HOUSE OF LORDS

Select Committee on the Constitution

Uncorrected oral evidence: Constitutional implications of Covid-19

Thursday 9 July 2020

3.05 pm

Watch the meeting

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

Evidence Session No. 9 Heard in Public Questions 105 - 118

Witnesses

I: Simon Davis, President, Law Society; Caroline Goodwin QC, Chair, Criminal Bar Association; Derek Sweeney QC, Vice-Chair, Bar Council.

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Examination of witnesses

Simon Davis, Caroline Goodwin and Derek Sweeting.

Q105 **The Chair:** This is the Constitution Committee of the House of Lords. We are conducting an inquiry into the constitutional implications of Covid-19. This afternoon, we are looking again at some of the problems that have arisen so far as courts and tribunals are concerned. Our witnesses are: Simon Davis, president of the Law Society; Caroline Goodwin QC, chair of the Criminal Bar Association; and Derek Sweeting QC, vice-chair of the Bar Council. Good afternoon to you all.

May we start by getting your general impression of what has been happening during this pandemic? How have the courts and tribunals been able to respond in their different jurisdictions? What different challenges have they been facing? We will come on in detail to some aspects of this, but could you start with a general impression? I will take you in the order on the paper. Simon Davis, perhaps you would like to start.

Simon Davis: I am indeed the president of the Law Society of England and Wales. I represent the many thousands of solicitors across England and Wales we are going to be talking about today. Also, by way of information, I sit on the board of LawWorks, the pro bono solicitors charity. My starting point, and a thread that will run through much of the session, is that, of course, so much in our answers and information will differ from jurisdiction to jurisdiction. It must be right for me at least to start by making it clear that many parts of the criminal and civil justice system were already in crisis before this current crisis arose. That was due, as we all know, to decades of underinvestment, court closures and slashed legal aid. The coronavirus crisis has exacerbated brutally the system's shortcomings.

A very positive part of this story has been the reaction of all the individuals involved: judges, barristers, solicitors, legal executives, HMCTS staff, and of course the victims and witnesses who participate. It is a great success story, but that success story must not mask or draw a veil over the serious shortcomings of the system. Shortly, it very much varies according to whether physical presence was a fundamental part of the system. I have had a long career as a commercial litigator and the kinds of cases I was involved in regularly did not involve the clients having to be there, or, to the extent they were involved, apart from a trial, they could easily be connected remotely. There has not been such an impact on those types of cases. Across the other jurisdictions—family, immigration, crime—where physical presence is so important, and where so many of what I loosely call clients are not digitally sophisticated or enabled, the impact has been far more serious.

The Chair: That echoes some of what we have heard already. We will go into more detail. Caroline Goodwin, would you like to make an opening comment?

Caroline Goodwin: I thoroughly support everything that Simon has said. The position was particularly acute in the criminal courts and the

Crown Courts because at the back end of March, from 17 to 23 March, we had a complete cessation of trials. HMCTS staff were ill. A number of buildings had to be closed and some had to be mothballed entirely. That meant there was a real urgency to ensure that cases that were already listed within that very short timeframe of the Covid-19 break coming in had to be dealt with in a timely way, and had to be dealt with openly. We now had this problem where people could not come into the buildings, but there needed to be access to those hearings and access to justice throughout. There was a terrific reaction by the judiciary, the Bar and HMCTS to try to pull that around. I would emphasise, if I may, that the pandemic has merely shone a light on an accruing problem that had been growing for many months, and had been spoken of and warned of: the Crown Court backlog of trials.

The Chair: Thank you. Derek Sweeting, do you want to make an opening comment before we go on to more specific points?

Derek Sweeting: I am the vice-chair of the Bar Council of England and Wales, which represents barristers. The point you made at the outset, Chair—that this has differed between different jurisdictions—is very well made because, whereas the senior courts have been able to keep going, albeit at a reduced rate, the picture has been different elsewhere. The family courts have done well. There is an imperative there to keep going because cases are often more urgent. However, the county courts and tribunals have seen a huge level of adjournment. That is surprising given the message we were given by the Lord Chief Justice in March of this year that, wherever possible, there should be remote hearings and that it is possible to conduct much of the work done in those jurisdictions remotely. That has come as a surprise.

One of the real issues in giving an assessment is the data. We have very strong anecdotal evidence from members of the Bar about the problems, and I am sure we will come on to this, but looking at what the data is in relation to levels of adjournment, for example, has been very difficult. Obviously the criminal courts, on the point Caroline makes, have been hardest hit. It has only been in the last month or so that they have been able to re-open, at a trickle which is gathering pace but is hardly a deluge. The real point with the criminal courts is that there was a significant backlog already, and that has only been deepened as a result of the Covid-19 crisis.

Q106 **Baroness Corston:** What impact has Covid-19 had on the need for access to legal advice and on the availability of legal services?

Caroline Goodwin: Perhaps I could start—

Derek Sweeting: To make an obvious point—sorry, Caroline.

Caroline Goodwin: Derek, do go on. You are the senior man.

Derek Sweeting: The obvious point is that clients have only been able to access legal advice remotely. Their access to advice has been proportionate to their ability to access the internet and to have suitable devices. That has always been a concern with any suggestion that we

should move to a situation in which advice is routinely given only through remote or internet means. The other problem—I am sure Simon will comment on this—is that most of the legal advice in the country is given by solicitors, and a great many them have been on furlough.

Caroline Goodwin: An absolutely massive problem has arisen, particularly for those clients coming into the criminal courts and those who are remanded into custody. It is commendable that HMCTS and the Prison Service have rolled out the video platform CVP. Unfortunately, it is just not sufficiently available within prisons. Bearing in mind prisoners are on 23-hour lockdown, solicitors have not been able to get access to prisons to see their clients, and barristers have not been able to utilise video suites for access to their clients to take instructions. It has caused huge issues in dealing with those cases; when they are finally listed, the barrister's ability to provide a succinct way through the problem has been hampered because they have not had a chance to take instruction from their client.

More money has been promised to fund the rollout of CVP into prisons. I know at the moment there is a list of about eight prisons, including Strangeways, Pentonville and Wormwood Scrubs, which this week are due to get those slots. In the meantime, access to clients is absolutely at a premium. The CVP platform runs in parallel with a number of hosts for the Crown Court. If they are being used for the Crown Court, you cannot use them for a conference with your client. It is really desperate. It is very important that we have that funded as soon as possible and it is rolled out fast.

Simon Davis: I might approach it slightly differently because I am conscious that we are going to talk about lawyers an awful lot today. I want to talk, because it is such a good question, about the people, whether you call them the clients, the victims, the defendants or the claimants. A category we must not overlook is those who may not have come into the system in the first place who otherwise would have. At the beginning of this year, we carried out with YouGov one of the largest pieces of research ever commissioned about legal needs. We found there was a major swathe of people in this country who lack legal confidence and who are not sure what they are doing. They are the ones who are least likely to be coming forward and getting legal advice. I know from LawWorks that the number of litigants in person has fallen away. That would seem to suggest that there is a category of people out there who have not come forward to access justice at all. I would be very worried about that.

A good example is the family courts. There has been a spike in domestic abuse cases. That is perhaps understandable as there are people at home, in financial dire straits, in very difficult circumstances. The person who wants to access legal advice might be at home with the abuser and may have little access to technology. This is the kind of person we really need to worry about very much during the course of this session.

Lord Howarth of Newport: We all fear that there may be a large rise in

unemployment and poverty. There must be an anxiety that this is going to compound the pre-existing problems, in particular the lack of availability of free legal advice. Do any members of the panel have any reflections on what the added responsibilities of the Ministry of Justice are going to be in this situation? I noted that when Simon Davis was paying tribute to a whole lot of players who have risen to this crisis very well, he did not mention the Ministry of Justice.

The Chair: Simon, do you want to come back on that?

Simon Davis: In that case, so that my friends—I use that word deliberately—at the Ministry of Justice do not think that in some way I am slighting them, I would absolutely include them in the list of those who have risen to the challenge. At one particular stage, I was speaking with others, including Caroline, to the Ministry of Justice every single day of the week. Lord Howarth, I am happy to include them.

The important point going forward will be to try to treat the system of justice more like the NHS, in the sense of, rather than waiting until somebody has become a litigant in person, preventing that person becoming a litigant in person. We need to look at what we are doing to prevent people coming into the system of justice in the first place. I am absolutely convinced that what that means is more early availability of what I call preventive legal advice. Right at the very beginning, we should spend some money to give people some reassurance about debt, housing, social security and the like—the most common problems—to stop them coming into the system in the first place. That is a responsibility that government needs to address urgently.

Q107 **Lord Sherbourne of Didsbury:** This question is probably directed more to Simon Davis in the first instance. I want to talk about law firms and legal professionals. The general question is: what has been the impact, broadly, of the pandemic on law firms and legal professionals? The particular question concerns your view of the impact on legal aid and the situation for the high street criminal legal aid practitioner.

Simon Davis: The Chair has given me a minute or two or perhaps even less to cover that, so I will speak quickly. The key to this is activity. Activity keeps solicitors and barristers busy. Everything stopped. There were no trials and virtually no immigration work. Personal injury work pretty much collapsed. Conveyancing moved away from the courts. That cessation of activity meant a cessation in cash, put bluntly. People had to go on furlough. It was very serious.

By the way, do not consider that the larger firms are, in any sense, immune. The timing is going to be slightly different for them. They have deals in the pipeline. They are now worried about global recession and whether there are going to be cross-border deals and whether the international work is going to keep coming. That is where you see them conserving cash and partners not paying themselves any money for the moment. Their time is going to come.

Legal aid is an area where people are shockingly underpaid. I would quickly make that point. Someone going to the magistrates' court gets a set fee of just over £50 for an appearance where they may be waiting most of the day to appear. For a trial, they are going to get between £130 and £140. Those in the criminal legal world do not make money in the magistrates' courts. They make the money, if they can, in jury trials—no jury trials; no money. Additional work will flood into the magistrates' courts, making these people's position worse.

The Chair: Caroline or Derek, do you want to add to that?

Caroline Goodwin: Certainly. In respect of the Bar, this has been the most crippling episode ever, for junior barristers and senior barristers alike. Our entire fee structure is built on trials—no trials; no significant income.

I will be candid. We have been very grateful to the CPS for its fantastic reaction and for rolling out a creative scheme that allowed us, effectively, to dip into some of the fees that were available, but the future is grim. The very large multi-handed trials cannot be listed at the moment because of the difficulties with social distancing and Covid-19. Those are the real backbone of the financial push into chambers. They cover all our expenses. We have not, unlike the hospitality industry, received any relief around business rates. Because we are self-employed, we cannot furlough ourselves. We have been outwith the threshold for self-employed income help and support. We find ourselves in a very dire situation.

Surveys conducted by the CBA and the Bar Council have indicated that chambers will be in significant difficulty, as we are seeing with other businesses, in or around September, because we will have had no trial work since March. Having three or four trial centres with one court running at the moment is beyond minimal. We desperately need some sort of cash package from the Treasury. Thus far, any requests have fallen on deaf ears.

I am afraid this has a very important knock-on effect on the development of pupillages. The way in which we operate means that we provide the funding for pupils ourselves within chambers. If we do not have the wherewithal to pay our own necessary staff and the work still is not coming on stream—for example, when furlough ends and we need to keep those staff on—we are facing a dire future. We are such a finely balanced bespoke profession anyway. We really are looking at very hard times. It is not the bank of mum of dad. I heard this from a Minister when I was speaking with them and looking at the financial package. The bank of mum and dad is no longer there. We are the most socially mobile profession at the moment. We need to keep it that way, but we need help. If we do not have trials, we have no income.

The Chair: That is interesting. Derek, did you want to come in there? Sorry, we can't hear you for some reason.

Derek Sweeting: I was dutifully muting but I will not do so in future. Picking up on what Caroline was saying, we are concerned about structural damage. That is the point. The Bar in certain sectors is extremely fragile, not just because of the way we organise ourselves and the way we have historically done business but because, particularly in the publicly funded sector, it has been cut to the bone. There are other sectors as well. Personal injury practitioners, for example, who do not enjoy legal aid support on the whole now, have seen a downturn in work, and are also in a position where they are worried about the sustainability of their chambers. That works through to not only pupillage but retention. We already have a problem retaining people in certain sectors of the Bar—particularly women in their mid-30s. That leads to a knock-on impact on recruitment to the judiciary and the senior ranks of the Bar. The problem of potential structural damage identified in the Bar Council's surveys, if we have to keep going with a minimum amount of work, is very concerning. There is no alternative. If you deplete the resource, it is bound to have an impact because, at the cutting edge of advocacy, barristers provide in the senior courts the resource that the justice system relies on.

Lord Howarth of Newport: Caroline Goodwin drew attention to a CPS programme. If the CPS has a little more money to fund prosecution, what about defence? That takes one back to Simon Davis's point that the justice system should surely be funded as a public service, as an organic system and a coherent service. Does it not need to be funded evenly across the totality of it?

Caroline Goodwin: Absolutely. At the moment, we are just about to move into part two of the criminal legal aid review. That obviously has been delayed because of Covid-19. The reality is that the fees that are paid into the system generally are so behind.

I am going to go back to the CPS. We had to wait 18 years before we had any improvement in the fee structure. That only came in in 2019. We are looking forward to a new regime. We likewise need the MoJ to push investment in the Bar. This comes through to the final question posed by your panel today: what is the short-term and long-term need? The long-term need, and indeed the short-term need, is to invest in the Bar and invest in the criminal justice system. You cannot keep taking an axe to it and expecting it to perform. It is coming to a situation now where we are literally surviving on petrol fumes. We cannot go on. Good will only lasts for so long. We need the Treasury to step up to the plate and have a coherent, well-thought-out approach to criminal justice and spending. Do not get rid of the Forensic Science Service. If you are going to employ more police officers to catch more criminals, you are going to need more courts to deal with it. You are quite right that it needs to be homogenised.

Simon Davis: May I deal specifically with Lord Howarth's very good point about the CPS and the level playing field? The CPS of course contains some very fine solicitors. That is not the point. In August last year, it was

given £85 million a year and it has gone out on a major recruitment drive. Good for it. It is seeking to recruit some 350 people. However, where is it recruiting them from? It is recruiting them from the defence side. Defence solicitors are woefully underpaid. They are not coming into the profession and are leaving pretty pronto when they see how much—or how little—they earn. Why not go to the CPS? You will get more money and a pension. Right now, we are hearing that the CPS is also hiring administration staff. They are now going there as well. The level playing field is far from it. It is entirely tilted, with the defence profession going down the proverbial pan.

The Chair: Thank you for that salutary warning. Lord Dunlop, mention was made of data earlier, but I think you wanted to follow up on that point.

Q108 **Lord Dunlop:** I wanted to ask about data collection, which is clearly very important in understanding how different groups using the court system have been affected by remote proceedings, and how this impacts on access to justice. In some of our previous evidence sessions, a number of witnesses have raised the collection of data as an area of concern. Derek highlighted that as well. What improvements are needed to data collection in the courts and tribunal system in the light of the experience of operating through the Covid-19 pandemic?

Caroline Goodwin: It is not just a mathematical calculation. The data needs to consider the outcomes of these court cases as well, particularly when we are looking at the use of remote hearings. Data collection needs to be looked at in a much more subtle way than just looking at the number of cases coming in, the number of cases that are dealt with and those that are waiting to be tried. We need a very clear system going forward that allows us to produce models. I am going to repeat the point about multi-handed trials. We cannot get those listed at the moment. We need to know how long those cases have been in the system. There needs to be a very rigorous approach to that, because obviously this backlog is creating a problem. A lot of the datasets we have at the moment are quite vague. If you go on to the government tables, they literally say "an offence of violence" or "a sexual offence". They do not drill down into the nature of the offence. We need to know how many defendants are involved or if there are vulnerable witnesses in those cases. It needs to be very much more thorough so we can look to a better listing regime in future. From my perspective, that is—[*Inaudible.*]

The Chair: We seem to be developing a technical hitch there. While we try to get Caroline's linkage fixed, Derek, are you indicating you would like to come in?

Derek Sweeting: Certainly. I mentioned this in my first answer. I would like to say the answer to Lord Dunlop's question is that there is room to have a lot more granular data collection, but it is more fundamental than that. The problem is that even basic information is not available, and, where it is available, it is not shared. That is the second half of this equation.

On 4 April, we made a request for data on the level of adjournment, because we thought there was a very high level of adjournment in county courts and tribunals in particular. We were simply told from week to week that the data was not yet ready to be published, leading to the chair of the Bar having to say publicly that we were being fobbed off. It was not until 11 June that we got that basic data on what the level of adjournment was. In fact, the data we have is opaque and unhelpful in certain respects. We have asked for some clarification. We were told we would get it. We are still waiting for it some weeks down the line.

The problem is that the timely provision of basic information like that simply does not seem to be part of the system. Indeed, I note that Lord Keen was asked about this; there was a question posed by Lord Falconer about the level of adjournment. He said that comprehensive figures for adjournment are not held for—this is the list—family courts, civil courts, magistrates' courts, Crown Courts and most tribunals. We are starting from a baseline of not even having comprehensive data about the levels of adjournment.

When we got the data on 11 June, in relation to the civil jurisdiction, for example, you might have thought that the purpose of the data was to make the case that a lot of hearings had in fact been listed, until you looked at the footnote. The footnote said, "Hearings include the administrative adjournment of cases, which do not happen in open court. The number of hearings includes those originally scheduled to take place during the specified period, regardless of whether they subsequently went ahead or not". That is a data capture failure of the first order. We need that information. The answer to a lot of these questions cannot simply be based on anecdotal experience of members of the Bar. We need to start getting basic data collected and shared.

Simon Davis: I will avoid repeating the points that Derek has made and just dovetail into them. A great deal of data is captured, but not necessarily of the right kind. We have data, and it is out there, about work levels at court, how many hearings are taking place and which courts are open and closed. Therefore, the Law Society was able to provide a very good heat map about that. The data is all about hearings. The kind of data we badly need is data about people. That is where there is a deficiency in the system.

You will have seen—indeed, I think she gave evidence before you—that Natalie Byrom produced a report back in October 2019. She went through in exhaustive detail the kind of information we need about people so that we can work out who are the people that the system really needs to look after. By that, I mean details about whether they are litigants in person, about mental health, race and the digitally excluded. That kind of information is not available and has been asked for for some while.

I have seen, and it is in the coronavirus recovery plan put forward by HMCTS, that it is going to seek to obtain information about the vulnerable. That is a welcome step forward. I would therefore endorse the point made by Derek about needing to have proper information about

what is happening in hearings, but add to it that we really need to focus on the data about the people who need to have confidence in the system.

The Chair: That echoes what Caroline was saying earlier. Thank you. Lord Dunlop, do you want to follow up?

Lord Dunlop: How does all this impact on the court modernisation programme? Are each of you confident that the lessons we are learning during this process will inform the court modernisation process and, where necessary, bring about changes to that programme?

The Chair: Simon, shall we start with you?

Simon Davis: I was rather hoping you would start with somebody else. It is always dangerous to say that one is confident. In relation to government, I have been saying things for years, certainly in the context of legal aid, and every now and then I feel confident that something is going to happen but it does not. I am confident, however, because there are so many people who are so interested in getting this subject right, that something will happen. I do not think there is any shortage at all of good will or talent at HMCTS. Susan Acland-Hood and her team seem to me at all times to be absolutely committed.

However, ultimately, this will come down to whether government has the appetite to invest the money that is required to ensure that the modernisation system is not simply a question of IT but is absolutely targeted at those people in society who are most in need of the system and most at risk. I would hope that your Lordships' influence will assist in this context. We are all shouting loudly and saying the same thing. I would never go so far as to say I am confident, but it must happen.

The Chair: Caroline, we have you back now. Do you want to add anything?

Caroline Goodwin: One of the dangers of this period is that the Coronavirus Act has expedited our ability to introduce more remote hearings. Historically, we have been able to have witnesses give evidence absent from the Crown Court. It is very important to understand the impacts from the participation side on either a witness or the defendant. They may at times feel slightly isolated from what on earth is going on. That is a real fear. We are concerned that this is an opportunity to gather data around that very fact before people become very happy with remote systems, not really taking into account the need for everyone to participate in those types of hearings. They are in a very short snapshot of time. We have very dysfunctional opportunity for conference.

The whole point about being involved in a justice system is that it is seen to be done, and you feel that you have had a fair crack of the whip. We are very concerned that when people leave hearings with results that they may not like, they may feel—I keep using that word—that they have not had a fair hearing. There needs to be real analysis now, and time and

investment in that, before we roll out remote into areas where, in reality, it is going to have a negative impact as opposed to a positive impact.

The Chair: Derek, did you want to add anything?

Derek Sweeting: I think Lord Dunlop's question was really about the court reform programme and the impact on data collection. I would like to think, given we have all been working in a giant laboratory and we have done things quickly which would otherwise have taken years, that there are going to be lessons learned. Our approach to it, as it was when the court reform programme started, is that there are a lot of basic things to fix before we start getting ambitious about having entirely automated online hearing systems and on so. A good example, and an impediment to collecting data at the moment, is that we are always told when data is not available that the county court is still—in 2020—a paper-based system. That is in sharp distinction to many other jurisdictions around the world. That could be addressed. That is the sort of thing that would improve data collection immediately. It has certainly not been addressed so far in the court reform programme. Our message is to get back to basics: the quality of the buildings and the computerisation of what we do. We do not need a new house. We need proper repairs and upkeep of the one we have at the moment.

The Chair: Mention was made of virtual hearings. Baroness Drake, I think there are specific thoughts you want to follow up on there.

Q109 **Baroness Drake:** The last questions naturally led us into virtual hearings. Mine is a broad question, but it sets the scene for the more granular questioning that I am sure will follow. What would you identify as the key benefits, risks and challenges of remote hearings for courts and tribunals?

Caroline Goodwin: In so far as benefits, it means that we can bring on hearings in a more timely way. That is very important because we do not want things being delayed more than they already are. The challenges include selecting the right type of hearing suitable for a remote hearing. It also includes an enormous amount of preparation and triaging so that the time you have in your hearing is well managed and utilised.

The difficulty around this is that at the moment the technology is not necessarily good enough. There are equality implications for defendants who have learning difficulties or communication difficulties. It can become very one-sided. There is a real fear that there will be a distinct cohort of individuals who will not find this sterile form of interaction a useful forum in which to involve themselves with the justice system. There are a number of challenges. There are some positives. It needs to be looked at very carefully.

Derek Sweeting: One of the benefits not to be overlooked is that virtual hearings have kept a great many people safe. They will and should continue to do so while there is a threat from the virus. That is why we should not abandon remote hearings any time soon. The other aspect I

was struck by was when a junior member of the Bar told me this week that, in the course of about 16 months, he had completed the circumference of the earth travelling backwards and forwards to court in London and in the Midlands. That is a very significant impact if you multiply that by the number of people who are attending court. Reducing the amount of travelling time and emissions will have a wider effect. It is not unheard of, and it has not been unheard of during the pandemic, that people have had to travel from London to Cardiff for very short hearings that could easily have been conducted remotely. The real benefits are that we can keep safe, we can cut emissions and we can have hearings that do not need to be dealt with in person conducted in the most time-efficient and resource-efficient way. Those are the primary benefits.

The risk is mostly that the perception of justice, if it is delivered remotely, is a different one. There are some hearings, particularly those that involve evidence or hearings that are dispositive of issues between the parties—they are going to resolve something—where people do not feel justice has been done unless they are there. It is very difficult to do justice unless you can hear and see people in the flesh. There is a watershed with some hearings plainly on one side of the line and some on the other, and I suspect the attendance of witnesses, where that is necessary, is probably a rough divide between the two.

Simon Davis: I would make a similar point. You are assisted by two very detailed reports, albeit they are only snapshots, and to an extent some of the more well-resourced cases. Those are the reports from the Civil Justice Council and Nuffield. Flowing from them are remarkably similar results—or perhaps, not that remarkable but natural, bearing in mind the points already made by Caroline and Derek.

The benefits are clearly going to be an end to the need to travel to court. We must not overlook the huge success of this jurisdiction in relation to international litigants. I have heard that a benefit of that is that international litigants have felt more engaged because they have not had to fly to the UK. They can flick open on their desk Zoom or Teams, or whatever is being used, and go straight into a hearing. In fact, they may get more engagement. Clearly, there are going to be savings of time in relation to case management and directions hearings and the like. I can see some real benefits there.

The downside is that our system has a very proud oral tradition and a tradition of fundamental engagement of people—not just justice being done but being seen to be done and feeling to be done. People come into the system as a last resort to get help. You will have seen a significant number of people in both the very detailed surveys who clearly do not consider that they are experiencing justice at this time. There is an interesting quote from the Surrey work, from a defendant. He said when he appeared in a video hearing, "It felt like I was watching it. It's like you're not there". That massive sense of disengagement is one that will run through much of our discussion. It will point very heavily to video

hearings not being suitable in many cases where you have contested evidence and people and children and livelihoods involved.

The Chair: Baroness Drake, did you want to follow up on that?

Baroness Drake: Thinking about the Ministry of Justice moving towards more efficient online and virtual courts and virtual hearings, as regards your own engagement with it, how sensitive do you think it is to the cases and jurisdictions where there is a need for people to be present, and a need for people to feel they are engaged and have access to justice? How significantly are those considerations, in your view, weighing in the MoJ's consideration of how to move forward?

Derek Sweeting: That is an interesting question. The Legal Services Committee of the Bar Council was involved in some of the video hearing pilots, particularly the earlier ones with the Tax Chamber and so on. I suspect it was selected because it was the least likely to involve people who really wanted to be there.

Having said that, they were not entirely successful. They had a range of technical issues. Nobody was particularly fussed about not being there, but very few people elected to go down that route. Pre Covid, it was pretty mixed. The potential for cost-saving was plainly a driver. I get the sense that one of the things we have established as the result of what I described as the giant laboratory we have been working in is that some hearings are simply not appropriate for the use of remote hearings.

I do not think for a moment that HMCTS and the MoJ are not receptive to that. They are anxious to find out from our experience, and the experience of judges, just how successful things are. They are tiring and difficult. There are problems with connections and so on. I did three days in the Court of Appeal last week very successfully, including the court hearing from witnesses, but there is no doubt that it is a very different experience, even at the appellate level. Where there are contested proceedings, the appetite for turning everything into a virtual court, if that was ever the direction of travel, has changed.

Q110 **Baroness Fookes:** Clearly there are some grave disadvantages with remote hearings, but have you any suggestions that would improve the position, particularly for litigants and lawyers? I am particularly interested in the vulnerable people who have already been mentioned, who may have learning difficulties or literacy difficulties.

Derek Sweeting: The issue of digital exclusion is a very real one, for a variety of reasons. When the court reform programme flagged up that the increasing use of digital platforms and methodologies and so on was part and parcel of the reform, the Bar Council had identified in its response that that community—people who were excluded from the use of digital means—was going to have to be considered carefully. That has not gone away. Again, we have demonstrated that all that has happened during the pandemic is that a lot of people who might have been able to access legal advice through traditional means have simply not tried

because they cannot get on to the internet, and so on. Digital exclusion is a real problem.

There are practical ways around that. I know the Family Law Bar Association has suggested that it might be possible to have banks of suitable devices that could be accessed. You could go and use one or be given a computer for a period. In a way, that is no different from the response to digital exclusion in education, of course. We know that giving children who otherwise only have phones or perhaps a shared tablet their own computer or laptop is transformative for their ability to engage with lessons and so on. The same must hold true for litigants. There ought to be some ability to facilitate that through the use of hardware and software, perhaps by going somewhere that might become an analogue for a court in some ways. That needs to be thought about.

You asked about the position of the profession. At the moment, what would assist more than anything else is some consistency of approach. We are going to come on to that. There needs to be, either from the judiciary or from government, some sense of precisely where we ought to be opting for virtual hearings, without trammelling judicial discretion in any way, or where we ought to be defaulting to an in-person hearing.

The Chair: I think Lord Wallace would want to follow up at this stage.

Q111 **Lord Wallace of Tankerness:** In your evidence so far, you have made clear that there are some cases which you just do not think are suitable for virtual hearings, and on the other hand the county courts are still so paper-based when they do not need to be. Looking forward to the time when we do not have the same requirements for social distancing, and when, hopefully, the health concerns have abated, looking across jurisdictions, what kind of cases do you think would lend themselves to virtual hearings in the future and which ones simply do not now or, if people are considering it in the future, should not in the future?

Derek Sweeting: Very shortly, preliminary hearings, case management and cases which involve solely legal argument are all cases in which there is no impediment to their being done remotely. Whether they should be in each individual case is a different question, but the starting point could be that those sorts of hearings are amenable to being done remotely. The other side of the line is hearings in which witnesses are going to give evidence. We know that can be done successfully over remote links, but, primarily, those should be hearings in which there is still physical attendance.

The Chair: Caroline, did you want add anything there?

Caroline Goodwin: At the moment there is the roll-out of something we call section 28, which you may have heard of in your previous discussions with other consultees. This is the preparatory cross-examination of witnesses in advance of a trial. That is one way in which we have been able to utilise the remote system as a whole. That is going to be very important as we begin to tackle sensitive cases. That is certainly a very

distinct area where it can be utilised with great success, we would have thought. Non-contested matters, non-contentious matters could be dealt with as well as extension of custody time limit cases. There is a whole cohort of cases that is eminently suitable for this.

Cases which are not suitable are those which are very sensitive, or which have difficult and complex sentencing regimes, because you can often have the complainants wanting families to come to court to see what is happening. We cannot disengage everybody from the process. The whole point is that it is meant to be about open justice so that people can be part of it. We have to be very careful that we choose the correct hearings to be dealt with remotely. A lot of preliminary hearings are certainly ideal candidates for the use of remote hearings.

Simon Davis: All I would add to that is to remind ourselves how is it that these people, leave aside for a moment crime where sometimes people have no choice, are in court at all? By and large, it is because this is the absolutely last resort for them, when all other avenues have been tested. They are not necessarily looking for an outcome. Of course they want an outcome which is in their interests, but what they really want is for their voice to be heard. They want to say, "I was injured. I want you to listen to me. I want you to help me". We have to be very careful to avoid carving up what is suitable and unsuitable. The reality is that we should be starting with what is in the interests of this person who is coming before this court. Therefore, I would agree with the previous speakers. Data is fabulous, but that old phrase should be adopted: data must be our servant, not our master. We must not allow data to drive us to say, "If only we did this, we could speed up a certain hearing".

The public need to have confidence in what is happening here. We must not allow what has happened during this crisis to shift the alignment of the whole system. I am wholly supportive of us cutting out a great deal of time which I am sure has previously been wasted with people hanging around in courts. With some remote directions hearings, people can be in two or three courts within a matter of moments, which they were not able to do previously. This is all very good news. For procedure, admin and organisation, it is perfect, but when people come to the court because they are expecting to sit in a courtroom and be heard, I would be very wary about trying to say some of those hearings are suitable and others are not.

The Chair: Lord Faulks.

Q112 **Lord Faulks:** May I first declare an interest as a practising barrister? I have heard what all the witnesses have said. It is extremely familiar. We know there were backlogs, particularly in criminal work, before the pandemic struck, caused partly by the reduced number of sitting days. Lockdown was 23 March. I have to say as a member of the profession that I am pretty embarrassed by the fact that this backlog has become worse and worse and worse. It threatens, I should have thought—and I would like your views—to compromise the reputation of our justice system. I absolutely appreciate that there are certain hearings that can

be dealt with remotely reasonably satisfactorily, as we have just heard, but there is an irreducible number that have to have a proper trial. Bearing in mind what other countries have done, or your own views, I would like to know whether you think anything could be done to reduce the backlog.

Simon Davis: Following my previous refrain, I very much believe that at the heart of our system of justice is the search to provide a solution to a person's problem. That means that the way in which the system should work is right at the very beginning people should be given advice as to whether they should be proceeding at all, or do something sensible, and, as you move forward, encouragement to be transparent and open with everybody else, and try to reach a resolution. A trial or a final hearing should be the absolute tip of the iceberg. Once you have tried to settle and tried everything else, it is the responsibility of the system to deliver that trial within a short timescale, as rapidly as possible.

Taking crime, before the crisis, a very good example of the backlog is that in January 2020 we are told a trial would take place in January 2021. How can that be right when we are talking about somebody's liberty, or right for the victim or witnesses, to wait for a whole year? In employment right now, I understand that a trial is to be listed for March 2022. When was this remotely appropriate in our system of justice? The short answer is something must be done. I am not being naive. Of course there will always be lags in court time, but it cannot be right in these kinds of cases for such a time to elapse. That is why the professions are absolutely taking part in whatever working group we can climb aboard on, to seek not just temporary solutions. We need to start talking about the courts and court space, and particularly about making the best use of judges, courts and temporary judges. Frequently, they were not being made use of. Let us get stuck in and reduce the backlog before the public start to lose confidence in our system.

Caroline Goodwin: I would support that. Since lockdown there have been more committees than hot dinners looking at how on earth we can address the backlog. The fact there is an immediate problem does not necessarily mean that we should simply bring in a quick fix to get rid of it. Before we even reach that stage, we have to ensure that we have maximised use of the facilities that we have, and that includes buildings. I am not entirely satisfied that the buildings we have across the Crown Court estate are being used to their maximum. We must do all that before we look to more dramatic measures, measures that we have not contemplated since World War II.

Obviously, that is easier said than done. We are looking at everything. I genuinely do not think anyone can be criticised as to the efforts that have gone on. Those efforts must go on until there is no other option. That may include looking at a reduction in jury numbers, but we are not there yet because we have not concluded all our work around the other areas. We are looking at moving types of court cases into other buildings, to free up custody suites so that we can operate. Never mind pop-up courts, which is one of the questions that comes later; why do we not have pop-

up prefabs in car parks for juries to use, thus freeing up the space within those buildings so we can utilise the Crown Courts themselves? There are so many options to look at before we start looking at more dramatic measures.

Derek Sweeting: The real problem with the backlog is the one Simon identified—delay. The result of that is fatigue in the long run on the part of litigants, even those who do not want to be there. Not everyone is a claimant and there to maximise their position. What that leads to in the long term is a loss of confidence in the system. There is a very significant risk posed by the backlogs as a result of the delay that they will introduce into the system. Of course, the point is that this is not even due primarily to Covid. It is due to the fact that we have been caught out in allowing a backlog to develop. Suddenly, the interruption of the usual business of the courts has meant that it has got up to a limit where it is going to be very difficult to do anything about it in the short term. I would agree with Caroline. Before we start looking at measures which might impinge upon rights that people have enjoyed for hundreds of years, we need to start thinking about whether we are making full use of the capacity and systems we presently have. That means full use of the court estate and such other buildings as might be used to hold trials in, full use of the judiciary, including the part-time judiciary, and ensuring that our system is running efficiently. It is only when we have done that that we ought to think about doing anything more radical.

Q113 **The Chair:** Caroline, you mentioned pop-up courts there. The committee has been told there is a real need for many new court venues across the country. Who has been consulted or involved in discussions about pop-up courts? What kinds of problems do you think they are going to create?

Caroline Goodwin: There have been a number of working groups looking at the opportunity to utilise buildings. HMCTS has had a wide group of staff going out to identify buildings. A very careful risk assessment was drafted up as to what was required. A fraud trial with defendants on bail has very different requirements to a trial of individuals who are involved in serious crime and need to be in a dock because they are coming from custody, and are, for example, category A prisoners. There is a big programme under way at the moment, but we really need to have it guaranteed that these buildings are going to come onstream. We were told there were going to be some 200 buildings required to be put into the system. Thus far we believe only 10 have been officially signed off and there might be another 40 or 50 in the pipeline. Everyone has certainly been consulted. There is a lead from HMCTS dealing with this.

It is likely to be the situation that family cases and civil cases are moved across into these buildings to free up the custody suites in those multi-trial buildings. That is the most precious aspect of those buildings. We also have to defer to PECS. They are the individuals who transport people from the prisons to the Crown Court. They have to look at very serious security measures around the transportation of defendants. That is one of the issues that has to be fed into the equation. Also, we have to add in

the position with the utilisation in docks of PPE. We are beginning to look at different ways of social distancing. The whole thing is a moveable feast at the moment. That is why there is no one-stop solution as we begin to move through this process.

The Chair: Baroness Drake, you wanted to come in and follow up on something.

Baroness Drake: One particular area of backlog was raised with us in previous evidence. It was said that the lifting of the suspension on house repossession proceedings was potentially leading to a perfect storm, with backlogs of vulnerable people and charities and high street lawyers' availability to give advice in significant decline. Do you have any better view of that emerging as a particularly imminent challenge in the backlog situation?

Simon Davis: As we know, and to an extent for understandable reasons, all possession cases were suspended. Of course that has had the knock-on effect that the work of those solicitors, who were already underpaid, but at least were getting some work that way, has stopped. You are absolutely right that there is therefore a pent-up demand which is going to come out in pretty short order. In relation to the way that is going to be dealt with, I think one of your previous witnesses, James Sandbach, who sits with me at LawWorks, was suggesting there may be ways forward in relation to some kind of legislation. I am not aware of there being any easy fix. It is symptomatic of the whole problem. As for any idea that we are going to move back to the old norm, which, as you have heard from all witnesses, is not where we ever want to get back to, or an idea that there is going to be a rapid fix, I do not see it.

Derek Sweeting: On that question, I would see that as part of the point we were making earlier that a great many of the hearings that have taken place during the pandemic have simply resulted in business being adjourned. There is going to be a pent-up demand. Adjournment in relation to possession proceedings was for slightly different reasons, but, potentially, there is a great volume of work now in the system which has simply been time shifted and will have to be done at some stage. That is why the backlog is not just a backlog of fairly routine matters now. It is a backlog of things which will take time and effort to resolve, because the hearings are likely to be contested.

On the point about pop-up courts, which is where we started, that is nothing new. I can remember sitting in lots and lots of local authority buildings. If you went to Northampton, you did most of your civil work in either the town hall or round the corner. I remember prosecuting for the SFO in Chichester Rents, which was just a commercial building used by the Courts Service to deal with the overflow of fraud trials. This is the point Caroline was making. Those trials do not normally require a lot of the paraphernalia of security you get in other criminal proceedings. There is a good track record of pop-up courts being used. We ought to be doing that at the moment. As I was saying earlier, that is a way of extending

the capacity of our present system to do what it already does, and it is what we should be doing.

The Chair: Let us move on to jury trials. You have mentioned that to a limited extent. Lord Howell, you wanted to come in on this at an early stage.

Q114 **Lord Howell of Guildford:** We come now to juries. We have already touched on aspects of the jury issue. We have a number of questions. For a start, how is this going to fit in with social distancing, which, frankly, is going to be with us for some time to come? What does this do to the whole system? What pressures does it put on it? How are they going to be resolved?

Caroline Goodwin: In so far as the Crown Court is concerned, there are a number of challenges. You have the assembling of the jury. You need a room of sufficient size for them, and it requires great creativity, so that they are sitting them in an area where they will be safe. An example I gave you is of pop-up portakabins in car parks which can provide a large enough suite of rooms. A lot of older buildings, and indeed the newer buildings, just do not have the corridor space for people to be walking in and out. There is the layout of the court. The jury box is obviously not designed for social distancing. There is an experiment under way to provide Perspex dividers between jurors. It is being looked at by Public Health England. There are 12 people sitting in the usual way but they are provided with dividers around them, like a Perspex box, so they are safe. There are a number of factors being looked at. I am afraid this takes a little time. That is an example of one aspect. Once we understand how that can operate, we can begin to roll that out and we can start criminal trials.

However, I think it is fair and right that I am candid. The biggest problem that we foresee is the listing of multi-handed trials, where you have three or four defendants. That is because of the limited space in the dock. The security around those prisoners will mean that you may not necessarily want them to have in their hands additional PPE in case there are problems. We are having to look at a number of alternatives there. That may include looking at the way in which the indictment has been put together. There are so many different factors that we have to consider at this time. You may have seen that we have taken a more imaginative approach. It was a bit like a court in the round. The jury was sitting in the well of the court where counsel usually are, and counsel were sitting up in the jury box, to allow social distancing. There have been some very imaginative steps taken forward, but these are all taking time. We have to accept that this is going to impact on the backlog. There are those who are remaining in custody throughout. These are not easy solutions, but they do not require a knee-jerk approach bringing in something which, with a little bit of investment of time and thought, could be handled in a very much more sophisticated and better way.

Simon Davis: Happily, this area is moving fast in the sense of ingenuity. It is again held up by lack of data. I am not sure that the information and

data on, say, the number of three-handed trials is even available. You have the experiment taking place in Leeds with the Perspex screens. I get back to the point that the secret to the way forward to this is ensuring that there is effective use of the existing court estate. All too often in any kind of issue the answer tends to be, "Let's go and find what else there is", rather than looking at what is under our nose. One member of our team has already pointed out that in Bristol seven of the 10 magistrates' courts are sitting there empty. It comes back to whether there is sufficient attention being paid to what is right under our nose in relation to existing capacity and existing judges, fee-paid or otherwise, before we waste too much time perhaps looking way beyond. To the extent we are looking at the estate, are we ensuring that we are looking at buildings which may well be available to be taken up by courts?

Derek Sweeting: HMCTS is doing some modelling around what is required and it is beginning to share that with us. The starting point is that we are unlikely to have a shortage of judges. That is the first thing. There are lots of part-time judges as well as regular judges. Many of the part-time judges are themselves criminal practitioners and are underemployed at this moment. We need a sufficient number of spaces or courts in which to allow as many hearings as possible to take place. That seems to me to be the starting point. That is why an assessment of blackstone or nightingale courts, and the effect that could have on capacity needs to be done urgently. Of course, that is going to require urgent investment. There is cost to that. It is a cost which we ought to be prepared to pay, rather than trying to interfere with other aspects of the system which are much more fundamental to its fair operation.

The Chair: Lord Faulks, do you want to follow up at this stage?

Q115 **Lord Faulks:** I have two points. First, picking up on what you have said about using existing buildings and infrastructure, what do you think about, for example, night hearings or sitting throughout August? Maximising the available judicial talent that you have told us about might help with the backlog. The second thing I want to ask about is jury trial. I certainly do not suggest to you that there should be a knee-jerk response characterised as doing anything to jury trials. It is also not a very good idea to start making radical changes simply because the opportunity presents itself. None the less, I would ask for your comment on a situation where somebody would normally be tried by jury, where they will have to wait for a very long time, perhaps in custody but even if not in custody, subject to bail conditions and so forth, with the uncertainty of outcome. If they are properly advised, what is wrong with their electing for trial by a judge alone or a judge and two magistrates, if it is their choice, and they are not having someone force it on them? I do not understand the problem with that, but perhaps you can enlighten me.

Simon Davis: Perhaps we could approach this as a feast of two courses. I will deal with the first and perhaps leave it to Caroline and Derek to talk about the second, which is the notion of extended hours of the kind that Lord Faulks has just outlined. I need to speak almost in words of one syllable as to the seriousness of the condition of the criminal solicitor

defence profession as we speak. Before the virus, individuals were not coming into the profession because they could not make a living. The average age of the criminal duty solicitor now, the person you rely on to come into court, is heading towards 50. The workloads are heavy for people who are doing a day job and who are then expected to wait up all night for the court at the police station. These are firms which have most of their employees out on furlough and the burden of the work is often falling exclusively on the senior partners. These people are making no little money through the magistrates' court and are facing bankruptcy. For it to be suggested that perhaps they do some extra work or more hours hides the fundamental problems that those people face. They often have caring responsibilities or may be at risk in travelling. I am talking about weekends and evenings. This is not a tolerable position for them.

I understand why it is said if that will not work, how about doing something else with the jury system. In relation to the jury system, after a fly-past at 30,000 feet, based on what I hear from the solicitors out there, this is in no sense a temporary fix for the person who is tried and convicted, or, in the eyes of victims and witnesses, tried and not convicted when they consider that person should have been. This may be a temporary fix for improving court timings. It will not be a temporary fix for the person involved. I will leave it to Caroline and Derek to talk about choice, we should certainly not, in any sense, implicitly be mandating or pressurising anybody to abandon an otherwise fundamental bedrock of the legal system.

Caroline Goodwin: Dealing initially with the point about advice and a judge and two magistrates, the reality is that it is not an approach that is welcomed by the profession. We have balloted on it very recently and it was rejected out of hand. As we understand it, that no longer remains on the table. Also, I think you would find in real terms that most people, if they have a choice of electing for jury trial or going for a judge and two, will go for a jury trial. That deals with that.

Coming to the point about night courts, one has to look at who is going to be involved in those hearings. There are going to be prison staff, HMCTS staff, CPS staff, and those people who are defending, as Simon has said. I think you will find that there is, first, going to be no appetite for it. Secondly, it is not going to remunerated in any way which would be seen to be acceptable. Thirdly, they are incredibly unsocial hours. Fourthly, if you are looking at trials, one very important group is the victims. We have already had discussions with victims groups and they are not at all keen on putting additional stress upon victims coming to court at awkward hours. At the moment, that is not being considered. You will also have to get the judiciary there late at night, Lord Faulks. You might need to consider that a little further. I certainly think that is a problem and it needs looking at.

At the moment we are looking at trying to rationalise the working day because we do not want working hours which are discriminatory to a very important group of practising barristers and solicitors, and that is women

at the Bar. These are unsocial hours and there have been a number of reports which have demonstrated that those who tend to suffer quite significantly when these types of hours are brought in are women at the Bar. Women have fought for a long time to ensure that they have parity in the types of cases they do. We would not want to involve ourselves in anything which promotes a discriminatory way forward, because it is not a way forward.

The Chair: Derek, do you want to come in on the back of that?

Derek Sweeting: On the really substantive question of a judge alone, I tend to regard that as a bit like plea bargaining, a "what could possibly go wrong?" type argument. Logically, if you could elect, however well you were advised or not, trial by judge alone, it would apply potentially, would it not, to every offence which is tried in the Crown Court? The reality is that you would be taking a pretty big bite out of one of the bedrocks of the jury system. It is our system and it works very well.

Could I inject something into it about how well it works? You will know that there have been two fairly recent studies into ethnicity and fairness in the justice system. The most recent one was a reconsideration of the facts of an earlier one on ethnicity and the fairness of jury trials. The conclusion of that study was that the one stage in the criminal justice process in England and Wales where members of BAME groups appear not to be treated disproportionately is when a jury reaches a verdict by deliberation. In other words, statistically, you are no more likely to be convicted by a jury if you are black than if you are white. In fact, the study says it goes the other way. Now is not the time to be interfering with a fundamental right which underpins our system. As soon as you start taking a chunk out of it, you are doing damage to it, and we should avoid doing that.

As to extended operating hours, they are deeply unpopular. It is being thought about at the moment. As Caroline says, it has a disproportionate effect on areas of the Bar where we have been working hard to ensure that the Bar is representative of society, and that we do not lose people at a stage when they are a loss to us all: to the judiciary and to the senior ranks of the Bar. That comes at a price. If we are going to do it, it needs to be done on well-thought-through terms and in consultation with the Bar.

The Chair: Lord Hennessey, I think you want to look to the future.

Q116 **Lord Hennessy of Nympsfield:** This afternoon you have painted for us a very vivid and convincing picture of a system in deep trouble. You are part of this great social laboratory of Covid, as one of you put it, living off petrol fumes and occasionally feeling you are in some bizarre video game. Out of this dreadful experience can good and lasting things come? If I could give you a magic wand to wave over one area where good could be made to come out of this experience, where would it be? Cheer us up.

The Chair: Who is going to cheer us up? Simon, do you want to come in?

Simon Davis: Almost every day, I open my newspaper and have a happy smile as the money tree is shaken and money comes from it in abundance. There was some welcome news recently of some money going into the courts for maintenance. In short order, we need a proper injection of money into the system to ensure that people want to become criminal lawyers. That will mean that people are able to get high-class representation, as they should, and people are able to go into court knowing that they have been helped to get there, and are only there because it is absolutely necessary; that they are there within a reasonable timescale, and they are going to get a fair hearing.

That all requires proper investment in not just the professionals, but ensuring that judges are not, as they were before the virus hit, in some cases, sitting there without business to do because the funding was not there. I hate to finish by talking about cash, but there is no substitute for a proper investment, if, as we consistently say—and I have been on platforms for so long and I shared one with Lord Faulks—that the system of justice in this country should be the envy of the world. If we mean that, we should do something about it.

Caroline Goodwin: I too would support massive investment, given that it is an unprotected area, and we have suffered slash after slash each and every year. Shockingly, I would like to see some joined-up thinking as to what on earth is going on with any of these budgets which are going to be deployed. If we are going to have, as I said earlier, more police officers, we are going to need more court buildings and an increase in probation staff. We are going to need an improvement in prisons and prison space. We are going to need an increase in forensic scientists.

Last but not least, but incredibly importantly, I would like someone to recognise the efforts of the criminal Bar. Those barristers who go in day in and day out need to be paid on a proper basis. Because we are lagging so far behind, we are expected to do more and more. You will never find a barrister doing the job who does not want to do the job. It is an absolute vocation. It is a privilege being a barrister. It is a wonderful career. But we cannot be treated in a high-handed way, as happens all too often. I want to emphasise that here today. It is vital for the future of the Bar that there is investment in us and that we are looked after. We are unique, we are bespoke and we are very fragile.

Derek Sweeting: The question was looking for good news. I might pick up on the fact that both the Lord Chancellor and the Lord Chief Justice have said publicly recently that we have done much better than comparable jurisdictions. It is not easy to find out what those comparable jurisdictions are, or indeed, what measure is being applied to reach that conclusion. On the face of it, that ought to be good news. If we are talking about comparable jurisdictions, the point that I would like to make is that we are virtually alone in western Europe in not having maintained or increased the funding of our justice system over the last 10 to 15 years. At 39 pence per day per person, which is roughly what it costs at the moment, we are well behind comparable jurisdictions. That is

a deficit that we need to make up if, as Simon says, we are going to maintain the reality, not just the fiction, of having a justice system that is the envy of the world.

Q117 **Lord Howell of Guildford:** Despite Lord Hennessey's plea for happiness, the picture you have projected this afternoon to us, and it is a picture we have had from other witnesses as well, is of a justice system facing very great challenges indeed; a dire future, hard times, backlogs, overload. All these things existed before the pandemic began but have been made much worse by the pandemic. One has to ask what is going on in our society. Simon Davis said we must somehow prevent people from coming into the system, and therefore reduce the overload, but it does not seem to be working. On the other hand, before the pandemic the estimate was that the crime rate was falling somewhat—by about 5%—in this country. Are people resorting more and more to legal means to access the justice system? Is this a trend of our times? Is it driven by the fire of the internet and digital changes or an increase in population? What is your judgment as experts in the middle of this as to why there is such a heavy pressure on this part of our society?

Simon Davis: That is a deep and philosophical question.

The Chair: Your colleagues are not jumping up and down to come in before you.

Simon Davis: That is why solicitors and barristers make such a great team. There are a number of factors to think about. The first is what is happening during the course of this virus. Lockdown is clearly going to be causing very substantial strains, which have led to domestic violence and the kinds of issues I have talked about. There are going to be greater problems caused by the virus.

As to your bigger societal issue, the experience of criminal solicitor professionals—my profession—is that, before the virus hit, many individuals would have been released under investigation rather than being pursued and charged and going through to the courts. As a result, of course, you are going to see less court work and on the face of it less crime. Adding to the perfect storm that is currently raging among the criminal legal profession, for some reason, perhaps because the police are concerned at the criticism which has been levied in relation to release under investigation, you might have been under investigation and out there but now you are receiving letters saying, "Please come to court". Suddenly there is a burst of additional activity which may account for the apparent surge in the crime rate. That is going to lead to further work for the solicitors involved.

I am not at all sure that I am in a position to comment as to whether as a society we are now more litigious. In the context of litigants in person, it may well be that here are people, and let us talk about family, who had they been able to speak to a solicitor, and qualified for legal aid, may have sorted out the problem without the need to go to court. That is what I mean by, I want to keep people out of the system. That is not because I

want to deny them access to justice, but to give them the legal advice and the support they need at the beginning to sort out their problems without having to go to court. That would certainly be an explanation as to why you are seeing more and more people coming into the courts. It is because they have not been able to obtain the kind of advice they need at the beginning to stop them going through to the courts.

In the context of the criminal world, there might be people now who are pleading guilty much later in the day when, again, had they had the benefit of proper effective advice from somebody they trust, they would have pleaded guilty at an earlier stage and not gone through the courts. I suspect there are all kinds of factors out there rather than one that suggests that as a society we have become more litigious or more criminal.

The Chair: Lord Howarth, you wanted to come in. I will ask Derek and Caroline if they would like to make a summing up comment.

Q118 **Lord Howarth of Newport:** All three of you have spoken very eloquently about the need for greatly increased investment in the justice system, but the fact that that investment has not taken place seems to me to be due to a political problem. Governments think that taxpayers are not willing to foot the bill for a decently funded justice system, or that insufficient of our compatriots take the view that a properly functioning justice system is an indispensable feature of a liberal constitution. Even if they do not take an idealistic view, they might consider that, as a matter of self-interest, it would be worth having a properly funded justice system, because a very appreciable proportion of our population, at some point in their life, will be engaged with the justice system. You are all passionate about justice. What are your views on how we shift that public perception and educate the public to the point at which politicians can no longer say to themselves, "We can get away with it. It is not popular to fund the justice system"? How do we create a clamour for a properly funded justice system?

Derek Sweeting: That question and the last one are wide and philosophical in their ambit. It is difficult. My reaction, to some extent, is that there are areas of our public life where we elect the Government to make decisions like that. I agree that there is a deficit in public legal education. There is a need to communicate better with the public about what lawyers do, what they contribute and what the advantages of ensuring our system is well funded are. However, as in many areas, including defence, education, health and so on, those difficult decisions are decisions which politicians ultimately have to make.

If it is not apparent to ordinary members of the public, it ought to be apparent to many politicians now that trying to regard the legal system and the justice system as a sort of silo from which you can keep on taking out, on the basis that it will always be kept going by those involved, is just not sustainable. Like many other areas of our complex national life, if you start hacking away at the justice system and underfunding it, you get knock-on effects elsewhere. Those effects are

felt in social services, education, the prison system, and more generally. Those are decisions which politicians ought to be making sensibly and responsibly. If it was not apparent 10 years ago, it must be apparent now that there are very significant risks and costs associated with underfunding.

The Chair: Caroline, do you want the last word?

Caroline Goodwin: The formulation of the question has just answered why it is absolutely vital that we keep the jury system. It is so that people are engaged in justice in some way and individuals are judged by their peers. If we do not have that, and there is this increasing trend to see justice as a very separate issue, which is only important at a convenient time, such as if there is a problem with, for example, an individual running amok and causing violence and mayhem, we are in grave danger of losing what is the most important and central plank that surrounds us every day. Even during Covid-19, standing in a queue all comes back to the rule of law and how we behave. It is absolutely vital.

One thing we have attempted to do throughout this last year is highlight those areas where important members of the community who have been involved in very difficult cases have not had a case heard, or have had delay, or have experienced the injustice of the system—which all comes down to a lack of funding—so that they are publicised. That is all we can do. We can generate that interest by putting that information out there. For example, there are elderly individuals who are having to wait 18 months for their trial to come on and victims of sexual offences who are having to wait two or three years before their trial comes on. Unless those types of figures are publicised, I am afraid we are not going to get the politicians coming through. A lot of it is about soundbites and what appear to be very attractive vote winners, such as longer sentences. We need to keep pushing on doing exactly what we have started to do, which is become more media savvy in putting that information out there. We are not an ivory tower and we have to share. We need to keep the jury system and we need to keep engaging.

The Chair: Thank you all very much indeed. We have had quite a wide-ranging discussion. It has reinforced some of what we have heard already and given us some other things to think about. We are very grateful to all three of you for coming this afternoon and giving evidence. We now close this session.