

Justice Committee

Oral evidence: [Criminal legal aid](#), HC 1069

Tuesday 22 May 2018

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[Watch the meeting](#)

Members present: Robert Neill (Chair); Mrs Kemi Badenoch; Ruth Cadbury; Alex Chalk; Bambos Charalambous; David Hanson; John Howell; Gavin Newlands; Victoria Prentis; Ellie Reeves; Ms Marie Rimmer.

Questions 1 - 109

Witnesses

[I](#): Daniel Bonich, Vice-Chair, Criminal Law Solicitors' Association; and Richard Miller, Head of Justice, The Law Society.

Examination of witnesses

Witnesses: Daniel Bonich and Richard Miller.

Chair: Good morning, gentlemen, and thank you for coming. Both of you are familiar faces by now. This is a one-off session that the Committee is conducting into criminal legal aid. I am grateful to our witnesses for coming to give evidence.

At 11.30, if we have not concluded our proceedings by then—we may have done—the House is going to observe a minute’s silence out of respect for the victims of the Manchester bombing exactly one year ago. We will do that in the Committee if we are still sitting.

We will deal with declarations of interest, and then I will ask the witnesses to introduce themselves. I am a non-practising barrister and consultant to a law firm.

Bambos Charalambous: I am a non-practising solicitor.

Ellie Reeves: I am a non-practising barrister.

Victoria Prentis: I am a non-practising barrister.

Alex Chalk: Barrister.

Q1 **Chair:** Mr Miller and Mr Bonich, we have had some written evidence and you have come to talk about the issues. Perhaps you could introduce yourselves and your organisations for the record.

Richard Miller: My name is Richard Miller. My job title is head of justice at the Law Society. My role involves overseeing our response to legal aid issues, pro bono and the HM Courts and Tribunals Service reform programme.

Daniel Bonich: My name is Daniel Bonich. I am vice-chair of the Criminal Law Solicitors’ Association.

Q2 **Chair:** That is national—England and Wales?

Daniel Bonich: It is a national organisation that represents solicitors across England and Wales—

Q3 **Chair:** Who specialise in criminal work?

Daniel Bonich: Indeed.

Q4 **Chair:** Thank you. Perhaps we can just take a step back before we get on to the immediate issues in the two current schemes and the changes to them that are proposed. Is it fair to say that the legal aid scheme as we know it goes back to about 1988, and there have been changes since? As I recall, when it started there was an annual uprating.

Richard Miller: Yes.

Q5 **Chair:** When was the last annual uprate, however?

Richard Miller: In 1998.

Q6 **Chair:** It is 20 years since there has been any inflationary—

Richard Miller: There have been 20 years with no inflationary increase.

Q7 **Chair:** But the 1988 scheme envisaged an annual uplift to reflect inflation.

Richard Miller: It did.

Daniel Bonich: Yes.

Q8 **Chair:** But that has not happened.

Richard Miller: Correct.

Q9 **Chair:** Am I right in thinking that in 1988 the idea was to make it broadly commensurate with the rates paid for prosecution work and for private work? How did that operate in practice?

Richard Miller: That is right, yes. At the time, the rates paid under legal aid were a little bit below the rate paid for private work. The basis of that was that it was Government funding and therefore guaranteed, so some discount was considered reasonable, but it was broadly commensurate with the returns from private work. Because of 20 years of no inflationary increase, plus a series of very significant cuts, we are now at the situation where legal aid rates are probably, at most, a third of the rates paid for private work. That would be my estimate.

Daniel Bonich: Yes, I think that is fair. Factoring in the inflationary loss alone, if we go back to, I think, 1997, it is a cut of about 42% in real terms.

Q10 **Chair:** Forty-two per cent.

Daniel Bonich: That is without taking into account the actual cuts, such as the most recent 8.75%. For every £100 that was spent in 1997, it should be £175 now, and it is much lower than £100.

Q11 **Chair:** I understand that. There has been a move to fixed fees, hasn't there, away from the previous system, which was, essentially, as I understand it, calculated at an hourly rate for "work actually and reasonably done," which was the original concept? Did it cover things such as unused material in those days? Maybe we did not have so much.

Richard Miller: It did, yes. The situation back then was that, if a defence solicitor had to spend time considering unused material and undertaking further work on the back of that, they recorded what work was done and, provided they could justify to the Legal Services Commission that the work was reasonably done, it would be paid for. There was that fundamental check by the Government body that the work had to be demonstrated to have been reasonably done.

Q12 **Chair:** That was ex post facto?

Richard Miller: Yes.

Daniel Bonich: It was, and in addition, there was an ability to claim an uplift for work that showed additional diligence, which was up to 100%, and that has been lost in the mix.

Q13 **Chair:** I understand. Were there any upsides to the move to the fixed fees? Did it save on administration? That has been suggested; it is a flat fee and you know what you are going to get, and you do not have to do some of that work. How did it compare with the downsides?

Daniel Bonich: It certainly would have saved administration from the Legal Aid Agency's point of view. The national taxing officers who used to oversee these things have virtually disappeared, if not completely disappeared. For our members, it means that, whereas in the past we may have used a costs draftsman to prepare our bills, now we can possibly go without that. Obviously, there is a degree of certainty that comes in from fixed fees because you know pretty early on what you are likely to be paid, so those are the upsides. There are significant downsides.

Q14 **Chair:** What would you say are the downsides?

Daniel Bonich: As much as anything, it is the lack of any uprating. It is a lack of flexibility to reflect changes in practices; for example, the amount of unused material and the amount of digital material has ballooned massively. I think we have spoken previously about the digital crater. That is still a problem, and is not able to be reflected in the way the LGFS is currently drafted and prepared simply because it is based on old ideas as to how much unused would typically be available in a case of a certain type.

In addition, there is ancillary work from looking at unused material. That would be attending upon a client, possibly instructing your own experts, preparing schedules and analysis of the work. All of that material has significantly increased, and the workload has increased, but the scheme as it is currently does not recognise any changes.

Richard Miller: The fixed-fee schemes reflect what happened at the time they were introduced. Fixed fees were introduced for police station work as well, so, regardless of the length of the attendance, a single fixed fee is paid. That was calculated based on the average cost of a case in the individual police station at the time that was done.

Processes have changed since then. For example, police conditional bail was introduced, and now we frequently have release pending further inquiries; and the need to investigate computer systems often means there are months of delay while evidence is gathered, and then further interviews. What used to be a simple case of attending the police station and being either charged or not, and the matter then proceeded, has now become potentially several appearances at the police station, and more material being gathered. None of that is reflected in the fixed fees that were set before all of that ever happened.

Q15 **Chair:** Things have happened that are not, in a sense, in the control necessarily either of Government or of solicitors. It is the way investigatory processes and other matters have grown.

Daniel Bonich: Indeed. The biggest cost drivers are matters outside our control. They will include the change in how people act, an increase in social media, changes in Government policy in terms of priorities and changing police priorities as to how they deal with things. Those are all outside the control both of the Legal Aid Agency and our members.

Q16 **Chair:** I was practising when the 1988 scheme came in, and in those days, as I recall it, the unused material in the average sort of case was very often a fraction of the witness statements. I do not think that normally is the case now.

Daniel Bonich: No, it is not. It fluctuates massively, but when the 1988 scheme came in, a case typically was paper, and you would receive your papers in the DX; you used to get two copies from the Crown Prosecution Service. Now there is a digital system, so there is no paper. With paper, there were costs: storing, printing, copying and transporting. All of that has been saved, but the costs have been transferred to us.

Equally, particularly with the increase in the ability of investigators generally, there is an increase in the amount of material that they come across during the course of their investigation. It is not just digital material, but third-party or medical material. All of that is now in unused material, so typically the unused material can often be significantly more than the volume of the witness statements in a case.

Q17 **Chair:** Is unused material really a bit of a misleading name? You might think that unused means it is not terribly important. In reality, it is disclosed because either it may undermine the prosecution case or assist the defence case.

Daniel Bonich: The fact that it is on the schedule means that it has been assessed by an officer as potentially relevant, so that is the starting-point. It is potentially slightly misleading, and we tend to explain to clients that unused material just means that the prosecution are not using it, but that does not mean we will not look at it. In fact, because the prosecution are not using it, we may want to look at it even more carefully than we look at the rest of the material.

Q18 **Chair:** That is why you make the point, as I understand it, that there may be follow-up work; it may lead you to something that may be of assistance in preparing your client's defence.

Daniel Bonich: Yes.

Q19 **Chair:** We have talked about the way that inflation and other things, such as the various cuts, have had an impact. There was a proposal, of course, for a 15% reduction, and that was changed, I think, to two tranches of 8.75%, one in March 2014. How, in your experience, have firms dealt with absorbing that?

Richard Miller: With great difficulty. At the time the cuts were being proposed, there was independent analysis by, among others, Otterburn Legal Consulting. PA Consulting also prepared a report. It showed that, if the two cuts came in as proposed, the net effect would be that around a quarter of firms would remain not loss-making, and that quarter of all firms would be ones that had no overheads and ones that had other sources of income.

Firms report to us now that criminal work is barely profitable. Some are being selective about which cases they take on, judged on the basis of whether they expect the fee to be reasonable to cover the costs of the work involved. We have seen a drop of somewhere in the region of 300 to 400 in the number of firms conducting criminal legal aid work, so there are now only 1,300 firms as opposed to somewhere in excess of 1,600 four years ago. We have seen firms pulling out of doing that work, and there are issues about young lawyers coming into the work, which we may expand on further.

Q20 **Chair:** Yes. We are perhaps going to come on to that later.

Daniel Bonich: Going back to the Otterburn report in 2014, at that stage, the assessment was that the average firm worked on about a 5% profit margin. Since, then inflation alone is 7% and there has been an 8.75% cut, so, if they have not significantly changed, firms that were earning 5% profit are now obviously loss-making. That obviously concerns everybody.

At the time of the assessment in Otterburn and various other reports, in the ideal firm make-up, a great deal of thought was given to how a firm could adjust to survive in those tighter areas. At that stage, the Government's idea was that bigger would be better, and that the larger firms would have economies of scale. In fact, the research showed that firms with more than 40 employees were likely to be loss-making under the new scheme, so even the strategies that had been identified back in 2014 to weather the cuts do not work in practice.

Richard Miller: It is worth noting that in 2013 the SRA published some research it had done into firms facing financial—

Chair: That is the Solicitors Regulation Authority.

Richard Miller: Yes, sorry. It identified at that stage, before all the cuts, that one of the key factors to identify a firm as potentially at risk of financial difficulties was that it generated more than 50% of its income from criminal legal aid. That is before all the cuts over the past four years.

Q21 **Chair:** That is helpful. Then in 2016, the then Lord Chancellor, Mr Gove, said he was going to suspend the second tranche of 8.75%. What is your understanding as to the current position? Is it still suspended?

Richard Miller: It is, yes. When the Government made the announcement in September/October last year that they were going to

bring in the cut to the litigators' graduated fee scheme, they also said at that stage that the second 8.75% cut would not be proceeded with.

Daniel Bonich: The consultation that came out in relation to that, the cut on PPE, effectively presented three scenarios to practitioners: whether we would accept a cut in the pages of evidence from 10,000 to 6,000; whether we would accept an 8.75% cut, the second cut; and whether a cut in court-appointed rates would be considered. I think 97% of respondents felt that the limit to the PPE was a bad idea, but that is the scheme we currently have.

Chair: We are going to move on to the litigators' graduated fee scheme now with Mrs Badenoch.

Q22 **Mrs Kemi Badenoch:** I do not have a practising legal background. Could you tell us in broad terms how the fee scheme works, in particular the special preparation system?

Daniel Bonich: Certainly. As we touched on briefly, prior to 1998, the scheme was that solicitors would record the time that they spent on a case, the preparation that had gone in and would send off a bill with evidence of the work done. It would be assessed by the Legal Services Commission, as it then was, and they would be paid accordingly.

Over time, that was replaced by the litigators' graduated fee scheme and, effectively, the LGFS, as it is known, came in, I think in 2008. The idea behind it was that it would fix payments based on typical cases of a certain size. The scheme covers all sorts of work deemed to be included, so it would be preparation of the case, including seeing your client, taking witness statements, as we have heard, looking at the unused material and viewing CCTV. All of that, irrespective of how small or large it is, is built into the LGFS scheme.

On top of that, there is something called special preparation. At that stage, in 2008, it kicked in on any material over 10,000 pages and any material that did not fall in the category of the LGFS scheme. The point about special preparation is that it is an hourly rate. It is slightly below the hourly rate that was paid in 1976, so it has not had an uprate for quite some time. There is no uplift, so it is quite a low rate in comparison. It only covers reading work. It does not cover anything else, whereas the LGFS scheme is based on pages of evidence, so you have type of case, pages of evidence and length of trial, and there is a matrix that tells you what your flat rate would be, the biggest driver being pages of evidence. The idea behind that was that it was a proxy; it was a general assessment as to how much time a case would take. Special preparation is not a proxy; it is just pay for time spent on reading.

Q23 **Alex Chalk:** What is the rate for special prep?

Daniel Bonich: It depends on the category of solicitor, but it is just below £45 an hour.

Q24 **Mrs Kemi Badenoch:** How does the fee compare with what is payable

for that first 6,000 pages of prosecution evidence?

Daniel Bonich: It is quite difficult to calculate. The scheme is quite complicated. The guidance to the scheme is nearly 150 pages long and there is a spreadsheet with 1,500 rows on it. Working it out overall is quite difficult. There is a notional fee per page. Once you get over a certain set figure, it is between 15p and 20p a page, which is a bit lower than would be the case at £45 per hour. Because it is not a proxy, the ancillary work that comes out of the reading of unused material is where there are difficulties, as that work is, effectively, done free of charge.

Q25 **Mrs Kemi Badenoch:** My understanding from the briefing is that you need special clearance for special preparation. How easy is it to get that?

Daniel Bonich: It is not special clearance. At the end of a case, you can submit the special preparation part of your claim separately from the main part of the claim, and it is actually examined in a similar way to prior to 2008; it goes off to the Legal Aid Agency, which looks at the work that has been done and works out how much of that time it considers has been properly and reasonably incurred, and assesses it appropriately.

Q26 **Mrs Kemi Badenoch:** I would like to move on to your understanding of what is happening. Can you explain why you think the Government have made the decision to revise the fees scheme? What is their reasoning, from your perspective?

Richard Miller: The situation over the past few years is that there has been a change in the nature of evidence. The original scheme said that documents only count if they are actually served on paper. The prosecution started serving documents on CD-ROM, which meant that they were not being served on paper and did not count as pages of prosecution evidence. In 2012, there was a change to say that, if the document could in the old world have existed on paper, it would count. What was excluded were things such as video footage, and pure computer and digital records, but anything that could have existed as a page of evidence would still count. A separate test was added, which is that it had to be particularly relevant to the case in order to count as a page of prosecution evidence. There was an additional, slightly subjective test applied to the material to see if it was actually valid material.

Because of the change in the nature of the evidence, the Law Society, the various practitioner groups and the Legal Aid Agency set up a working group to look at the changes in the way cases were run to see whether changes were needed to the litigators' graduated fee scheme to make it reflect more the way that cases are handled today. Pages of prosecution evidence are still a relevant consideration. There is still a correlation between that and how complex a case is and how much work is required on it, but the addition of computer records, social media material and all those other things are new factors that simply were not taken account of at the time the LGFS was set up.

We had that working group set up, and the understanding was that we would try to find a cost-neutral adjustment to the scheme that would

better reflect the work required on cases now. In the middle of those discussions, the LAA announced that it was going to make the cut, the effect of which is to take around £30 million out of the LGFS system. That undermined the previous commitment that there would be a cost-neutral re-evaluation of the scheme.

The reason they gave was that they felt they were paying more now than they had in the past. We think that is not correct. We think that they have read the data in a particular way that does not actually match what is going on in reality, and that there are other factors to do with changes in the case mix, with more historical sex abuse cases, for example, and perhaps the CPS is now prosecuting only more serious cases because of its resource constraints.

Q27 **Mrs Kemi Badenoch:** That makes things more expensive.

Richard Miller: A whole range of changes have caused costs to increase; it is not down to one factor. It is not down to a change in the way that material is being considered, and it is not down to pages counting as pages of prosecution evidence that would not in the past. It is simply down to the fact that cases have changed, and there is more material that is pages of prosecution evidence, but the LAA decided, in the middle of our discussions about what should be the changes to the LGFS, to make that arbitrary cut to all cases where the page count is above 6,000 pages.

Q28 **Ms Marie Rimmer:** Significant changes were indicated in the announcement. How satisfied were you with the Ministry of Justice's 2017 consultation process for the new LGFS? Were you satisfied with the process?

Richard Miller: No, we were not, for a couple of reasons. The first is that, as you may be aware, we are now judicially reviewing the decision that resulted from that consultation process. We have now seen additional data and additional calculations that did not form part of the consultation process. Had we known about those data and those calculations, we might have submitted different and more substantial evidence in response, to raise the points that I have been making today, that actually we think they have misunderstood what was happening in the data and what the causes were of the trends they claim to be seeing. We feel that we did not have an opportunity to respond to that because it was not included in the consultation material.

Secondly, we do not think the Government have taken full account of the vast evidence there is about the fragility of the criminal legal aid supplier base and its ability to withstand further cuts of any nature. We have had the various reports that were conducted in 2014. We have evidence of an ageing and shrinking profession, showing that lawyers are voting with their feet, in terms of existing businesses choosing not to carry on with this work and young lawyers choosing not to come into the work in the first place. It is an incredibly fragile market that cannot sustain any cuts

whatsoever. We think that the Government have completely failed to engage with that issue.

Q29 **Ms Marie Rimmer:** In summary, what are your concerns about the new LGFS?

Richard Miller: The key thing is that for the first time ever it leaves necessary work completely unremunerated. The scheme was set up on the basis that you would be paid on the PPE and the other factors, in a system calculated to ensure that it reflected both the work done in considering that material and all the further evidence you had to get—the interviews with your client, the statements that had to be prepared and the expert evidence you had to commission. Now, for all cases where there are more than 6,000 pages, the LAA has just dropped the axe, so that work is no longer paid for.

Daniel Bonich: It is partially a cumulative problem, so, as well as the fact that there is that arbitrary cut at 6,000 pages, it is just layer upon layer of cuts.

Q30 **Ms Marie Rimmer:** It may be that my understanding is incorrect. Isn't it special preparation rate for above 6,000?

Daniel Bonich: It is.

Richard Miller: The situation is that the formula means that, for each additional page, the amount paid goes up. Before December, that was up to 10,000 pages. It is now up to 6,000 pages. If you had more than 10,000 pages—now more than 6,000 pages—and you could show that the LGFS fee was insufficient to compensate for the time you actually had to spend reading those extra pages, you could submit a bill for reading those extra pages. It is a small part of the work involved that you can claim for. It is, as Daniel was talking about, a low hourly rate, relatively speaking. It is discretionary and many claims are knocked back.

It is quite expensive for firms to submit those claims, so, in many cases, even when potentially it would be possible to make a claim for special prep, it is not economically viable to do so, and a lot of times firms feel that the only economic way to go is to write off that work. Whether that will remain the same following this cut is too early to say, but overall the problem is that special prep is not a realistic means of covering the work that has been cut out. As the MOJ's own impact assessment said, it is cutting probably about £30 million out of the system by making this change. Somewhere in the region of 5% of the whole LGFS budget has been cut as a result of the change.

Q31 **Ms Marie Rimmer:** Thank you for that. I was under a misunderstanding. Would you like to continue?

Daniel Bonich: Thank you. As I was saying, part of the concern is the cumulative effect of various changes. We have heard about the inflationary pressures on the scheme and we have heard about the 8.75% cut. The difficulty is that, when you take all of that together, even the slightest change puts the market at risk. As we heard, potentially

25% of firms could weather the two cuts that were proposed back in 2014, one of which has come in. Of those that could survive, the 25%, a large proportion were firms that had other areas of work, so what we are actually saying is that firms doing only crime legal aid work are unlikely to be sustainable. That research was jointly commissioned by the Government and the Law Society back in 2014. It is obviously a deep concern to our members.

Fast forward to 2018, and anything that reduces the amount that firms can claim for the work they are doing causes concern. Added to that, as you heard from Richard, the special preparation scheme in our view is not adequate because it does not include all the work that is done. It includes only, effectively, reading time. That is where the issue is. You are asking firms to focus even more time than they were already doing on work that does not pay, against a background of an ever-decreasing legal aid budget, and of course we have a decreasing Ministry of Justice budget as well. That causes great difficulty for our members.

Q32 Chair: In the past, firms were effectively cross-subsidising in some cases.

Daniel Bonich: They have been. Going back to the Otterburn report, the conclusion was that firms would be increasingly unlikely to be prepared to continue to cross-subsidise, and that is starting to be borne out.

Richard Miller: Yes. I believe the average claim under the LGFS is something like £1,500 or £2,000, but some of the high PPE cases are very much more substantial, yet firms say that perhaps 1% of their cases might account for 30% of their income under the litigators' graduated fee scheme. To give an example that one firm quoted to me, they had a multi-handed murder case where their fee under the old GFS—as it was—was about £90,000, and following the cuts it would be about £60,000. Bearing in mind what proportion of the firm's income was represented by that small number of cases, that huge reduction was very significant to the firm's turnover.

Daniel Bonich: Part of the idea behind the fixed-fee scheme was what we call case mix, and was previously called swings and roundabouts. The idea is that there would be some areas of work, some types of cases, that did not pay compared with the amount of time you put in, but other cases perhaps paid disproportionately more, so, if you had a good mix of cases, you would be fine.

Cases where there were potentially larger claims that you could use to subsidise the smaller ones were those where there were more than 10,000 pages of PPE. To have them go means you are asking firms to make a choice, because they cannot continue to subsidise the lower cases. As Richard touched on, there is some evidence now of firms declining the sort of work where they cannot earn as much money as they need to justify taking the work on. The Law Society itself published a practice note about 18 months ago explaining to solicitors not just their right but their obligation to consider declining work that did not pay

enough and that put their stability at risk. The difficulty is that the sorts of cases we are talking about are historical sex cases, cases with vulnerable witnesses and vulnerable defendants and those with mental health problems. It is a real concern if firms start blanket-refusing that type of case just so that they can keep the lights on.

Ms Marie Rimmer: I understand. Thank you.

Q33 **Victoria Prentis:** What evidence do you have that that is happening?

Daniel Bonich: From our point of view, only from general conversations with members. I do not think there has been any real research into it, but the fact that the Law Society felt it needed to issue guidance suggests that that is right. Certainly, almost on a daily basis we hear firms saying, "We're not going to apply for legal aid in that case."

We are required by our various service standards to carry out a risk assessment before we take on a case. Part of the risk assessment before taking on a case is the financial risk. The concern is that firms will start saying that these cases are high risk financially as well as for other reasons, and will not accept them.

Q34 **Victoria Prentis:** You have told us about the difficulties with the system, as you see it, but we are where we are. What minimum changes would you accept to make the system acceptable?

Richard Miller: The problem we have is that the immediate dispute is the culmination of 20 years of cuts and more cuts.

Q35 **Victoria Prentis:** Can I ask the question again?

Richard Miller: There are two things we would like to see. First of all, we would like an independent evaluation of what it takes to be economically viable to do the work. Once that has been established, we would want to see a commitment from the Government to maintain it in real terms for the foreseeable future. Unless you do that, you will continue to get young lawyers saying, "There is no viable career here." They will choose alternative career paths, and we will not have enough criminal lawyers coming in.

Q36 **Victoria Prentis:** And the second one—weren't there two parts?

Richard Miller: The first part was the independent evaluation and the second was maintaining the system in real terms thereafter.

Daniel Bonich: There is something fundamental to the provision of legal aid in general. We would all accept that access to justice is a fundamental pillar of our democracy. While I accept that we are where we are, the legal aid spend as a percentage of Government spend is a fraction of a per cent, less than a quarter per cent. In general terms, we are not talking about a huge amount of money to rectify our concerns. Just thinking about that, it is perhaps not realistic, but doubling the legal aid budget would add 0.2% to the Government spend. That gives you an idea as to how insignificant the budget is. The Government's website has

a breakdown of expense. We are such a small department that we do not actually merit a section of our own. We are under "Miscellaneous other," and that is part of the problem.

In terms of minimum changes, there has to be a proper assessment of what it needs to make the market sustainable, to ensure that work is done and to ensure that those who are financially eligible are able to apply for and get legal aid. It has recently become clear that the threshold for the means-testing has been left unchecked for the best part of a decade, with inflationary changes as well. The poorest members of our society are potentially priced out of legal services.

All of those issues concern us greatly. While we accept, as I said, that we are where we are, it is worth nothing that the Ministry of Justice budget, which is predicted to fall, as we all know, currently receives about £7.5 billion, soon to be much less, from the Government. It raises £1.6 billion from court fees, fines and recoupment from legal aid, which is about the same as the legal aid budget. In sensible terms, money from central Government is used to pay for legal aid. Well, there isn't any, because it all comes from self-financing through the Ministry.

Q37 Alex Chalk: My favourite statistic at the moment is that we spend more on the aid effort in Syria alone—at £2.5 billion—than the entire legal aid budget.

Before I move on to the advocates' graduated fee scheme, could you help me in trying to provide an illustration to dig down into the points you are making? Imagine the situation where there is a multi-handed murder allegation, with five people on the indictment. Four are charged with murder. It is a stabbing in south London, and four people are said to have been at the scene and involved in some way. But the fifth person is up for perverting, the suggestion simply being, in respect of the first defendant, that when the police came round five days later and said, "Can I have the clothes of the first person?" the person knowingly gave the wrong clothing knowing fine well that that was not what they were wearing at the time.

Suppose that the prosecution serve a whole bunch of evidence, 7,500 pages, and the overwhelming majority of that, 7,400 of those pages, relate to what happened at the scene in south London—the stabbing, the forensics, the CCTV, the witness evidence, fingerprints, DNA and all that kind of stuff—and just 100 pages relate to the perverting. The police officers say, "We went round, we spoke to the defendant, we asked for the clothing, and the defendant gave us this material, which turned out to be completely phoney. They got taken down to the police station, interviewed and charged, and that is pretty much it."

In those circumstances, just playing devil's advocate for a second, can I confirm that, if all the material is served, that solicitor will get paid for reviewing all the material—up to 6,000 pages—even though a lot of it will overwhelmingly relate to something that the individual is not going to be cross-examined on and is not going to be charged in relation to? By the way, I am not making the point that you are overpaid. That is not the

suggestion for a second, but I want to put some flesh on the bones. Is that right?

Daniel Bonich: In broad terms, it is right. My only comments are that in your scenario the individual who is only charged with perverting would be on a different pay scale, because of what he is charged with. As well as PPE, the nature of the offence is part of what drives the uplift.

Fundamentally, it comes back to the idea of a case mix, which was a Government scheme introduced in 2008. It was deeply unpopular at the time. If you were to suggest a solution to the exact scenario you have just raised, it would be, as most solicitors would tell you, "Go back to paying us for the work we do." If we cannot have that, there are always going to be anomalies in the scheme.

- Q38 **Alex Chalk:** Sure. I just want to understand. Suppose that, in the course of preparing for the trial, the CPS serve another 1,000 pages of evidence to do with what happened at the scene. The D1, D2, D3 and D4 solicitors say, "Can I have my special prep for that?" Presumably they say, "Absolutely, because it goes to what happened." In respect of the fifth defendant, where clearly it has no relevance to their case, in those circumstances wouldn't it be appropriate for special prep not to be provided because it is not relevant to the case they have to meet?

Daniel Bonich: As you heard from Richard, special preparation is discretionary, so in that sort of case I would expect the Legal Aid Agency to decline special prep claims. In your scenario, it is unlikely that special preparation would be paid.

- Q39 **Alex Chalk:** The general point, you would say, is that it is swings and roundabouts. That might be a good one for the fifth defendant, but, unless it is very good, they are going to be in big trouble in respect of the less well-funded work. Is that the main point?

Daniel Bonich: Yes.

- Q40 **Alex Chalk:** I just wanted to have that example to clarify people's minds.

Daniel Bonich: The fundamental flaw in the scheme, if I can call it that, is that it does not ask, "What work have you done?" That is the important point. It is literally, "How much evidence have you been sent?" Arguably, it is flawed from its inception.

Richard Miller: That is exactly the sort of situation where, in discussions between the practitioners and the Legal Aid Agency, I would expect to say, "That is an area where amendments to the scheme may be needed." We can adjust the scheme in that part, and use the funding to adjust the scheme where there are significant underpayments.

- Q41 **Alex Chalk:** I do not want to take up too much time, so this is the last thing I want to say on this. There are ways in which the system could be made to work more fairly, it always seemed to me in practice. What have you done from your side of the fence to come back to the Government and say, "Look, we recognise there are potentially circumstances where

this is not working in the way that it should. Some people are on one view occasionally in some cases being over-remunerated"? It is a tough thing to say, but sometimes people are getting paid for reading a whole load of material that actually has very little relevance to their client. Have you ever come up with proposals that could make the system fairer?

Richard Miller: Yes. As part of the work with the Legal Aid Agency, the Law Society developed its own paper setting out three alternative proposals that we thought would be an improvement to the system. We had thought we were moving towards a consultation on one or more of those proposals at the point when the LAA announced that it was making this arbitrary cut.

Daniel Bonich: With each and every new Minister of Justice we have had, my association has sent a paper with various proposals for cost savings and policies that we identified. The last time that was acknowledged would have been Mr Gove, who agreed that he would look at it. He was not in post much longer after that.

It was recently said in debate that our side of the profession has not come forward with proposals. That is not right. Almost on an annual basis, we send in suggestions, and we have always been anxious to speak to the Government about our ideas and where we see waste at the coalface and flaws in the scheme. The difficulty is that there is a credibility gap at this stage. We have sat in a room with people telling us, "Let's design a cost-neutral scheme," while outside they are making announcements about a cut that would reduce a sizeable pot in the cost-neutral scheme. Some work needs to be done to repair that particular issue.

Q42 **Alex Chalk:** It is totally my fault for taking too much time, but we will have to move on fairly promptly with the advocates' graduated fee scheme. Very simply, solicitors have rights of audience in the higher courts, so I take it that they are affected by AGFS as well, albeit to a slightly lesser extent than barristers. Do you agree that they are still affected?

Daniel Bonich: Yes.

Q43 **Alex Chalk:** In terms of your concerns about AGFS, is this really just a collective howl of anguish from the profession, which has faced years of sustained cuts, given that on one view it is broadly neutral, or do you have principled objections to AGFS?

Richard Miller: We actually disagreed with the AGFS scheme that was proposed. Our feeling was that it flew in the face of the recommendations of Sir Brian Leveson, who was very keen to incentivise early work in order to ensure the promptest possible disposal of cases. We felt that the proposals that the Ministry of Justice put forward actually took money out of the early work that could lead to early disposal and put it into the trial end of the process. We thought it was providing the wrong incentives in the scheme, and we made that point in discussions with the Legal Aid Agency.

Q44 **Alex Chalk:** As you may be aware, the CBA, the heads of circuit and the Bar Council all, certainly initially, welcomed it quite warmly, because the idea was that it recalibrated the system and put more money towards the junior Bar, at the expense perhaps of more senior practitioners. People argue about whether in fact that is what the outcome is, but, if it was the motive, do you think it was a sensible and reasonable thing for the Government to attempt to do?

Daniel Bonich: In principle, yes, it is a sensible approach. Much like the Law Society, we put in our own paper at the time, suggesting that we did not think that the scheme that was proposed would work for the exact reasons that the Law Society raised.

The difficulty is that the scheme as proposed, and as was discussed at the very early stages—the Law Society were statutory consultees to it—included annual uplift for inflation. That got lost. As we touched on earlier, the inflationary pressures are in themselves not insignificant. I completely understand, as a point of principle, where the Bar is coming from.

For our members, it is not the core of our work as solicitors. We are affected by AGFS, absolutely, but it is not the core of our work. In the sorts of case that solicitor advocates are more likely to do at the lower end, in theory we should have been better remunerated, but in practice it does not quite work out like that.

Q45 **Alex Chalk:** Would you scrap it?

Daniel Bonich: The existing scheme?

Q46 **Alex Chalk:** No. Would you prefer to see the proposal for the new AGFS scrapped in favour of retaining the existing scheme?

Daniel Bonich: Yes.

Q47 **Alex Chalk:** Is that the same for you as well?

Richard Miller: Yes.

Q48 **Alex Chalk:** Do you have any views on the consultation? Is it similar to the criticism you had in respect of the new LGFS? Do you think the Government handled the nature of the consultation well?

Richard Miller: We do not have the same issues with the consultation on the AGFS. We have not observed similar issues with the data. It may be that we have seen more of the workings, as it were, of the LGFS scheme because of the judicial review that we brought, but we did not have the same sort of principled issues with the AGFS consultation.

Q49 **Alex Chalk:** Is there one single thing about which, if the Government were to bring it to the table, you would say, "Do you know what—we are now going to go from opposing these proposed changes to backing them"? Is there a single change, apart from more cash, or perhaps including more cash?

Daniel Bonich: More cash is the answer, I am afraid, as much as anything. It is not just more cash for the AGFS scheme. It is for the wider criminal justice system. You rightly said that, to a degree, the current issue with the AGFS, and indeed with the LGFS, is a cry of anguish from the profession. It is not just on our own behalf, but from the managed decline we are seeing across the criminal justice system. Short of commitment to listening to those at the coalface and actually tackling issues, which will involve more funding, it is difficult to see how the situation can be resolved.

Q50 **Gavin Newlands:** Could you comment on the consultation process by comparison with the recent review in Scotland into legal aid? It was an independent review, and both the legal profession and the Scottish Government agreed to abide by the outcome of the review. The review took a year and came up with six or seven recommendations, all of which have been welcomed by both the Government and the legal profession. Would you say that is probably a much better way of going about things and would have buy-in from everybody?

Richard Miller: Yes, I would. The two keys on that were, first, the fact that it was an independent review. Many of the changes we have seen over the past few years have been driven by the financial constraints that the Ministry is facing. It has to make savings. It cannot carry on spending as it has because of the Treasury imposing cuts on it. That has driven decisions that perhaps could not be justified on policy terms if you took out the financial considerations.

The other thing that was so refreshing about the Scottish approach was that they started from the principle that they wanted the best legal aid system possible. That is a really positive approach to how you review any scheme.

Daniel Bonich: I agree with that. As well as the fact that it was very refreshing to see that it was independent, the crux of it, which was significant for us, was that both sides agreed to abide by it and to listen to what was said. Comparing it with our own consultation on LGFS, when 97% of people said it was a bad idea but it happened anyway, one wonders if that is a consultation in the same sense as you had in Scotland.

Q51 **Gavin Newlands:** One of the recommendations was for a Scottish legal aid authority, an arm's length public delivery body. Do you think that could be a good thing if it was replicated down here?

Richard Miller: It is worth exploring. That was the situation we had before 2012, and then the Legal Aid Agency was set up as an executive agency of the Ministry of Justice. It is part of what is being reviewed in the so-called LASPO review at the moment. There are arguments both ways, but the arm's length nature of the body can have some benefits.

Daniel Bonich: The Legal Aid Agency itself would tell you that, although it recognises, as it is dealing with public funds, that it needs a degree of scrutiny, it is increasingly frustrated that it seems to have become just a

further level of administration and a further level of review. It does not really want to be the regulatory body of the profession, but it increasingly finds itself in that situation.

- Q52 **Chair:** Mr Bonich, your association represents solicitor advocates, people with higher court rights of audience. Of course, your members will also be instructing members of the Bar on a daily basis.

Daniel Bonich: Yes.

- Q53 **Chair:** I am sure you have discussed with them the sort of fee levels that they get. You see the fee levels, both that your solicitor advocates get under the AGFS and those the Bar gets.

Daniel Bonich: Yes.

- Q54 **Chair:** Part of the suggestion, as we heard earlier, was to take money away from the bigger cases and the more senior end of the Bar and solicitor advocates, and move it to the junior end of the operation. Has that worked in practice?

Daniel Bonich: The answer to that is probably no. We are still quite early in the new AGFS to assess it. Those of our members and those chambers we have spoken to who have run their own figures report mixed results. Some have said that they are marginally better off at the junior end. Others have found that that has not been the case, and they are looking at substantial cuts. The difficulty is that everybody's practice, particularly at the Bar, is different in terms of make-up of the sorts of cases. It also varies from chambers to chambers. As a concept, I understand the idea behind it, but there is a sense from the ground that that is not what has happened. It is a bit early to properly assess the statistics, in my view.

- Q55 **Chair:** To give an example, one of the things that changed was that under the old scheme, for a short trial you were not paid for the second day of the trial. There was no separate fee for a refresher. That has been corrected, but, as I understand it, at the price of the brief fee going down.

Daniel Bonich: Yes. It is giving with one hand but taking with the other.

- Q56 **Chair:** There is actually no real gain to the young barrister doing a short case.

Daniel Bonich: Much of the early discussion was around the idea that a young barrister would be able to take on a handful of smaller cases a day and get through them. The volume is just not there for that to work as a model, so it is fundamentally flawed.

- Q57 **Chair:** There is less volume of work than there was. More work is done by solicitor advocates. The CPS often do more work in-house as well. All of that affects the amount of work that both the Bar and solicitors acting as agents can do.

Daniel Bonich: Indeed. The last set of figures suggested a fall of around 28% year on year in terms of volume of cases. That is part of the issue.

Q58 **Chair:** In an ABH trial in the Crown court, by the time you have had the jury sworn, the opening, maybe two or three prosecution witnesses, the defence, a couple of speeches and the summing-up, the odds of its going into a second day are quite substantial, unless you were really lucky and got a clean start at 10 or 10.30 and there was nothing else in the judge's list.

Daniel Bonich: Yes. The majority of cases are likely to go into a second day. There are not too many in the Crown court that get done in a day.

Q59 **Chair:** For the junior Bar, pay for the refresher is not going to be of much value at all.

Daniel Bonich: Indeed.

Q60 **Chair:** That is the sort of mix you would be getting for barristers or solicitors of four or five years' court experience. It would be the ABHs, the burglaries, drugs and the less serious levels of sexual assault—if there be such a thing; assault rather than rape—or something of that kind. Those are the shorter trials.

Daniel Bonich: It is, and those are the sorts of cases that historically solicitor advocates have been more likely to do than the longer ones, as much as anything because of their other commitments. They cannot afford to be out of the office for as long. For our members, they would see that sort of work as the core of their HCA work.

Q61 **Chair:** If a young barrister doing that sort of work says, "I have run my figures on my practice, and my net benefit under the new scheme is about 0.2%," it would not surprise you.

Daniel Bonich: No, it would not surprise me at all.

Q62 **Chair:** Perhaps the same would apply to solicitors and what they bring into the firm. There are some other anomalies. We talked a little bit about fraud. There have been some changes to the way that is remunerated; is that right?

Daniel Bonich: There have been some changes in relation to the more complex cases, including fraud. Those are large-volume-of-paperwork cases, so anything that moves away from paperwork in that sort of case is likely to have a significant effect. A lot of that work was looked at during the consultation process, so maybe Richard can answer that. My organisation is not a statutory consultee, so we did not actually have any input into the consultation at that point.

Q63 **Chair:** The payment level varies if the fraud is over £10,000, for example, in terms of value.

Richard Miller: Yes. One of the significant things is that they kept the threshold of 10,000 pages for the advocates' graduated fee scheme while

cutting it to 6,000 for the litigators' graduated fee scheme. We have not seen an explanation for that.

Q64 **Chair:** Have you not had any reason given for that?

Richard Miller: No.

Q65 **Chair:** It is a very arbitrary cut-off. It is not terribly attractive for a middle-ranking barrister to do a fraud case that might involve somebody stealing from their employer. It might affect their prospects if they are convicted, and would be likely to result in a custodial sentence because it is a breach of trust. If it is a £9,500 fraud, it is deeply unattractive to do it, as opposed to one that is worth a bit more. It is a bit arbitrary.

Richard Miller: Yes.

Daniel Bonich: Yes.

Q66 **Chair:** The other thing I was going to ask you about as an example is this. Is it fair to assess the weight of the case simply on the size of papers? Is too much weight given to that?

Daniel Bonich: That is a very difficult question. If we work from the premise that we have to have a proxy because we are not going to measure time, certainly from a solicitor's point of view we have to come up with something that best reflects the work we do. I know that the Bar were very keen for their scheme to look at the length of their trials, but for a solicitor the length of the trial is not particularly significant. These days it is unlikely that there will be a litigator sitting behind counsel during the course of a trial. Trial length is not a factor for us. The closest we can get to the work we do is that we have to read all the papers and speak to our clients about what those papers say. Absent going back to time, pages of evidence or something similar is probably as good as we can get.

At the working group, when we were trying to reform the LGFS with the Legal Aid Agency, before the talks broke down, we were looking at alternative units of work. A unit would be a certain number of pages. It would also be a certain number of hours of looking at footage of CCTV, for example. There are other ideas, but certainly moving away from PPE to something like trial length would be fundamentally flawed. Although it may be unrealistic, because the Government would not wish to re-recruit taxing officers, to go back to the old ex post facto day, ultimately time is the best way of measuring the work that we have done.

Q67 **Chair:** Length of trial may not reflect the gravity of the offence. For example, in a murder/manslaughter the facts may not be greatly in issue, but the causation issues as to whether or not the defendant is convicted of murder as opposed to manslaughter can make a very significant difference. It may not be a very long trial, but nobody would doubt that it is a case of the very highest weight.

Daniel Bonich: Indeed. A great deal of work has been done by various initiatives, including Better Case Management, but even before then, to

focus on issues in cases. We are much better now at identifying the true issues in cases. What that means is that, whereas in the past we may have needed four or five witnesses to come to court, we may now only need one or two because the rest has been reduced.

In fact, in terms of trial length, it is a bit arbitrary these days. You can reduce it through hard work outside. It is not a case of it being simpler; it is a case of prosecution and defence outside court working out that we do not need half of the witnesses, and the trial length has reduced as a result. In my view, trial length is a pretty poor proxy for the density of work.

Q68 **Alex Chalk:** The harder you work, the shorter the trial and the less you are remunerated. But, of course, it is your professional duty to ensure that you assist the court to the fullest extent possible.

Daniel Bonich: Indeed. I think the courts have seen the flip side of that, which is that when people represent themselves we have to factor in that the trial will take significantly longer.

Q69 **Chair:** There is a perversity in the system at the moment.

Daniel Bonich: Yes.

Q70 **Chair:** The final issue I want to raise with you relates to serious sexual offences, such as rapes, for example. On behalf of your client in those sorts of cases, you want to instruct counsel of appropriate seniority to deal with those matters, if you do not have a senior solicitor advocate in-house.

Daniel Bonich: Absolutely. It is not only in the interests of our client in those sorts of cases, but, if there is a vulnerable complainant, there needs to be someone who is suitably skilled in how they approach their cross-examination to avoid additional trauma. It is fundamentally important, almost above most other cases, that the advocate is the right advocate for the case.

Q71 **Chair:** Is it easy always to get advocates of suitable skill and seniority in these sorts of cases?

Daniel Bonich: If you had asked us before 1 April, the answer would be "Probably, just about." Post 1 April, it is proving impossible.

Q72 **Chair:** I put this anomaly as an example to see if I am correct. On the one hand you could have, for example, a defendant charged with a single count of rape. It may be people who met at a social occasion and so on. The main issue is likely to be consent, but there may be some other evidence. The page count might be about 250 pages, or something like that. On the other hand, for the same offence classification, you could have a defendant with 12 counts of rape and maybe 5,000-odd pages, when you put it all together, and a lot of unused material. As I understand it, the fee will be the same.

Daniel Bonich: If the page count increases, the fee will obviously increase.

Q73 **Chair:** How much difference would it be? The brief fee would not be much.

Daniel Bonich: Under the advocates' scheme, I do not think there is a huge difference; the brief fee would increase perhaps. The litigators' fee, which is still based on pages of evidence, would be different.

Q74 **Chair:** Do you have any worries about how that sort of thing is going to pan out in relation to getting people?

Daniel Bonich: I think our members do. We are concerned about being able to find advocates who are appropriate for the type of case. We have not really touched on this, but the Committee will no doubt be aware that the Bar are currently refusing to accept new work from 1 April.

Q75 **Chair:** Yes, we are going to move on to that in a second.

Daniel Bonich: That problem is going to become extremely important very quickly.

Q76 **Ellie Reeves:** I want to move on to the issue of how the barrister action is affecting the conduct of trials. Obviously, it relates to cases from April this year, but if it escalates to no returns as well that might have an impact. What is the impact at the moment, and how do you see it going in the future?

Daniel Bonich: Because it is for representation post 1 April, we are not yet seeing, at least as far as I am aware, any actual trials that have been affected. That will come quite soon though.

Q77 **Ellie Reeves:** How soon? How quickly?

Daniel Bonich: It varies massively from court centre to court centre. In some court centres local to my office, we could be waiting three or four months. In others, we are probably talking weeks before we start to see the first trials coming into the lists. Putting aside the issue of trials, dealing with sentencing hearings, which are potentially the final hearing in a case, and pre-trial preparation hearings, which are designed to manage how a trial will be, are proving extremely problematic for our members at the moment.

There are huge variances between court centres as to how the courts are dealing with that particular issue. There has been some very clear guidance from the senior presider as to how judges should deal with situations where no counsel are able to be instructed, but it is not being applied across the board. We are aware, as an organisation, of a number of reports of cases where judges decided that they wished to proceed, even though a defendant was not only entitled to counsel but had asked for counsel, and where solicitors explained that they have contacted 80, 90 or 100 sets of chambers to find barristers. The public defender is not available because they have already been asked, and they are obviously overstretched themselves.

In many cases, solicitors are doing their best. There is an awful lot of pressure being put on solicitors to try to help cases stay on track. In

some courts, the judges are asking or directing solicitors to attend the hearing and try to conduct the hearing themselves. There have been some reports of cases where non-qualified people have, effectively, been bullied by the judge to conduct a hearing. There was one where a secretary conducted a hearing for sentencing, and that is obviously quite worrying. We are aware of a case at Isleworth where somebody received a life sentence without counsel or an advocate in court. That is wholly unacceptable.

Q78 **Alex Chalk:** It is a breach of the Human Rights Act.

Daniel Bonich: Absolutely. It casts a shadow over our justice system.

Q79 **Ellie Reeves:** Had he requested counsel?

Daniel Bonich: He had requested counsel.

Q80 **Alex Chalk:** I am very surprised that the judge proceeded in those circumstances. We do not know what the circumstances were.

Daniel Bonich: We do not, and we continue to investigate those sorts of reports. Other courts are doing their best to keep things on track. We recognise that judges have to try to keep the wheels on during this action, but there are certainly massive differences between different courts. Even those that are trying to be more practical, to require a litigator to come to court to deal with what is ultimately advocacy, when they are not qualified to do so, worries our members a great deal. Conducting a plea and trial preparation hearing, where you may bind the hands of the advocate you hope to find later, is a real worry.

It may lead to PTPH hearings that are a farce. Our members may take the view, "Well, I can't agree any witnesses. I can't agree any of your legal applications because I just don't know." Trials fixed to last two weeks may only have needed to last three days, if there had been counsel there.

While I recognise why the Bar are engaged in the decision that they have taken, it has placed solicitors under a huge amount of strain. We are the client-facing part of the profession. We are the ones who have to explain to our clients why they do not have counsel, and that we have to try to guess how the particular court centre is going to deal with the issue. We have to say, "You may be stuck with me." In cases where firms have said, "We will send a paralegal or somebody similar," the court has directed that a representative attend. That representative may then be put under pressure to conduct the hearing. That is a massive worry for our members. If we are to continue to sell ourselves as a country that really prides itself on the rule of law—our legal services industry is worth about £25 billion a year—it is not going to help our international reputation when people have secretaries representing them on serious matters.

Q81 **Ellie Reeves:** A constituent come to see me last week who is an experienced criminal defence lawyer. He received a call from the Legal Aid Agency saying it needed to find representation for a person for a pre-

trial preparation hearing. My constituent explained that no one on its approved list of counsel was available and it was not willing to go to the public defender service because it did not feel that that would be in the client's best interest. It was a murder charge. He then came under pressure from the Legal Aid Agency about the terms of its contract, and in effect there were implied threats that contracts might be terminated unless counsel was found. Is that something you have come across or heard about? It seems to me that that is very worrying.

Richard Miller: I have heard of something similar, yes. The Legal Aid Agency set up rules a number of years ago—in fact, I think it was in the Legal Services Commission days—that firms must maintain lists of approved experts, including counsel. The idea was that that was the way to ensure you got suitable and properly qualified counsel attending hearings. It should be absolutely exceptional for a lawyer to instruct someone who is not on their list. They need to do due diligence to assure themselves that the chosen advocate is appropriate for the case.

It is simply not acceptable to say, "Well, only someone unsuitable is available; therefore, you must appoint the unsuitable person." One of the things we did a couple of weeks ago was to put out guidance to our members, reminding them of their professional obligation not to undertake work that is beyond their competence. That is an overriding professional obligation that goes beyond trying to assist the court and trying to represent the client in circumstances that are not appropriate. If it is beyond their professional competence, they should not be doing the work. There is real concern, from reports we have been getting, that many of our members are being put under pressure to undertake work that they do not feel suited to undertake.

- Q82 **Victoria Prentis:** What you are telling us is really frightening and has significant implications for the entire justice system, not just the criminal end, although that is very worrying in itself. What we need in order to help with this is real evidence and real cases. I include myself in this: our professions have traditionally not been good at working together to stand up for each other. It strikes me that we now need to get over ourselves and produce the evidence that people such as this Committee need in order to fight our corner. Who is doing that?

Richard Miller: We have been getting a number of reports from around the country, which we have been compiling. I can ask our team to make what we have got so far available to the Committee.

Victoria Prentis: That would be very helpful.

- Q83 **Chair:** That would be extremely helpful. If you would do that, we can make sure it is brought into the public domain in the proper fashion.

- Q84 **Victoria Prentis:** You have considered it serious enough to issue new guidance about professional responsibility. Clearly that must have gone through your internal processes, and that is significant in itself.

Richard Miller: Exactly, yes. In fact, we are reviewing that guidance in the light of the further reports that are coming in, to see if it needs to be amended, expanded or toughened up.

- Q85 **Alex Chalk:** If I may say so, you gave the example, in the spirit of being helpful, about somebody who was given a life sentence at Isleworth unrepresented. Further details about that case would be gratefully received.

Daniel Bonich: We are continuing to gather that sort of information. We can either pass it on through the Law Society or send it directly to the Committee.

- Q86 **Ellie Reeves:** Do you think it is likely at some point that criminal law solicitors would consider withdrawing their professional services in support of barristers?

Daniel Bonich: The short answer is yes, not necessarily in support of barristers but as part of the larger issue. The sort of conduct I have touched on from courts is really putting our members in situations where they are feeling more annoyed, shall I say, than they have been for a very long time. Although I cannot say that anything is imminent, the mood music has changed dramatically from, "This is a headache for us because the Bar is taking action and we understand why," to focusing the frustration on the Government and the judiciary for their conduct. If we feel as a profession that we are being forced into a corner and forced to do work we do not feel competent in doing, in my view it is likely that we will see similar action from solicitors in the not too distant future.

Richard Miller: The way I would look at it is that it is not so much taking what you might term strike action. It is more a case of making the economic decision that the work is simply not economically viable, and the professional decision that "I am not going to take on a case if I'm going to be put under severe pressure by a court to undertake work that I don't feel professionally competent to do." Those factors coming together will lead firms to make those decisions.

Daniel Bonich: In assessing risk to an individual firm, it is not just a case of not feeling competent. Potentially, your professional indemnity insurance may not cover you for that kind of work, so you are taking a huge financial risk in doing it.

- Q87 **Ruth Cadbury:** With over 400 legal firms coming out of criminal work as a result of these changes, what does that mean for the ordinary person, the defendant, the witness or the victim? Already we have heard some quite worrying examples of what is happening to the criminal justice system. Is there anything else that should be covered in relation to the wider implications?

Richard Miller: The situation is that the scheme is becoming threadbare, and we are on the point of the crisis really biting. What I mean by that is that, as far as I am aware, we have not yet had an example of someone

in the police station who has requested a solicitor not being provided with a solicitor, but we are getting very close.

One duty solicitor scheme in Kendal was down to its last duty solicitor, so they had to combine it with a neighbouring scheme. Of course, that now means that the lawyers have to travel much greater distances to provide the service, and it is even less economic than it was, so it becomes a vicious spiral. There are a large number of other schemes where the numbers have been dropping consistently, and we are down perhaps to the last half dozen or so lawyers left on the scheme. We are getting to the point where there is insufficient coverage on our duty solicitor schemes to ensure that everyone who asks for representation in a police station gets it.

The problem is that we are nowhere near addressing and turning around these trends. The last thing that young lawyers saw when considering, "Is there a viable future here?" was that in December, in the face of all the evidence, the Government imposed yet another cut. That is sending a clear message to people, "Don't think for a moment that there is any prospect of this terrible situation getting any better."

There is no prospect whatsoever, as we sit here today, of those trends changing. They will continue. Lawyers are retiring. Lawyers are dropping out of the schemes. Lawyers are choosing to go off and do other types of work. Young lawyers are not coming in to replace them. The schemes will continue to shrink and shrink, and there is nothing happening to turn that trend around.

Q88 Ruth Cadbury: From the defendant's perspective, or the ordinary person's perspective, that means staying in cells for a longer time. It means delayed cases or being poorly represented in cases. What else does it mean?

Richard Miller: The Kendal example is a good one. If lawyers have to travel further, it means that the suspect will be longer in the cells, and of course the police will be hanging around longer waiting to get on with their part of the work as well.

The situation is well illustrated by the MOJ report that was recently published on BuzzFeed. There are implications for the defendant—we talk about defendants standing there like rabbits in the headlights—for the witnesses and victims, who face potentially being cross-examined by the defendant in person, and for the system as a whole. It is far less efficient, and cases take a lot longer. There is no easy way of serving large volumes of electronic material on a defendant acting in person. There will be huge efficiency problems for the system if we start to have significant numbers of defendants being unrepresented all the way up to the highest courts.

Q89 Ruth Cadbury: If there are fewer and fewer solicitors, there could be parts of the country where there is no legal firm doing criminal law work. Would that be right?

Richard Miller: We are getting very close to that point. There are some areas where there is one firm left. There are a few more where there are still two firms left. With some recent analysis we did, we published a heat map that showed the ages of solicitors around the country. To give you some figures from that, in Dorset, Somerset, Wiltshire, Worcestershire, west Wales, and mid-Wales, 60% of criminal solicitors are over 50. To put that in context across the profession as a whole, 27% of solicitors are over 50. Criminal solicitors are disproportionately a very ageing profession.

In Norfolk, Suffolk and Worcestershire, there are no lawyers at all under 35 doing this work, and there are only two or three in Devon, Cornwall, west Wales and mid-Wales. There are areas where absolutely nobody is coming in to do this work.

Daniel Bonich: The difficulty is that those sorts of trends will take a long time to reverse. If we decide to fix it today, it may be years before we have qualified people entering the profession again. It really is a concern. There is a minimum number of firms you need in an area for it to be viable. If there are two defendants and there is a conflict, for example, one firm cannot represent both. You need a minimum number of firms.

Coming back to the question about what happens if there is a long wait for someone to come out, there is also the issue of the period of time that the police can hold someone. Potentially, the police may get to a stage where they run out of time. They will say, "What do we do now? We have not been able to get a solicitor here." They will start releasing people, which potentially puts other people at risk.

It is a real issue. You have to factor in court closures as well, which have an impact on provision in an area. An analogy, probably a few years into the future, is the current situation with the housing legal aid contract. That is one I can talk about because my firm had a housing contract. Housing legal aid rates, like crime rates, continued to drop year upon year. It came to the stage when an awful lot of firms just left the market. They actually left the market. They did not threaten to; they left the market. In my area, we were the last provider in my county. We were contacted by the Legal Aid Agency and, effectively, pleaded with to cover work that was two counties over—that is how far the distance was—because nobody else wanted to do it.

The tender has recently gone out for housing contracts. To try to fix it, the agency had to double the size of procurement areas, because there just are not enough people prepared to do the work at those rates. That is a bit of insight into what will happen. Although for many years people have accused us of crying wolf, and perhaps we have, we can actually now look at examples and say, "When you get to the stage where work is not viable, firms will stop doing it." The idea that, "Oh, they will keep doing it" has not happened with housing, and it will not happen with crime.

Ruth Cadbury: We had a debate last week on housing legal aid.

Chair: The Law Society or yourselves as criminal lawyers have done some heat maps that quite graphically demonstrate that.

Richard Miller: That is right, yes.

- Q90 **Gavin Newlands:** Some of those stats from the different parts of England and Wales were quite concerning. One of the recommendations in the Scottish review was perhaps to have increased rates for different geographical areas to maintain access to justice. Is that something you think may help in this situation, to stop young lawyers going to other areas and stay in the area to fix the local issues?

Richard Miller: It would not be unprecedented. The Legal Services Commission introduced a difference between urban areas and rural areas, and had different rules for how they were paid, to reflect the fact that, in theory at least, in urban areas you would have greater volumes and therefore more to spread the cost. It is certainly something that could be explored. It would not be the sole thing that would solve everything, but it could potentially be part of the mix.

Daniel Bonich: It is not just potentially rural areas that have the issue; it is urban areas as well. The Otterburn report of 2014 concluded that London was the least profitable area of the country for criminal defence work. For all the volume of crime, those firms were the least profitable. Those were the areas with the highest wage costs, the highest living areas, and young people just will not work in London. They cannot afford to, so firms will not be able to continue.

Richard Miller: One of the problems we have always had in looking at schemes such as that in the past has been that we have been doing so in the context of a fixed pot. If you are going to increase the payments to one part of the system, it would only be at the cost of another part of the system. When the entire system is completely uneconomic, that just cannot be done.

- Q91 **John Howell:** I want to pick up on the comments you made about the absence of young people in the profession. That strikes me as the most serious of the problems for the long term. How do we deal with it?

Richard Miller: It comes back to the fact that the reason lawyers are not coming into this area is that they cannot see a viable career in it. There is a real passion for doing this sort of work. It is a vocation that people really long to do. For many years, that has, just, trumped the problems of making a really successful and economically viable career in it. We have now got to the point where even those who have that real vocational pull to the work cannot see how it can possibly work.

There is no answer that does not involve more money to make it a more attractive career for the lawyers who are coming in. There may be other things we can do. For example, we are talking to the Crown Prosecution Service to see whether there are ways of enabling lawyers to get experience on both sides of the fence, in order to make it a different and

perhaps more interesting career. The attractiveness of the career and the appeal of the work is not the fundamental problem.

Q92 **Victoria Prentis:** Would it be the case at the moment that a CPS lawyer would earn more than a lawyer in private practice?

Richard Miller: Generally, yes.

Daniel Bonich: Absolutely. I had a look at the jobs currently being advertised by the CPS. They would not get much change out of £65,000 for the sort of people they are recruiting. Those would be Crown advocates or Crown prosecutors. The equivalent in the private sector would probably be earning in the region of half of that. That is significant. It is not even close; they are significantly better off. That is not to suggest for one moment that they do not deserve the money they are receiving, but it is a yardstick by which to measure how bad it has become for young people on our side of the profession.

Q93 **John Howell:** I take it that neither of you is enthusiastic about the medium and long-term future for criminal law solicitors. Is that a fair assessment?

Richard Miller: Yes.

Daniel Bonich: A very fair assessment.

Q94 **John Howell:** And you think the solution is more money.

Richard Miller: I think it has to be. This is why we would like to see an independent assessment. It cannot be just what lawyers say we want and demand; but it cannot be what the Government say they are willing to pay, if we have the situation that what they are paying is simply leading the system to reach extinction point. There has to be some independent, third-party evaluation based on clear, viable evidence, to demonstrate what is actually required to make it economically viable.

Q95 **Chair:** Ms Prentis made the point about the two bits of the profession needing to address common issues. You were making the point, Mr Bonich, about the importance of getting appropriately experienced counsel, if you do not have advocates in your own firm to do it.

Daniel Bonich: Yes.

Q96 **Chair:** It has been suggested that one of the problems of shifting from the higher cases to the smaller ones is: does it actually reward the junior advocate anyway and does it affect the career progression of the advocate? You might assume, either at the Bar or as a solicitor, that you start off doing small cases for which you are not paid terribly well, but then you expect to do the bigger cases, getting to a middle level of seniority, and your income goes up to reflect that.

Daniel Bonich: There have historically been two trade-offs for young lawyers, barristers and solicitors at the start of their career with not great remuneration packages. The first is that it is a great job. We all love the job we are doing. The second is that there was an idea of a career path.

For counsel, it was moving up to doing the larger and more experienced cases, perhaps even becoming a QC or making it on to the Bench. That is a career path for individuals.

For solicitors, it was perhaps making partner in a firm. We increasingly get reports of members from our side of the profession who are at the stage where they are being offered partnerships and are refusing, because they do not want to have to face the burden and the risk to their own finances of subsidising a practice that may be struggling.

In terms of an extra step in the career path, although I think something like 45% of applicants for judicial appointments are now solicitors, the number that actually make it is still very low. It is quite difficult to point out to new entrants, "Here is the career path." If you skew money away from the end of the rainbow, if I can call it that, and say, "Well, that's now gone and this is as good as it gets," it is only going to get worse.

Q97 **Chair:** There is no differential for me being instructed in a case where it is the single count that we were talking about as opposed to the multi-count. As a person with 10 or 15 years' experience, I am going to settle for being paid for doing an easier job, frankly.

Daniel Bonich: Yes. There is an impact on entrants as well. It has a real impact on diversity and the types of people coming in to do the work. It is only those who have independent wealth who can afford to do so. The Bar is certainly reporting it, and to a lesser degree from our side of the profession. People are still leaving after two or three years because they cannot stomach what they are seeing. They genuinely believe that there is an almost managed decline in the standard of justice, and to see that, and not even make any money, is heart-breaking.

Q98 **Chair:** It makes it even worse. We have the daft situation where you cannot get the good and experienced people to do the middle ranking cases, because it is no longer attractive, and, equally, because they are still doing the smaller cases, they are squeezing out the youngsters who need to have the experience of doing those cases to get established in the profession to start with.

Daniel Bonich: Absolutely, yes.

Richard Miller: I want to put some figures on the whole career path issue. In the Otterburn Legal Consulting report that we commissioned jointly with the Ministry of Justice, one of the figures they looked at was the salary of the highest paid employee in a firm of solicitors. The median figure for that was around £45,000. In other words, for most lawyers coming into a criminal legal aid practice, the top figure that they could hope to earn was £45,000.

Bear in mind that we now have a generation coming through with huge student debts, and those are going to kick in. They will be paying them off throughout their career. Add to that the increase in housing costs recently, and that is why people looking at the career are saying, "There

is no way I can ever foresee being able to afford my own home, being able to afford to start a family or being able to have any sort of life here."

Chair: I understand that. I have been told that the one minute's silence for the Manchester tragedy has been postponed until 2.30, so we will not have an interruption at 11.30.

Q99 **Bambos Charalambous:** To get young people into the profession, you would offer traineeships or articles, as they used to be called. I imagine many firms do not offer that now because they cannot afford it. I think you touched on this earlier. Do you think it is a matter of getting the funding right to attract more young people into the profession?

Richard Miller: It is, yes. The Legal Services Commission used to have a scheme where it made grants to assist firms in taking on trainees. That ran for about seven or eight years from the early 2000s and seemed to be quite successful and popular. It would again only be one small part of the jigsaw, but there was merit in that scheme, and it helped. Right now it is a real struggle for any young lawyers to find training contracts in any sort of legal aid firm, particularly crime.

Q100 **Bambos Charalambous:** If they are not coming through, it just means that there are firms where people are getting older and older and there is no regeneration.

Daniel Bonich: Part of the reason why the average age is so high is no doubt that people who would have retired felt that they needed to keep going because there was nobody to step in. It feeds into itself. It is not just a question of getting the funding right. Although funding is part of it, it is about making people feel valued and appreciated for the contribution that they make. Ultimately, we are a quasi-public service. We are providing a service, on behalf of the Government, that the Government have decided that they want to send out through us as individuals, but we do not feel that we are appreciated in the same way as many other public services are.

Q101 **Bambos Charalambous:** Do you think that the Government should be taking a more strategic approach towards criminal legal aid than they have been?

Daniel Bonich: Yes.

Richard Miller: Very much so, yes.

Q102 **Bambos Charalambous:** I imagine you have made that case to the Government on many occasions. What has been the response that you have received?

Richard Miller: The response is always, "There is no more money." The scheme for funding trainees was cut as part of one of the earlier rounds of cuts. It was probably in about 2010-11 that that went. The clear message has been that there is no more money for any sort of initiatives like that. It was very interesting that, when we published the heat map, the response from the Government was, "We have enough lawyers

today." There was absolutely no engagement with the fact that the data clearly show that they will not have enough lawyers in a very short space of time.

- Q103 **Bambos Charalambous:** Clearly that has fallen on deaf ears, because it has not been dealt with as a strategic long-term future for criminal legal aid. You mentioned some figures previously. What do you think would be needed to fix the problem?

Richard Miller: It is very difficult. If you look back at what happened to NHS dentistry in the 1990s, there was a similar situation. There were cuts and cuts and cuts, and, by the time the system collapsed, it took far more to repair it than just restoring what had been there before. People had just said, "Right, that's it, I've had enough, I'm not interested any more." To rebuild it, once the system has collapsed, costs far more than to stop it collapsing in the first place.

Daniel Bonich: It is important to say that these changes, cuts and increases in pressure are cumulative. Although at the moment we have a Government who we feel are not listening to us, this has been a long time coming. It is Governments of all complexions.

Richard Miller: It is 20 years.

Chair: It is 20 years, and it has gone through a number of different parties in government.

Alex Chalk: It has happened at a time of rising overall budgets and declining overall budgets. It has always been a soft target. Frankly, putting it bluntly, there are no votes in justice. That is the truth of it. But, in fact, it is a critical part of public service and what it means to live in a civilised, democratic, rule of law society.

- Q104 **Chair:** I want to wrap up with a couple of points. It has been put to me by people that it is particularly galling in terms of value when there is no money for expenditure in this area but there is a lot of money wasted elsewhere in the system. For example, you gave evidence to us recently about disclosure, Mr Bonich. Failures in disclosure can cost a great deal of money.

The example was put to me recently of a very substantial drugs trial involving half a tonne of drugs. It was multi-handed, and barristers and solicitor advocates were involved. It was listed for trial in November. The trial was due to start on a Monday. On the Friday, telephone evidence was disclosed that had been made available to the prosecution in June. By the third day of the trial, it was apparent that it could not continue because their own experts were needed. A huge amount of money was wasted there, for which there will probably not be adequate remuneration, I anticipate, for the work done.

The other instance that was put to me was the way listing works. Do you find that a problem in terms of inefficiencies? I see you are saying "Yes" very strongly, Mr Miller.

Richard Miller: That is right, yes. There are numerous ways that it causes problems. One is that some courts list everything at one time, and then everyone is kept hanging around waiting. There is a problem of listing multiple cases together, in the expectation that at least one of the cases will crack and therefore the other case will go ahead. If neither of them cracks, one of them has to be put off to a future date.

I did a visit to Nottingham recently and practitioners there were telling me that they have cases listed for Crown court trial in September, and the lawyer has told his client that there is at best a 50:50 chance it will go ahead when it is listed. There are huge problems with listing and huge waste in the system as a result of those issues.

There is so much waste going on. Both the CLSA and the Law Society have done various studies at various times looking at waste in the system. Another problem is that, because the CPS is also significantly under-resourced, some of the conversations that can get rid of cases do not happen until the day of trial. For example, it is not uncommon on the day of trial for the defence and the prosecution to talk and agree, "Yes, we can accept a plea to a lesser offence." That could have been agreed weeks beforehand, saving a lot of costs on both sides, but it is just impossible to have those conversations.

Q105 **Alex Chalk:** One of the things that always used to happen in the early part of my career was that solicitors would send a letter of representation to the CPS early on and say, "Can we carve this up?" or, "Look, this is a man of good character who has never done anything before. Look at this in the round; is there really a public interest?" Do those letters still get responded to, or do they just go into an empty hole?

Daniel Bonich: The problem is that these days the question is, who do you write to? The old concept of being able to pick up the phone or write to a lawyer at the CPS who had responsibility for the case has mostly gone. They have pod schemes and giant lists, and you have no idea. The CPS sends out correspondence with no contact details on it.

I was part of a working group where they asked how they could improve, and how we could encourage more engagement. We pointed out that they sent letters without any contact details and could they at least do that. They said they would look into it. That was three years ago and they are still not there.

Q106 **Alex Chalk:** Meanwhile the criminal procedure rules are inviting the parties to narrow the issues between them and to ensure that the material put before the tribunal of fact, be that magistrates or jury, is simply those matters they need to deal with. If you have not been able to narrow the issues, you have not been able to do your duty by the court.

Daniel Bonich: Yes.

Q107 **Chair:** At the end of it, because of the lack of strategic view, you have issues, for example, of listing, and an ineffective trial fee is very little recompense because the advocate will have fully prepared the case for

trial.

Richard Miller: Precisely.

Q108 **Chair:** They are ready to go, but for whatever reason—there is no court time, the interpreter is not there, the prisoner is not produced or something of that kind—it goes off and goes back into a warned list. That advocate may not be available to do the job because of other professional commitments, and they never get the money for the work they have done.

Richard Miller: It is not just the defence that is impacted by that, of course. There are witnesses and potentially a complainant to whom you have to say, “I am sorry but it is not happening this week” for whatever reason. There are real inefficiencies in the system that need to be tackled.

Q109 **Chair:** One of your advocates or young barristers might go along to court to do a mention at 10 o’clock, and it is not reached until 3.30. Effectively, they are earning £90 or £120, or whatever the fee is, for a whole day’s work. That is the disincentive, isn’t it?

Richard Miller: Yes.

Chair: Gentlemen, thank you very much indeed for your evidence. There is a lot more that we could go into, and I am sure we will on future occasions, but we wanted to look at some of the immediately pressing issues around the two schemes. I am sure we will return to a number of other matters around criminal justice in future. Thank you very much for your time and your evidence.