

## Justice Committee roundtable on court capacity and legal aid: family law

Monday 14 December 2020

**Participants:** Anne Barlow, Naomi Cousins, Jess Mant, Lisa Harker, Jane Robey, Elspeth Thomson

**Elspeth Thomson:** Hi I'm Elspeth Thomson. I'm the Co-Chair of Resolution's Legal Aid Committee, Resolution being the family justice organisation. I'm based up in Newcastle where I'm the managing partner of a legal aid firm and I specialise in children law, so I've been spending an awful lot of time in front of screens in this room over the last few months.

**Anne Barlow:** I'm Anne Barlow. I'm Professor of Family Law and Policy at the University of Exeter. I've been doing quite a lot of research, mainly around legal aid and mediation and access to justice and this issue around why people prefer to go to court and represent themselves rather than take up legal aid for mediation. I have practised as a solicitor in a legal aid practice, many years ago now. I don't know how relevant that experience is, but I have been there and worked at the coalface too.

**Lisa Harker:** I'm Lisa Harker. I'm Director of the Nuffield Family Justice Observatory. During the pandemic, we have conducted two large-scale consultations of professionals working within the family justice and parents and families affected by it to find out how the pandemic has affected their experience of family courts. We undertook a consultation in April and then another follow-up consultation in September which has highlighted some of the challenges and opportunities in terms of where we go next.

**Jane Robey:** I'm Jane Robey. I'm Chief Exec of National Family Mediation. We've submitted to both the future of legal aid inquiry and the court capacity inquiry. We're a national provider of family mediation. Family mediation is legally aided. We have first-hand experience of what happens to people who are in conflict and are trying to resolve their divorce and separation and the problems that everybody has experienced since LASPO and subsequently coronavirus.

**Chair:** The first topic we're really interested in getting your thoughts on is: how the current legal aid system affects the way that the family justice system works? Who would like to kick-off with your take on that? Elspeth?

**Elspeth Thomson:** I think the first thing to say is since the LASPO<sup>1</sup> cuts came in the number of people eligible for legal aid has seriously reduced. The main impact that we see in the courts is the increase in litigants in person. I particularly see that as I tend to get appointed to represent children under Family Procedure Rule 16.4 and you often have a situation where both parents are unrepresented yet there are pretty serious issues to be dealt with.

This isn't some squabbling over what time a handover is – there's serious safeguarding issues to be dealt with and yet people haven't been able to access legal support, or if they have, only one person has, and you're left with the other party unrepresented. So, that's

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<sup>1</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

one of the most significant impacts we've seen – an increase in unrepresented people. We do feel that if there was more access to early legal advice that could, perhaps, help set people off in the right direction and ease the pressure on the court. But there's a clear link between legal aid going and the courts struggling.

**Chair:** Could you describe to us, as someone who goes to the courts, what the practical impact of litigants in person is in terms of pressures on the courts?

**Elsbeth Thomson:** For a start, there's bundles. Judges need to be able to look at the paperwork, particularly when everything's remote, so everybody's bumbling around trying to switch between screens. Litigants in person don't have the technology to be able to put a bundle together. We have software which enables us to put this together and you can click onto a document in the index and get through to it. Litigants in person, even if they are technically savvy, they can't do that.

So, the courts of ending up with trying to trawl through bundles in the form of hundreds of attachments and that just takes up more court time. So, that's a very practical thing that you see – people struggling with how to get their tackle in order for a court hearing.

Inevitably, the hearings take longer because the arguments aren't as focussed. People aren't as used to using the power of the position statement or the case summary. Lawyers are very used to being able to write everything down on a couple of sides of A4 so the judge knows exactly where we're going to go in this hearing, what needs to be done and can address it. That's something that people who don't do it for a living, and why should they know. So that takes more time.

And then you can get situations where people would be advised not to litigate on certain points, and yet, these end up being litigated and taking up time. Arguments which aren't ever going to be going anywhere have to be addressed by a judge and a lawyer would just say, 'this is not a good point', and steer people away from that. I think those are the main practical implications.

**Chair:** It's quite an additional burden on the judge as well, isn't it?

**Elsbeth Thomson:** Hugely, yes. I know from judges... I think that their hearts sink a bit when they see they've got cases with no representation in because it's just going to take them so much longer to get through their lists.

**Chair:** Is there any estimate as to how much additional time – can we actually measure how much longer the cases take? How much more common adjournments are for example? Wasted days?

**Elsbeth Thomson:** Probably on a directions appointment, it's going to take twice as long. So, maybe an appointment that would be taking 40 minutes is going to take well over an hour.

**Jess Mant:** Just to build on what Elsbeth has said - there is some research that has been done in other jurisdictions which does indicate how much longer cases with litigants in person do take, particularly in Australia. There is that research and it is available. It does show that they take longer, and adjournments are more common.

To reiterate, the pressure on the court: the consequences of that are not just for litigants in person themselves. That's also for represented parties as well if lawyers have to take on

more of the work to make sure that those hearings can function. The increase in litigants in person has had an effect on, basically, how the entire court system operates.

But also, you can't really undermine the consequences for those individuals themselves. Research has consistently indicated that those litigants in person are disproportionately characterised by vulnerable characteristics – people in very extreme situations; very chaotic circumstances.

We're talking about people who don't have any other options. A lot of people are in the court process because it is their last resort. They haven't got access to other forms of dispute resolution, through legal advice, the way that they traditionally would have. You can't really forget the connections between the different aspects of the justice system.

**Anne Barlow:** Looking at why more people don't take up the offer of mediation – the idea was that would reduce the burden on the courts, if you like, by more people agreeing their disputes in family matters. The lack of practical readiness which includes knowing what the fair deal for each individual is has put people off going to mediation where you get information rather than advice, according to our research.

That, I think, could be addressed by allowing advice prior to mediation or a decision about court so that people make a decision for appropriate dispute resolution. And I think legal aid has a role to play in that because not every case is suitable for mediation. Not everybody wants to go to court, of course, either.

But actually, having a better triage system that gets people to the right form of dispute resolution through advice or possibly other things, like counselling, would be better for the parties to get to the right sort of dispute resolution process. But it would also, I think, mean that the courts weren't struggling with this over-burdening of capacity.

I do think that some solicitors, if not all, did manage very well people out of the court system into alternative forms of dispute resolution or through settling things. We've lost that, I think, with people who are unable to afford legal advice or indeed, counselling for themselves to help them get emotionally ready to deal with mediation, or indeed, just the whole burden of resolving their dispute through whichever way is possible. And that just doesn't lead to good outcomes for anybody as well as a process problem as we are experiencing.

**Chair:** The suggestion was, wasn't there, when LASPO came in that mediation was going to pick it all up and it wasn't necessary. That clearly didn't happen at all did it?

**Anne Barlow:** It takes two people to mediate whereas if one person goes to court, the other person has to go to court. Just right there you're not going to get as many people as you would wish because even though people are encouraged, strongly, through the system now to go into mediation that doesn't actually work for everybody. You need the conditions to be right, both to get them there and then for the mediation to be successful. Or they go to court.

Another thing people were saying to us is, 'what's the point', 'we're going to end up in court anyway, we might as well go straight there as soon as we can'. I think we've just got the incentives and the support wrongly balanced and that could be addressed.

**Chair:** In practice are lawyers themselves willing to refer people to mediation? And that's certainly the evidence we've had from people but is that, in practice, often the case? You

know if a client comes in, how often would you actually say you're better off mediating this? Any thoughts?

**Anne Barlow:** Pre-LASPO, our research definitely showed that people were encouraged to mediate. Post-LASPO, I don't have the same sort of evidence. Sorry to interrupt.

**Jane Robey:** What I would say is that post-LASPO, the figures of people going into mediation have not recovered in six years. The system, pre-LASPO, was that solicitors could access [12:40 -12:47 inaudible].

But I would say that, as I said in my submission, the problems are not about legal aid, legal advice because the system has in place... It's changed obviously. LASPO was introduced before compulsory MIAM<sup>2</sup> was introduced. There was a year gap in that. There is a problem with the courts not ensuring that people attend the MIAM. There is a problem with the second party to any dispute being required to do anything.

But I think a lot of that has now been addressed in the recently published family solutions report where they have identified what kind of support people need to help them avoid going to court. On another point, the delays in family courts now for private law proceedings are enormous and people are waiting months before they can get to a hearing.

So, COVID obviously has made that a whole lot worse. But this problem is going to be with us for a long time to come. If the system were working properly that the courts were making sure that everybody had attended a MIAM before listing hearings and before heading off down that route, then maybe that would help solve some of the problems that they've got with the logjam.

**Chair:** That's helpful. Any thoughts, any other issues around that particular topic?

**Elsbeth Thomson:** Just a few things to pick up. Firstly, on Anne's point of the triage. I think that's picking on something that is very important. In my firm, we've introduced something called 'Choosing Options Together' and I know lots of people have similar where you're basically talking to people about what the different ways of resolving their dispute are and which ones going to work for them.

And explaining all the problems with going to court – how it's out of your control, it's a judge making decisions and encouraging people towards that. I think it's important to triage before people go to mediation, that is a very useful point. Anne also said you have to have people emotionally ready and, of course, that is often the problem with why mediation doesn't work. People are at different stages in how they are coping with the separation.

And just picking up on Jane's point about hearings taking place without people going through mediation. Somebody I'm supervising today let me know that a case we've been dealing with under legal help, the client's now received court papers and I emailed back going, 'well, why hasn't she got a mediation?'. And apparently the application form has just been ticked to say she was offered mediation, but she didn't go. According to our client, she's never been contacted. So, something's going wrong with the actual mechanics of making sure that the actual MIAM process works.

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<sup>2</sup> Mediation Information & Assessment Meeting

**Chair:** That's really helpful too.

Are there other things around court capacity? Elspeth was just talking about the length that cases are being listed out. Are there physical capacity constraints? Accessibility, travel constraints or not? Are there IT constraints and so on that people are coming across which are making it harder? Anything you can help us with on that as well as the point you were going to make Jess?

**Jess Mant:** Thank you. Yes, there's a lot to talk about isn't there. The court capacity is a huge issue at the moment in terms of access to technology, in the remote hearings or hybrid hearings, what's going on at the moment. There were already issues with resources in the court system anyway.

I was thinking particularly in terms of domestic abuse within the family court hearings in terms of judges not necessarily having access to the correct technology in order to enable video-links and screens and similar. Those are all pre-existing issues.

**Chair:** Does the research suggest that it applies more to the local court level rather than in the high court? I assume that's probably the case as they are better resourced and so on?

**Jess Mant:** The data suggests that there is a general willingness to use the resources when they are available, but they tend to consistently not be available and that's all due to under-resourcing.

**Lisa Harker:** Our two consultations show that, largely, most family law cases are being heard by telephone at the moment and that's primarily a lack of technology available.

**Chair:** Is that COVID related as well or not?

**Lisa Harker:** It's obviously COVID related, yes of course. But in terms of the move towards making the best use of the technology that is available and the rollout of CVP<sup>3</sup> across the estate, it's still very limited. In the sense that there will be, in a particular courtroom access to CVP, for some of that court, but not the entire court.

There is a hierarchy whereby the high court has access to good technology and those who are working at district judge level or magistrates level... If you're a magistrate you're having to use your own laptop.

**Chair:** Is that still common?

**Lisa Harker:** It's absolutely still common. If you read the responses to our consultation magistrates have not been supplied with laptops yet. And when we ask professionals what would help, what would make a difference, the things they ask for were really quite basic things. They were headphones, larger screens so they could see people properly in court. These are not things that are insurmountable. It feels like we've got quite a long way to go to put some of the basics in place to help that function properly.

**Chair:** That's helpful. Any other observations on capacity issues?

**Elspeth Thomson:** Just to say with capacity – the experience up here has been mainly, as Lisa says, telephone hearings which is increasing capacity. Over the last couple of months, there's been a lot of recorders brought onboard, so the lists now have a lot of fee-paid

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<sup>3</sup> Cloud Video Platform

judges. That seems to be the solution that's been brought in, so it is keeping things moving at the moment.

But there's also other problems with managing phone hearings, particularly for people listening in. Sometimes it's hard to follow things when you're in a room, let alone when you're just listening. And the same comment that Lisa made about CVP that it's not across the piece. It tends to be selected hearings only and trying to manage hybrid hearings and the court staff have to deal with it. So, it's difficult at the moment.

**Chair:** On recorders, just talk through the practical things of that.

**Elsbeth Thomson:** Recorders are fee-paid judges, so they are solicitors and barristers who have passed the selection process to be part-time judges. Recorders sit at the same level as circuit judges and there are also deputy district judges.

**Chair:** What's the practical problem you find when you've got lots of recorders coming through?

**Elsbeth Thomson:** Sorry, It's a good thing. The only problem is with judicial continuity. They will come in; they will do a bit and then they are off again. So, you don't the judicial continuity.

**Chair:** So, the case may get handed round to other people?

**Elsbeth Thomson:** Yes.

**Chair:** I get your point about the continuity. I can see logic there. I suppose that's the problem too with magistrates' benches sometimes isn't it? [21:45 inaudible] gets listed a long time to make sure you can get the same bench together and so forth.

Is there anything about how we should be looking to adapt any of the court processes to deal with some of these issues? Either with COVID in short-term or these other issues that you're picking up on for us? Any thoughts there?

**Jess Mant:** In terms of how to adapt the court process, there's a been a few suggestions and Anne might be able to talk more about this as well. Basically, you can train litigants in person to be lawyers but that requires a lot of resource and a lot of training and a lot of investment which doesn't currently exist and also might be beyond the capacity of some litigants in person anyway.

You can rely on, kind of, quasi-lawyers which would be what's happening at the moment where McKenzie friends and/or non-legal advice support services are helping them out but again will only ever be limited. And the third option is to reform the court process and make it more inquisitorial which will be more appropriate for lots of litigants in person but of course that can't be done without a massive overhaul of the resourcing as well. So those are the three that have been outlined so far in research.

**Chair:** And that's sort of the argument is it? That sometimes for certain types of work in family law you ought to move away from the older adversarial approach that historically you'd have in civil litigation and so forth? Are there any examples of common law jurisdictions that have made that sort of shift?

**Anne Barlow:** Well, in terms of other jurisdictions, most European jurisdictions...

**Chair:** I'm thinking about people with our common law tradition if any of those have made that shift?

**Anne Barlow:** Certainly, in Australia for example they have tried to go to a system that encourages mediation where they limit the points that people are in dispute about before they ever get to court. There's a lot of pre-trial work. Even here, we have the FHDRAs<sup>4</sup> and the different approaches to try to minimise down.

But with litigants in person again, you do have the problem that they almost want their day in court. They think they've got a right to it. Even if everybody is telling them it's not worth it, they feel that somehow, they can only get beyond the dispute if they do go through the court process however unpleasant or awful that is in some cases. Other people are terrified of going to court of course. Some people find it almost therapeutic in a strange way to be able to have themselves heard.

I think just narrowing down issues as much as possible; making sure people are emotionally ready in the sense that they are able to negotiate and get beyond the emotional angst and issues that everybody feels when relationships breakdown. People are not at their most rational when they are going through this process. That's the other problem that you need somebody almost to take charge and some people see the court as a way of doing that.

In the old days, you would often use your lawyer in that way even if you needed legal aid. Other people do go to counselling etc. Just narrowing down the points of dispute, I would say, is a really key thing. And giving people support through the process, be that lawyers or other ways. So, it's not just people using the courts to air their conflicts in a different forum.

**Chair:** I suppose in the old days, there was a green form scheme that even helped a bit. Someone came in off the street and you could perhaps sit them down and give them a bit of a talking through the thing and that might take some of the heat out of it. Elspeth any thoughts on that?

**Elspeth Thomson:** I'm essentially agreeing with that. There's a lot in trying to give people early advice about what things will look like. We always set out in our first letter of advice, we explain to clients what the court is likely to do and what the court expects of parents.

And just a reality check about what you're going to achieve from this whole process. I think a lot of people aren't getting the reality check early doors about whether court is going to magically solve their problems.

**Chair:** That's helpful. Any of my Committee colleagues want to come in on any thoughts at the moment?

**James Daly MP:** I'm a criminal legal aid lawyer. One of my many faults is I hanker back after the old days of criminal legal aid. In that, I think that the system, although it could be pointed out that it was inefficient and perhaps people took advantage of the system, actually achieved better outcomes.

You're not saying this directly, but it gets back to the same point – how we create that balance between an efficient system where people are getting paid a sufficient amount of money to have careers in legal aid but not take advantage of the system. That sounds like a

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<sup>4</sup> First Hearing and Dispute Resolution Appointment

very lawyers' point. This is not negative. You've got the legal aid solicitor here – I'm on the side of access to justice all the way.

Getting down to the more specifics, is there anything that we as a Committee can look at in that fight between the Treasury, that look at how much we're spending and the efficiency of this system and how we can target that in the best possible way?

**Elsbeth Thomson:** I think that's really interesting James. For me, that was one of the things that was a problem with LASPO. I am not saying that pre-LASPO everybody who got legal aid should have got legal aid or that the system was well-targeted, but the problem was that we chucked it out all at the same time. So rather than trying to focus on the most deserving cases, we just said nobody's getting it.

For all private children law, it was cut out of scope and you had to get back in through the gateway. Whereas, I think if there had been better focus on merit and trying to understand the merit side of it, we could've got a better result. I know what James means about pre-2012, some cases you're thinking, 'really, is this the best thing we could be spending money on' and yet, it has managed to fit the tests. Obviously, with my magic wand, I'd like to get stuff back into scope.

**James Daly:** When you come down to Parliament, one of the things that you find out is that policy gets lost in a big, wide generalised discussion about the big issues. Whereas, one of the things that we can do and one of the things that I feel MPs are good at is focusing on one, two, three issues and using that as the focus for wider and bigger change within the system.

What I mean in respect to that is there are lots of generalised things that could be changed, and we could have a general discussion about not enough money in the system, or this or that. But it's a bit like what Bob just said, if we could go away from this and say that we need to introduce a green form system and that would make a difference. And then we could get the legal aid minister to work out how much that's going to cost, that's one of the ways I think we can practically help and assist. Rather than a sort of general 'this isn't fair, and you need to look at this'. Unless we, as a Committee, are very specific, 'do this, do this, do this', I think some of the detail won't get ironed out.

**Elsbeth Thomson:** Early legal advice. I don't need to call it green form, we can call it something else. But getting early legal advice in. That's really what Resolution's main manifesto call is for.

**Jane Robey:** I think the point here is by early legal advice you're continuing to frame relationship breakdown as a legal issue which as Judge Wildblood ranted about in September the things that the courts are dealing with are not necessarily legal issues.

I think there's an issue with the whole culture of divorce in this country. It is framed as a legal issue when in actual fact it's a relationship breakdown issue with some legal issues in it. They are not the priority in a divorce. I think until we shift our thinking to support people through the emotional problems of divorce and then follow it with the legal issues then you're always going to be facing this discussion about the huge cost to the taxpayer of a legal system.

**Elsbeth Thomson:** Just to follow-up on Jane's point, you can't take the word 'legal' out of early and advice, and that's still going to do the job.

**Anne Barlow:** Just following up on that. There are quite important legal principles that govern financial dispute resolution for people. That is, I think, a legal matter. Non-financial contributions equate equally with financial contributions to family life. And how you divide all of that up does link to where the children are going to be living, how the arrangements for sharing their care are going to work out.

I do think, if people just agree without having that information to hand, I think it could be quite dangerous. Our research certainly showed that people felt they regretted some of the arrangements they had negotiated, either face to face with their partners or through mediation or even using solicitors. Because they hadn't fully appreciated what the longer-term financial consequences would be in particular.

I do think children is a different matter in many ways. Although, where there's violence or issues of that nature, you have to be careful there as well that any agreement isn't being achieved through pressure that's inappropriate. I think the law does provide some important checks and balances. That's not to say that I want everybody to go to court because I certainly don't think that's good for anybody either.

But I do think we need to feed that into the decisions people are making when they negotiate and then check that against what the law would expect and the sort of outcomes that we would hope to see in those types of cases.

**Jess Mant:** Firstly, to reiterate and build on what Anne has said. I don't think any of us are suggesting that everybody should go to court and litigate. But, obviously, the legal framework does play a very important role in terms of being a shadow of those negotiations which happen in private.

I think that we need to get past this idea that the court process should be avoided for everybody. The court process is a feature for some couples, a very significant minority of course but in situations where there are these safety concerns maybe the court is the best place for those cases to go. And it's making sure that that is accessible and available if it's needed.

**Elspeth Thomson:** I just wanted to tell you a bit more about the Resolution manifesto for the family law credit – very happy to send you this afterwards rather than read it out to you. Basically it's looking at a form of initial advice from a professional who can talk through options and that's really what we see as being the key. I will send that to people later.

**Chair:** If you can that would be very helpful, thanks. And then Jane?

**Jane Robey:** Just to say that I didn't say that the law wasn't necessary I just think that it's at the wrong point, and even with children issues, children should be at the centre of everything because the money must follow the children. So if you want a financial divorce or whatever, the money must follow the children.

And of course, there is a legal framework, but if you set out on that route to start with it becomes adversarial because that's what the law and the courts do. And it doesn't give people any opportunity to negotiate. And of course, there are going to be people who say, 'oh I wish I didn't agree this or that or something else'. But being made responsible for your own decisions has got to be the right way to move this forward culturally, rather than relying on the law and the courts.

**Chair:** Does everyone have the capacity to do that?

**Jane Robey:** No, obviously not.

**Chair:** So, you've got to have some form of triaging process?

**Jane Robey:** Obviously. The Family Mediation Council undertook some research that showed that 70% of people... when you have two people in a case who had attended a MIAM, went on to mediation and of those people, 70% reached an agreement. And the agreement can then be converted into a legally binding document. So the law isn't ignored at all in family mediation.

**James Daly:** From my own perspective, that's been a really helpful contribution from everybody. One of the things I often have, not trouble with, but the understanding is that when a statement is made that litigants in person are causing problems and delays to the courts and that lawyers are required in certain circumstances... I suppose it comes back to me trying to understand this clearly – if we start off from the perspective that we all in a perfect world would want access to justice for everybody in every single circumstance but that's not going to happen, we all know that it's not going to happen.

I sometimes feel that we, or the Committee, probably needs some very eminent lawyers like the Chair on this who certainly doesn't need assistance but people like me do, about what are the characteristics and criteria, whether it's related to the actual nature of the hearing or the circumstances of the hearing, which would mean that the state should provide legal advice for that person, do you see what I mean?

I'm sometimes still unclear in my own head when I listen to these discussions – which are fantastic and it's not a criticism – what it is that people are asking us as politicians to do. Who would you want to be represented, if it's not everybody, how do you bring it down in terms of saying that the state should provide advice in this circumstance, or access to advice in these circumstances – which is a big question and I don't expect anybody to answer it now.

**Chair:** There was a couple of people wanted to come in anyway, they might pick up some of it. Anne?

**Anne Barlow:** Thank you. Well I think the reason that we need people to be advised is so that they can build forward in a better way to the benefit of their children, but also having confidence that they have settled the matter in a way that is appropriate to what the law would expect. When people are left to their own devices on financial matters for example, they think 'oh, fifty-fifty, let's split everything fifty-fifty, that's fair' because it sounds fair doesn't it?

But as Jane said the money needs to follow the children. But then if the other person is the main breadwinner they will think, 'oh that's my money, why should I give it to her or him' in that sort of way. Yet the law is very clear about how the non-financial contributions to family life – not working and staying at home or going part time, not taking promotions, doing all the running around to help children get on or whatever – that is a contribution that equates.

But that's quite a difficult thing for people to accept at the moment that their relationship is falling apart. They accept it during the relationship, but you can be sure the moment it breaks down that sort of discussion, all rationality goes, if you like, and people see things from their own perspective. So I think actually having that legal advice, that as I say

narrows the issues and explains why the law does the things it does in the way that it does, why it thinks that is fair, in inverted commas.

I think really just sets things up in a way that enables people to have equal power to agree a good way forward for the family. Whereas if you do that at the very end of a negotiation process everybody is feeling very uncertain about whether it is the right or the wrong thing for them. I would see legal advice, as well as counselling actually I have to say, as a sort of pre-emptive strike in this whole process. And it actually sets things in a positive way. You've seen what happens when that doesn't actually go ahead like it used to – the courts are overrun, and people are at loggerheads with each other and the children are suffering.

I just think that for a short and sweet intervention at the right moment you could get a lot of value for money, but not in a way that policymakers typically assess and measure value for money. But everybody, sort of, knows it would be better, those of us that work in the field, if you did those things for everybody. But the way value for money is assessed, as I say, it doesn't ever take that.

It's like goodwill in a business – it's a different type of measure to one you can easily put a figure to. I think we've learnt sadly from experience that not doing it has had very adverse consequences for the whole system.

**Elsbeth Thomson:** Thanks. With James it's a bit like being in court when you've got a judge saying, 'what exactly are you asking me to do Ms Thomson?' It's a really good question: what is it we are saying that the government can do?

I think there's two things that James' point is getting at – firstly, yes, early advice of whatever sort to try and get people on the right track. I think James was then saying if the number of people who can have lawyers is limited, who should those people be?

I think it has to start from the safeguarding for the children and at the moment CAFCASS<sup>5</sup> do safeguarding letters to identify where there are issues which are akin to harm for the children, and I think the legal representation should flow from safeguarding. At the moment, the victim can access through the gateway but the difficulty we've got is because the other person – perhaps victim wasn't a particularly neutral term – but somebody raising allegations can access legal representation but not the other person. That's where I would target if I was going down the list of who should be getting legal representation, for me that would be the next person down on the list, the other side of a safeguarding case.

**Chair:** OK, that's fair. Jane, I think you had a point about some work that was being done by MLJ.

Jane: Well it's HMCTS<sup>6</sup> who were developing an online C100 and part of the issue is that all of the court forms are phrased in legal terms. So, they were bringing it down so an individual could complete their own application and understand the process they were entering into.

I mean, obviously, it's a case of public education about legal rights and legal knowledge and you can have a big debate about that and it can go back into education and there isn't any room in the PSHE curriculum, all of that kind of thing. But that is one of the issues that we experience every day when we're meeting people through the MIAM, is there are so many

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<sup>5</sup> Children and Family Court Advisory and Support Service

<sup>6</sup> Her Majesty's Courts and Tribunals Service

things to think about when you divorce and separate, where to start? And people's starting point isn't always the law. It could be about where am I going to live, when am I going to see the kids, how am I going to pay my mortgage, who's going to pay the rent – all of those kinds of things.

So, it's bringing it down to a level that most people can understand so they can manage their own affairs. It's not legal. It's not about wrapping it up in legal language. And I think the HMCTS have done a good piece of work starting with the C100.

**Chair:** Ok, well that's an interesting thought. Perhaps we will follow up with the HMCTS as to where they're going with that, but I suppose there's got to be some legal process to distil the issues, hasn't there. But I thought we'd done a fair bit, or they tried to do a fair bit to make court forms more user-friendly. Elspeth, that's the case is it?

**Elspeth Thomson:** Certainly, the last iteration of court forms, I think they're easier to fill in but there still are bits where it says, 'what order do you want to court to make?'

**Chair:** Yes, and that's the bit nobody knows what to ask for.

**Elspeth Thomson:** Yes, I don't see how you can make a form that says, 'what order do you want'.

**Chair:** No, I get that. When I did do family work in the very early days I had one regular client who'd sworn so many affidavits trying to get her husband committed for various breaches of things that she actually started talking about her little girl as 'the said child'... But it is, it's a jargon, isn't it, trying to get people through it.

**Anne Barlow:** There was some research done in Birmingham, I think. I can't remember the exact details but there was work done about how to improve the court forms and I'm pretty sure some of those recommendations were taken forward a couple of years ago now probably.

**Chair:** Was that some academic work done in Birmingham?

**Anne Barlow:** Yes.

**Chair:** So perhaps we should try and track that down.

**Anne Barlow:** Yes, I can certainly find that for you.

**Chair:** If you could that would be really helpful, thanks.

Any other points around that sort of topic that we've been kicking around – any colleagues, anything else that springs to mind at the moment? Or shall I try to move us on to the next area we were going to try and chat about?

We talked about reform to legal aid itself. What we could do around the forms, how we might do the system of who warrants advice and so on and where that comes into mediation and so forth. If its not to be provided through classic, traditional legal aid, are there other routes whereby you can get that sort of information and assistance to people?

**Jane Robey:** The MIAM is obviously the starting point for many people. It's not just about mediation. We work with people to look at issues that might prevent them from coming into mediation. Any of their issues that are right at the top, and we do a lot of signposting in that.

So, I would say that the MIAM is a good place. Mediators are very skilled at signposting to all sorts of support services, the hard and the soft, and are good at preparing people for mediation. A lot is made about people's capacity to negotiate and it's very counterintuitive to think about sitting in a room with your ex and negotiating, but that's what mediators are skilled at doing.

The family solutions group is looking at services that take place on the apron of the court which is where mediation sits before court is used. I think that anything that could be done to make the MIAM more freely and readily available to people would be a good starting point for the right type of advice and support that people need.

**Chair:** Ok, that's helpful. It's a shame our colleague John Howell isn't with us today, he couldn't make it. But I know John's been very involved in mediation and is qualified as a mediator himself now, so I think he'd be interested in the evidence when we get the playback of it.

**Jess Mant:** Thank you. Yes, it's really important to stress the difference between legal advice and legal information at this point because obviously legal aid would pay for legal advice. What a lot of people are now having to do is turn to either the ad-hoc, sporadic availability of pro-bono legal advice, there are some amazing solicitors offering pro-bono drop-in advice evenings, etc., and they are obviously fantastic. But they are very limited given the constraints that are now being placed on those legal aid firms.

What a lot of people are doing is relying on information about the law rather than advice on the law and that's really important. That might not necessarily give them a bespoke insight into the specifics of their case. But also, if they can't access that information they may then look to other forms of information like social media, and then therefore, you run the risk of misconceptions about the court system.

**Anne Barlow:** There were two points following up from Jess. I think that people have trouble navigating legal information on their own. They don't know what to do with it. They read it and they don't know exactly what it means for them. So, some sort of access to a bespoke interpretation, if you like, of that information people would really welcome.

And actually, knowing what legal information to trust because it is a bit of a wild west out there in terms of digital information that is available. In a way there's too much and they're not sure what the trusted sources are. Even if they feel they're well equipped to find it and understand it, actually that's not always clear – what is the trustworthy advice or even which jurisdiction.

If you google divorce you might come up with California or Australia as much as you would come up with England. People don't even know Scotland is different from England and Wales, things of that nature. You have to know a little bit about the law in order to understand the information that is relevant to you. I do think that's important.

And then there's the point about the digital divide and people who really are not able to use – they're not skilled enough or confident enough to find the right information even before you get to the point of understanding whether it is trustworthy or not, and what it means for you.

I think expecting everybody to do everything... Autonomy is a nice word and it's great for those that can do it, but some people do need a bit of handholding and support through this

process. That's, I think, a really valuable role that legal aid could play in getting people to the right point and understanding information that is applicable to them.

**Jane Robey:** I'll just make the point that legal aid is available for legal help with mediation. So, for people who have been into mediation who are eligible for legal aid, they can go and get legal advice on the agreements they've reached in mediation.

Of course, the issue is that it's not paid highly enough and not many solicitors offer it. But then that's the same for legally aided mediation anyway. We may still have legal aid but we haven't seen any fee increases since 2004. Doing more about legal aid rates and legal help with mediation would help to satisfy the issues that people are getting proper legal advice on the agreements they're reaching.

**Chair:** That's after the event rather than before?

**Anne Barlow:** The way it's set up at the moment you can only get legal help after you've mediated as I understand it. So if a part of the MIAM could be some advice because people want to know what it meant for them. In our research, they wanted to know what it meant for them, rather than generally this is what people might decide.

I think when your life is falling apart, not that you want to encourage people to be adversarial, but you want somebody on your side and that's exactly the opposite of what people think should be attractive about mediation in that it's neutral. Our research certainly found that a lot of people felt they needed somebody to have their back, not in an adversarial way, but just to give them confidence that they weren't selling themselves down the river or agreeing to something that they really would regret because it wasn't appropriate for them in their situation for one reason or another.

**Chair:** Jane, any response to that in terms of the timing or the sequencing?

**Jane Robey:** The thing about mediation is it's not legally binding. So, for people who reach agreement or who develop options in mediation. When I say develop options, that can be options about what they do with their finances, what they do with their house, what happens with the children.

They can then go away and get their own independent legal advice through the legal help with mediation, where the lawyer would be able to tell them if it's fair, if it's right, if it's good enough for them, and they could come back and agree it. Solicitors could then convert that into a legally binding order.

The other thing I would say is that apart from the fact that LASPO cut the numbers, what we've seen in the past year is a massive increase in the number of people eligible for legal aid, and we've seen a shift in our workloads from around 25% legally aided now up to about 75% and that's a reflection of what's happening out there in the world.

**James Daly:** This is a question Chair which is a little bit out of ignorance, but when I was doing criminal law a grey day happened – means testing was gotten rid of. And suddenly, therefore, everybody became available for legal aid funding. The means test was brought back in later, we're talking in the last ten to fifteen years.

What I'm trying to get at is... Anne is putting forward a very strong case but in terms of a state functioning legal aid system which is going to support people, and is going to be the

right thing to do, etc. Are we saying that the means test is not the appropriate test as to who gets it? It's the sort of moral test of the arguments at stake?

If I've misunderstood you, Anne, I forgive you completely. But when you were talking about some of the initial issues that people need assistance and help to understand, and it makes the whole process easier. Are you talking about literally every single person no matter whether they're a millionaire or have mental health problems? That everybody should be entitled to this support that the state can provide?

I'm not making a view on it. I just want to understand. The means test we have in this moment in time, are we happy with that? And it's just the breadth of where those people that are entitled within the means test, what advice they can get, expanding it for that grouping? Or do we need to expand it for more people who currently don't qualify because of the means test?

**Anne Barlow:** People who can afford to pay, often they will do that. What's often very unfair is that one party can afford to do that, and the other party cannot. And then it's the party that can afford to pay that refuses to go to mediation. If you were able to use state support to make a more level playing field at the beginning and provide the right sorts of incentives to get people into a place where they could both negotiate in a more even-handed way, then I think that would be money well spent. Because otherwise you've got the poor litigant in person up against the represented person...

The point about mental health, I think that's very different from the millionaire, because people who have mental health problems, often their partners can't mediate with them because they're not able to have that sort of free and fair negotiation that one would hope goes on voluntarily in mediation and usually does when it's working well.

But obviously people with mental health issues, for all sorts of reasons, it's often not a good situation to mediate, and then you end up in court for quite different reasons because one person's got mental health issues and the other person's having to go to court to sort things out to get a decision.

**James Daly:** Just so I understand what you've said – and I'm sorry but I'm looking to you for your expertise in respect to this – if you've got one person going to mediation, one person can afford it and the other person can't, but legal aid excludes the person who can't afford it because of their means, or do we just not just provide any...

**Anne Barlow:** No, it's because all the private family law matters, unless there is domestic abuse, you're out of scope. So, the millionaire goes off to court, the other person has no right to legal aid at that point. They can't force the other person to mediate, so they all have to go to court, one of them unrepresented, and the other one as the millionaire with the barristers in tow.

So, it really is very unfair. And the judge has to bend over backwards to try and make things fair within the court system and that of course quite typically makes things much longer and more difficult for everybody.

**James Daly:** Has an academic piece been done on 1) the scope of providing that support, the cost of it and how we could roll that out? Is there anything we as a Committee could look at and send to the Lord Chancellor and say, 'this will cost this...' to achieve what you want.

I'm agreeing with you. We as a Committee can then go and say, 'we think this will be value for money' because of the very good points you've made.

**Anne Barlow:** Jess, would you want to come in? I mean, I can't wait for one piece of research, it's more you need to add up all the different elements of what it is costing and different parts of the court and family justice system.

**Jess Mant:** I and a solicitor, Jenny Beck, from Beck Fitzgerald, we've submitted an application for a Nuffield grant to do this project to basically measure the economic savings that could be made from providing early legal advice. So obviously we haven't received that grant yet, but I can send the outline application if that would be helpful?

**Chair:** That would be interesting to see. What's the sort of timeframe you're looking at around that Jess?

**Jess Mant:** We hope to do it within a year starting July 2021. So basically, we'd be comparing a group of people who had received an hour of early legal advice at the beginning of their problem with people who received advice later to see whether they were able to make use of mediation and other resources.

That outline application does draw together the existing literature which does not address that exact problem, but it does indicate that problems are resolved quickly.

**Chair:** That's helpful. If you could keep us in the loop with that, that's really useful.

**Jane Robey:** Can I just respond to James, something he said. So obviously one of the things I would like to see is that the MIAM is available to everybody regardless of ability to pay and the means test. But in terms of the system as it currently works, if one person is eligible for legal aid, and in most cases one person is eligible for legal aid, the second person can have their MIAM free of charge. Under rules that the MOJ introduced a few years ago they can also have one session of mediation paid for by legal aid.

**Chair:** Well that's helpful to know. We've talked quite a lot about those sorts of issues and thanks for volunteering to come back to us with some of the information Jess. That's really useful.

We also did want to know about COVID and the impacts that's had and I just wondered: are there any lessons, thinking back about what's happened, with the way the family courts have had to adapt their operations. Any lessons we can take from the impact COVID has had on family courts – are they good ones? Or bad ones? Things we must make sure we never do again? Has it highlighted particular failings that have become even more pressing, or are there some changes that might be worth keeping?

**Elsbeth Thomson:** I think, looking back to March and April, the court system responded really well, as did the legal aid agency. I thought it was quite a heroic response. I think what we have to be careful about is because we've managed to make remote hearings work we shouldn't say that, 'oh, that'll be the way forward in the future'. I'm sure you've heard this from many people just about all the stuff that is lost in a remote hearing, and I've yet to meet anybody who is saying, 'I want this to continue how it is' from lawyers I speak to.

But there are features of remote hearings which could be useful and that particularly for managing people who've experienced domestic abuse, for whom going to court was a very

traumatic experience and involved a lot of lurking around side doors to go and sit behind screens and stuff. Doing it this way is so much better for people like that.

And it also can be a lot more accessible for other vulnerable people. I think it would be useful for the courts to bear in mind that for court users, for some of them it works better not being in the building, and that's certainly something they could do. And also it may well be that working through lists it can be more efficient from the court's point of view to do it remotely and let's not get rid of it altogether.

**Lisa Harker:** I think it's absolutely the case that case management hearings and admin hearings have worked really well remotely and should continue to be held in that way. I think professionals have really indicated that it's a much more efficient and effective way of working. But that complex or contested hearings simply can't work in that way. It's been helpful to move on from a debate about whether remote hearings are good or bad, to a debate about what kind of hearings can be held remotely.

In terms of lessons learnt, what's been really striking when we've asked people for good practice or examples of where things could be improved, that they've almost entirely centred on the basic administration of the process; the clarity of the systems operating well; getting information to people at the right time; somebody being in charge of setting up the hearing; being clearer who's responsible for supporting litigants, represented and unrepresented litigants.

It's not been clear who should take responsibility for providing information, or organising hybrid hearings for example. And the very big differences around the country in terms of the efficiency and effectiveness with which courts are operating could be addressed with much greater clarity about what's expected.

**Jane Robey:** I think that COVID has catapulted us into somewhere that we were resistant to going and have been resistant to going for a long time. And like everybody else has said there are good bits and bad bits to it. I don't think that IT will go away after this.

**Chair:** I don't get the sense the judiciary want it to go away and the senior judiciary seem very keen.

**James Daly:** Bob, I tell you from a lawyers perspective the remote hearings are going to be a disaster for the junior bar. All the senior QCs will be sat there keeping everything to themselves.

**Chair:** Absolutely, that's a real worry, that's a very fair point actually. Any other points? Jack from the Committee team, any questions you had Jack because you've been putting a lot of the brief together?

**Jack Simon-Caird:** Thank you all for coming and for the discussion so far, it's been fantastic. I suppose the main thing from our perspective is to... one of the reasons we put this roundtable together is because of the crossover between legal issues raised in the legal aid context and the court capacity context. And that's something that's quite difficult. A lot of the evidence we received raised these crossover issues where it appears that there's a sense that perhaps...

**Chair:** Jack's internet seems to have frozen on him at the moment... Are there any other points that you are keen to get across to us whilst we're wrapping up the session? Any bits you think that are important that we haven't touched on yet?

**Anne Barlow:** One of the things our research did begin to uncover was that where children were consulted, this was for mediation mainly, it was often a good way of narrowing down the issue between the parents about the arrangements that were being discussed.

Certainly, in the mediation context where you're trying to do something that is very child-focused, actually including the child more directly in that process, before everybody rushes off to court actually. To their surprise – I mean we didn't have a very big sample for that, but for those people who had tried it they found it very positive and resolved a dispute that was looking to be a very high conflict one.

Now I understand that the legal aid rates for child-inclusive mediation – and Jane can probably talk more to that – are very low, in that it isn't really worth the mediator's time particularly for doing that. Yet it might be a good way if you had it almost as an adjunct to the MIAM to narrow down the issues and get people to do, not what the children want, but making sure they get their voice heard and the parents really do know that that is a true view that the children are taking. Rather than each parent representing the child as agreeing with them, which often is one of the reasons everybody ends up in court.

**Jane Robey:** All I would say is that legal aid has never taken account child-inclusive mediation. It has always said that it could be paid for as a multi-session rate and that undermines how child-inclusive mediation is set up to work, which means the parents have control. You have a meeting with the parents to start with to define what the agenda would be. You have the meeting with the children in a way that they want it to be done – so if there were three siblings there could be three meetings, or it could be all together – and then there's a feedback session to the parents about the meeting that the mediators had. Legal aid have always said, 'no that's covered in the multi-session fee' which it definitely isn't.

**Jess Mant:** I was just going to raise a different issue actually – the pressure on the advice sector post-coronavirus is a really huge concern as well. Obviously under huge pressure already in terms of providing pro-bono or even just information about what the law is and family issues.

Obviously now that we've had the impact of COVID we now have people experiencing legal problems for the first time in relation to employment and social welfare issues, and because of that more pressure is being placed on the not-for-profit providers. Therefore, they are even less able to then stretch to the task of providing any information or referrals around family law. So it's even more pressing at this point because of the impact on other areas and how they interact with family law issues.

**Chair:** That's again a very useful point. Jack was going to ask whether they thought changes to court capacity might mitigate the impact of limited access to legal aid? [everyone shakes their head in disagreement] Could you say why you don't think that's the case?

**Elsbeth Thomson:** Because you can have lots of courts sitting but if you've got people there unrepresented it doesn't solve the problem.

**Anne Barlow:** Just really to say that if people get to court in a very high conflict situation then that's going to be a bad thing, I think all-round for the continuing family relationships. Even if you get through the system, if the wrong people, the inappropriate cases and parties end up in court, it does more damage than if they had found a more appropriate route for them at an earlier stage I would suggest.

**Jess Mant:** Just to reiterate what's already been said.

**Chair:** I just wanted to say thank you all very much. It's been a real help to us, quite an insight. It's a long time since I was doing this sort of work. It's good to have that breadth of view from those of you who are involved at the coalface in the system. We'll be able to take this onboard as part of our evidence towards our report and the rest of our inquiry. Thank you very much.