and they have not felt able to communicate with their lawyers in the same way, or that those intimate communications between lawyers and clients have not taken place. Does the panel feel that this is a real potential constitutional deficit, despite all the courts' best efforts to cope with the situation?

Cris McCurley: I do. It is something we will have to keep reviewing and evaluating as we go along. It is much more difficult to reassure a client if

you are not actually there. It is much more difficult for them to feel that they have been properly heard if they are not there. It is similar if they are limited as to what questions they can ask the person who wants to take their children away from them, for example. We need good systems in place so that we can take a step back from the hearing if we need to. I have seen that work quite well in the higher court, where I have had to take clients to one side, virtually, to deal with something that has come up unexpectedly within a hearing, and then been able to go back into the room and give a position on that. We need proper systems to do that.

Carol Storer: There is a very touching comment from a judge reported in the Nuffield review of what is happening post-Covid. The judge, he or she, says, "You have built up a sense of parents' expectations of what you can do for them … You adjust your views as you hear what legal representatives say on their behalf but also from watching and noticing responses and demeanour. You have to inspire confidence that you can be trusted with the information you have read, that you understand the issues, that you have a plan to resolve the dispute and that the process will be fair". I found that very moving, because it is not just a transactional process for the people involved.

Cris McCurley: One of the things I want to say, and I mentioned it earlier, is that judicial discretion as to who has to attend in person is with the trial judge in each case, and that can cause real difficulties if an advocate such as myself, for example, is required to attend in person. I am shielding—I am chronically asthmatic—so it would be very nerve racking and it would give me additional pressure if I had to attend court in person. However, the reality for my client, who I might have worked with for years, of my having to instruct a complete stranger to step in at the last minute to represent them, because I could not physically attend court, would be a real blow to them and to their confidence. They would have built up trust and a rapport with me.

We need systems in place for how we decide who has to attend court, decide what the guidelines are if the person cannot attend and decide who can be excused attendance. At the moment, we are confronted with, "Advocates must attend if required to by the judge", and it cannot be one size fits all. We have to have a process by which we hear submissions on that and a traditional decision is taken after hearing all the pros and cons. I think that is just another thing that we are going to have to build into this process as we go along.

Q102 **Lord Howell of Guildford:** I would like to ask the witnesses about juries, which is rather an emotive issue in the light of our history. What are your views on the possibility of removing the need for juries in some types of case to help with the backlog of justice, which was, of course, there before the pandemic and is much worse? Which types of case could one identify as no longer requiring juries? It would be very helpful to have your views.

Carol Storer: I chair the Law Society's access to justice committee, which covers criminal as well as civil legal aid, pro bono and general

access to justice issues. This is an issue I feel very strongly about, as do the Law Society and the Bar Council. Yes, there is a problem with delay. Pre-Covid—I am very grateful to a solicitor who this morning answered a question I had asked about this—there were approximately 38,000 trials in the system. That backlog was caused by the Ministry of Justice restricting judges' sitting hours and, of course, a number of buildings have been stalled. It was, it seems, a cost-cutting exercise that led to the backlog and, of course, Covid-19 issues have caused further problems.

Jury trial, trial by your peers, is only a small proportion of the cases involved in the criminal justice system because most are dealt with in the magistrates' courts, but it is such an important principle for this country and for our justice system. It ensures that ordinary people are directly engaged with the justice system, and I think that for many communities, to have a jury of your peers is fundamental to their support for the justice system. Given the discrepancy particularly in respect BAME people, where there is a very small number, for example, of black Crown Court judges and a very high proportion of BAME people in the system, it is fundamental that the right to a jury trial must continue.

James Sandbach: Criminal trials and juries are not Law Works' area of expertise, so I would not want to give a view on it, but I think that all of us on the panel would agree that jury trials are a bedrock of our constitutional and legal architecture, ensuring that people have a fair trial. They should not be put aside lightly in any way and I refer the Committee to the pilot and evaluation done by JUSTICE of how to do a remote jury trial. At the very least, that establishes that it is possible, and it should be looked at. Whether it is desirable, again, I leave to others.

Cris McCurley: The very limited experience we have of the Diplock courts has given us a flavour of what issues could arise out of having a lack of jury trials. I agree with Carol: there are systemic reasons why we have a backlog in the system. We would do better to address those systemic needs than to take away this bedrock of our judicial system.

Lord Faulks: I entirely understand that there is a strong feeling on the panel that we should not do away with jury trials just because there is a pandemic, but the position is pretty acute. As you have quite rightly identified, there is a huge backlog anyway. It is being made much worse by Covid. I wonder whether you can help us on this: it is possible in many common law jurisdictions for a defendant, notwithstanding their right to have a jury trial, to choose—to have it heard and to get it out of the way apart from anything else—to have their case heard by a judge and perhaps two magistrates, or some alternative mode of disposal. Providing that they are properly legally advised before making their choice, is that not a way to reduce a backlog without undermining the basic principle of right to trial by jury?

Carol Storer: It would be far preferable to investigate ways to hold jury trials, even if there will be social distancing. I have not looked at JUSTICE's physically separated jury in the detail that James has, but that

is another possibility that needs to be looked at. You could hold jury trials by finding venues where the jury could socially distance. Obviously, people are always worried about short-term fixes that stay for ever. If I remember my history right, was income tax not brought in as a short-term measure? It has been going on for a long time. People are genuinely very concerned about the erosion of the jury trial even for a short time.

There are enough judges. It is been expressed to me that some Crown Court judges have been tearing their hair out because they have not been sitting very often. They see this huge backlog, but why can venues not be found for available judges to take on more trials, instead of being, in some cases, two weeks on and two weeks off, and process more cases? Let us not erode rights. Let us get enough money in the system to enable jury trials to go ahead. As a country, we built those Nightingale hospitals. It would be much simpler just to find a few more venues for jury trials. I would still argue against any erosion of the jury trial.

Cris McCurley: Practitioners are already advising their clients about the benefits of summary jurisdiction—of being heard within the magistrates' court. Those who are suitable for that will obviously take it. That is happening already. I wholeheartedly agree with Carol. We need to make sure that there is money in the system, rather than just say that there is no money so we will not have these rights. That is a dangerous road to go down.

James Sandbach: I would urge the Committee to look at JUSTICE's report on remote and socially distanced jury trials. The evaluation from that has been very positive and the people who have taken part felt very much engaged in those proceedings.

The Chair: This is a big question that will no doubt be raised on many occasions. Shall we move on?

Q103 **Baroness Drake:** My question is on the suspension of house possession proceedings. We have had some reference to this already. My specific question is: what will the backlog of cases look like when the stay on possession proceedings is lifted? What will be the consequences of proceedings resuming, in particular on access to support for people involved in such cases?

James Sandbach: There is very significant concern around this. The Master of the Rolls has formed a working group to try to work on solutions. There is the demand that came into the system pre-lockdown, and all the tenancy problems and disputes that might have developed during lockdown could lead to a tsunami of cases once the stay is lifted. There has been widespread support for the stay as both a public policy measure to protect people and to prevent homelessness, but also as a way of managing housing cases during the pandemic. However, it will be a massive backlog.

One of the most fundamental policy changes that needs to take place is in respect of the Government's commitment well over a year a year ago

to make some reforms of tenancy rights, in particular the so-called no-fault eviction provisions in Section 21 of the Housing Act. That legislation has yet to be brought forward. Just bringing that legislation forward in itself would help the position, as would some reform of ground 8 for housing repossessions, and the pre-action protocol procedures. It should be an ongoing matter of public policy that we recognise that people have had financial problems as a result of the pandemic, but that they should not be losing their homes. The responses of the court and of government need to be more joined up on this issue.

Carol Storer: It was a very good initiative by the Master of the Rolls to bring together a working group to look at this. Many law centres and private practices provide the duty schemes for possession hearings. They are all heard in blocks, so you can have 20 or 30 or so cases easily in a session at court. They have had none of that work over the last three months. There is concern about who will be around to assist people in the future. We want to make sure that they survive. The scheme needs to be in operation from day one of the stay being lifted. The Legal Aid Agency has been looking at ways to do that. I do not think that a lot of progress has been made, but representative bodies have been putting forward suggestions for how to advise in future and how to give access to people whose cases start going back to court. It is to be hoped that there can be some progress on these suggestions.

Cris McCurley: To go back to the changes under LASPO, the cuts in scope and the rates of pay in the housing sector have led to massive deserts over the last 10 years in housing advice provision. We have a small housing department. It is really difficult, based on the work we are able to do within legal aid scope and the rates of pay we are able to achieve by that, to expand. We cannot expand because it is so difficult just to break even as a practitioner. Like many practices, our housing team is looking forward with trepidation to when the scheme opens up again and the housing courts are fully functional, because we are one small practice wondering how we are going to cope with demand. Probably many, many others are in the same situation.

Q104 **Baroness Drake:** On the issue of support for people who are faced with these possession proceedings, and the reference to more joining up between the courts and government policy on this, what top two things would you want government to do at the moment, be it action or legislation, to boost the support available to people caught up in these possession cases?

Carol Storer: They would be the reform of the no-fault evictions, and making it clear what advice is available on notifications of possession proceedings, as well as making sure that that advice was available so that there is funding for legal advice. Sometimes you can get a list of lawyers who are around your area and could notionally advise you, but actually they are very short-staffed and cannot give advice. Meaningful advice should be available.

James Sandbach: I absolutely agree with Carol on that and add that the pre-action procedures could be looked at to ensure that being referred to advice is built into them.

Cris McCurley: I would say proper funding, and proper support. I share Carol's concern about who will be left after this long drought of work and people not being able to make a living as housing practitioners. Who will be left in the system? That needs to be looked at very carefully.

The Chair: Thank you very much, all of you, for those answers and for all your answers this morning. You have dealt very efficiently with quite a wide range of issues, and I am very grateful to all three of you on the panel. What you have told us will be very helpful to us. Thank you for your contributions.