

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

**Monday 8 February 2021**

**Participants:** Robbie Ross, Lucy Welsh, Kerry Morgan, Tony McDaid, Michael Duck

**Chair:** The first thing we really wanted to look at was where we are with the current legal aid system? Are you finding issues particularly around the sustainability of the profession? What's the score on recruitment retention? Have you had to shift mix in your practice on the sort of work you can do, for example, to keep things viable? What challenges are there? We're interested in fixed fees, how the means test might work, and so forth. What are the real issues you're finding on a day-to-day basis? Tony – you have your hand up there...

**Tony McDaid:** Thank you. I think it's a real problem here, and I'm seeing this in recruitment. I've been in chambers now for a number of years – decades in fact – and the problem, certainly for the Bar, is that you're getting barristers coming through who are saying they want to be criminal barristers, but they simply can't afford to do it. After about two to three years practice, they realise that they're going bankrupt and they end up doing personal injury or commercial or anything else that they can. The unfortunate thing in all of this – what we boasted at the Bar and across the legal profession for a number of years about creating more diversity – is we are actually sending the clock back by twenty or thirty years. Unless you come from a background where your parents have money, there's no way that you can sustain a career in a criminal practice, in a solicitors law firm, or indeed certainly at the Bar, unless you've got some funds coming in from other means. It's absolutely desperate. Even people in large sets like ours... at least we've got the flexibility to move them over into other areas, but if you're in a set that's predominantly crime, I don't know how they cope at all. I'd be surprised if some of them survive Covid, and I just think that the whole thing is – and I know we've been saying this for decades; we've been saying this would happen – but the rates are so low now that it really is crisis point. There will not be a viable legal aid Bar, and indeed further afield. If you've got private money to get legal representation, that will be where you get the best representation because it's really, really bad.

**Chair:** As just an example looking across the chambers, maybe not the big ones like yours or the ones that I was used to, you know, the more run of the mill types if you like – as a junior or something – somebody's just become a tenant for up to five years call, something like that, and they're doing nothing but crime... what's the sort of money that you reckon they can be making?

**Tony McDaid:** I think it very much depends on the sets, but I think they're probably looking at around about £35,000 in the first twelve months or so. What you've got to remember though is that they're self-employed; there's no sick pay, there's no maternity pay, there will be anything between 15-20% in claims expenses, so you end up with junior barristers earning the same sort of rate as post room boys... and we're not even talking about renting a flat or renting accommodation or anything, it really is that desperate for them. It's very worrying.

**Chair:** ... and they've got their student debt no doubt. Ok, that's a sort of ballpark figure, thanks. Kerry?

**Kerry Morgan:** We pay our five-year-plus duty solicitors on average around £35,000 a year, and they can't really earn more than that because criminal practices don't earn the fees to earn more than that – so that is the ballpark figure. Last year we invested in one of our duty solicitors to become a higher rights advocate – we paid for the courses, qualified in November, and in December he'd got an email from the Crown Prosecution Service through some agency, through LinkedIn, offering him money that we just couldn't compete with in any way, shape or form, and he leaves at the end of this month. There is no one to replace him with because there are no new duty solicitors out there to recruit who are going to do it for £35,000. All the firms in Manchester in the same position, I would probably say a third of over 40s have now gone to the Crown Prosecution Services on salaries we just can't compete with.

**James Daly MP:** Sorry can I just interrupt? Can I just say when Kerry talked about Manchester, did she talk about Greater Manchester...?

**Kerry Morgan:** Yes.

**Chair:** Yeah sure, yeah.

**James Daly MP:** ... so these solicitors are being asked to travel big distances just to go to work each day...

**Chair:** Robbie?

**Robbie Ross:** I've been involved in criminal defence work my entire working life. I've never done anything else, I have absolutely no interest in doing anything else. I think if you ask most people on the street what a real lawyer is, it's someone who stands up in court and defends or prosecutes someone, and that's important. I think at the moment, having seen the changes over the past thirty years, we've come to the point where the sustainability of legal aid ties in with the sustainability of the justice system itself. We have a circumstance now, as Kerry just indicated, where it's almost impossible to bring people into the profession. We had a chap who was the vice president of a law society who indicated just now that it's difficult to get young barristers to come into the profession – and when I say 'the profession' I mean to stay within the justice system; the criminal and the civil justice system. Sustainability has to be seen from the point of view of the future. The system at the moment, you've cut it to the bone. It's been cut to the bone by successive governments – this is an apolitical point, frankly – and consequently there is huge, huge difficulty in us not only recruiting, but actually keeping staff on. I think the point Kerry made about people going to the Crown Prosecution Service is a good one. I've seen it happen in the area where I've always had my business and that's an irony, because when I started back in the very early 80s it was the people who weren't overly good at the job going to the Crown Prosecution Service because it didn't actually pay as well as we could pay.

**Chair:** I remember that.

**Robbie Ross:** So the important point really is sustainability. If you can get sustainability into the system, all the way around... it's not just within our profession. When I started, police officers knew what they were doing; now, I won't use some of the words that ex-custody sergeants that I've employed over the years have used to talk about the lack of

skills that police officers have. The court staff have been completely massacred. The probation service has been massacred. The whole system is broke, and unless we look at it in a very holistic way I think we have a huge problem for the future. We aren't talking about a huge amount of money. We've seen over the past twelve months, because Covid has brought into stark contrast some of the problems we've got, we've seen the amount of money that can be found from nowhere to let us go out and eat, etc. If we can find money to do that – billions and billions – I'm sure we could find about a billion pounds that would at least redress the balance within the criminal justice system.

**Chair:** Thanks Robbie, that's really helpful. Lucy?

**Lucy Welsh:** Thank you. I guess just to echo the points made earlier about salaries – I was ten years PQE, I was a quality mark manager for my firm, duty solicitor in Kent, and I earned £36,000 a year before I left for academia – so similar sort of salary level. Just on the retention point: I qualified in 2006. There was about seven other newly qualified solicitors in the relevant area at that time, and by the time I left in 2016 all seven of us had left the criminal defence practice and had not been replaced. We'd gone to a variety of different places; some people had joined the court service, some had joined the CPS, and then obviously some had left completely. So similar sorts of experiences to those that have already been raised. The other dimension is of course student recruitment, which has already been mentioned. I frequently speak to students in my current role, and they all have a passion for criminal law. It's the easy subject to teach in a way, because it's the one most students find most interesting. But they simply say they cannot afford, with student debt, to go into criminal defence work in particular, and joining the Bar is particularly problematic and has always perhaps come with greater difficulties in terms of there being less availability to join chambers than to join firms for training contracts. But there is still the retention issue... When I left my firm, I was the last trainee that they had taken. Recently, in fact, they had taken on a trainee solicitor, so it's been a number of years without any new entrants to the profession coming through in that part of the country. The means test I think has been mentioned. I also think that's a significant problem in the context of practice, in terms of the uncertainty it creates around whether clients are going to be funded and therefore the uncertainty it creates for business practice and the extra bureaucracy involved. That's one of a number of bureaucratic measures I think at the legal aid agency that could be reviewed to kind of ease these pressures on practitioners.

**Chair:** That's really helpful. Michael, you're leader of the Midlands circuit and it would be interesting to hear your take on what you're picking up from your members there in the number of years you've been in practice at the Bar.

**Michael Duck:** We've made strides in the last few years of recruiting criminal practitioners. Again, as Tony may have mentioned, and I apologise if I'm repeating anything, a major part of my role and one of the reasons I took the role on was to make sure that we ended up with a diverse and representative profession which includes youngsters. Of course, with the fees problems over the course of the last decade or so, I think even a chambers as large as ours had a gap of about six or seven years for recruiting criminal practitioners, which is disastrous. I saw a figure the other day which I find difficult to believe, being fifty-five. I'm told that is the average age of criminal practitioners. I forget the demographic exactly but that is a terrifying figure. I have to say, one of the problems of the Covid crisis for me is we have set up all sorts of hardship funds because I'm so conscious of the problems youngsters particularly are going to have. The lack of government support – if I can just be political for

just one minute – during this crisis has meant me selling the criminal Bar to young people is a pretty difficult sell. I've always done it completely conscience-free up until five or six years ago because it's a job I love, it's a job people do because it's a calling as opposed to just something to do in a professional career, and I've done that with an easy conscience up until about five or six years ago. It's been very difficult over the course of the last six or seven years to look a youngster in the eye, who is a talented and bright kid, and say 'this really is the way forward, it's a brilliant job that will pay you well, that will allow you to bring up a family,' etc... The crisis we've had has really demonstrated that we're in danger of going back to that position. We were beginning to emerge from it in my view, and chambers had the confidence to start recruiting criminal practitioners, youngsters were enthusiastic to come again, I was able to stand up in front of them as I do regularly, audiences of youngsters at university, saying 'yeah, I do think there's a future in this.' During the last nine months I've watched young people get precisely no financial support in any way, shape or form, and now I'm being expected to say – and I'd love to say it with a clear conscience – 'come and do this job.' But I'm going to be asked the question: 'what if we have another breakdown, what if we have another Covid, what support am I going to get... if we have another outbreak, what support am I going to get, can I be sure that I can sustain myself through that period?' That's a real problem. I think we're in real danger of losing confidence amongst youngsters again, and therefore we're in danger of sleepwalking right back into the crisis that we have spent so many years, all of us, looking at trying to make sure all of us end up with a diverse, much younger profession, and we are dying from the bottom up unless we are very careful.

**Chair:** That's really helpful. I can take the point – I see that from my own contacts as well. You mention these hardship funds, can you give us a sense of what they are, those things you do to try and help people?

**Michael Duck:** All the Inns of Court have been very good as well... From a circuit perspective, we're obviously fund limited. But we have said, 'look, if you are in a desperate position,' by which really we're thinking of hand-to-mouth and paying rent etc., 'we are prepared on application and fulfilling the criteria to forward a fairly modest sum,' I mean £1,500. It's short-term, not long-term. But whilst it's not long-term, what it does do is demonstrate the magnitude of the problem I perceive occurring, because that is providing a small amount of money for sustenance and not for long-term retention of people within the Bar. So it has that very limited purpose.

**Chair:** So real hand-to-mouth stuff, tides you over.

**Michael Duck:** Completely. To be honest, it's not being drawn on to a large extent, but I think that pressure will build as the realities dawn now, because of course people may have survived the last six to nine months on savings, and other bits of work, but at the moment with capacity still not picking up as quickly as we'd like, then those problems may tighten.

**Chair** Let's go over to Kerry,

**Kerry Morgan:** I started my practice in 2006, and more or less every year for eight years we had a trainee every year, so we would be taking on a trainee solicitor, getting a duty solicitor, keeping them on, but we've probably not had one in years and years simply because you haven't got the money to train them, or the time required, as you're keeping the wheels on in terms of the rest of the practice, and when they do qualify they end up going to the Crown Prosecution Service. So we've become a training ground for the

prosecution, as opposed to being able to retain them ourselves because the money is just not there.

**Chair:** It's very recent, isn't it? I mean, I'm picking up on this quite strongly, the fact that the CPS can compete in a way which I could never imagine in my time.

**Kerry Morgan:** Yeah, they've employed some agencies to be quite aggressive in recruitment. I mean, I've had a few emails from LinkedIn from recruitment agents asking me to contact them, and I did actually contact them at one stage just to see what the process was. But they're very, very aggressive, ringing you all the time. It's not even as if someone's unhappy at work, they're just going to go and offer them something you just can't compete with.

**Chair:** Ok, that is interesting. Robbie?

**Robbie Ross:** I think that's a very good point that Kerry makes. I did exactly the same thing, I mean I've been running my own business now since 1990, and I always had trainees because I thought it was an important thing that we should do. I can't even begin to think about that now. First of all, it's about sustaining how we actually keep afloat. I'm not going to lie to anyone on the Committee – I did alright out of the nineties because I worked 24/7, 365, and we kept a tight ship and we made reasonable money. We didn't compete with the big firms, but we made a reasonable living. But I'm having to use some of that money now to keep my firm afloat. I happen to own the buildings that I bought back in the nineties so I could operate more cheaply, I bought a couple of run-down buildings – they were supposed to provide me with an income now. I'm supposed to be retired, but I can't retire at the moment because I've got a firm to keep afloat. I've had to take no money from the rent so that the firm can stay afloat. My co-director is not taking any money at all out of the business. That is not sustainable. Very interesting point I'd like to make: I spoke to the presiding judge in my local area about this particular committee the other day, and I said, 'do you have anything from your experience that you'd want to get over?' I think sometimes little vignettes are useful. We've already heard Michael talk about having to set up a hardship fund... this particular judge said to me, he was working down in Bournemouth, they had a very, very good young lawyer down there who was doing a lot of good work getting into bigger and bigger cases, and it took them ages to unsuccessfully try and persuade her not to leave the Bar and go to for Lidl as a manager. Now I've got nothing against Lidl, but there are a myriad of different places you can go to buy food; there aren't a myriad of places we can go and pick up skilled criminal lawyers. The problem we've got – and again I think Michael picked up on the fact the average age of lawyers is fifty-five – well I'm sixty-three and there aren't any duty solicitors in Wiltshire, I think, who aren't under fifty. The situation down where I live down in Devon is even worse – the average age of duty solicitors is approaching the high fifties. That is not sustainable. Give us ten years and we haven't got any bloody lawyers left! How is the system going to operate without lawyers? You can't have loads of prosecutors when you've got no one to defend. The fact is, if you read your history books – I mean Tony Benn used to say if you want to see the future, read your history books – if you read your history books you'll see why the legal aid system was set up in the first place. It was put in place in order to create a better environment where everyone had an equal right before the law. By creating that, by sustaining that in the long run, surely we build what you people all joined Parliament for. You build a better democracy. The bed of a decent society is how we deal with people who

transgress, and how we assist victims in getting the right people convicted. But you can't do that if you don't have a system that can do it.

**Chair:** You've got to have lawyers to make it work, haven't you? It's a totally fair point, yeah. Tony?

**Tony McDaid:** I think one of the things here as well – this affects quality. And what you're seeing, it's clear on screen here we've got lots of people committed and with good standards, you know, Robbie with his success story from the nineties where people were making hay while the sun was shining, and fair play to him. But what you see is because the fees have been squashed down, because we've got these problems with recruitment in the solicitor profession and the Bar, it's created a vacuum where mediocrity at best is coming in, setting up firms and businesses where the standards are simply not there, they've not even got the same ethical standards as firms traditionally have had and they're operating on high turnover with their cases. Quite how some of them got through the audit process, and that's lax compared to what it used to be, we used to get all sorts of calls from firms saying 'can we say we've been to your seminars etc. so we can say we've got enough CPD points?' It's dragging down the standard so that you've got some people who loosely call themselves lawyers who would otherwise be dishing out football tickets or selling burgers outside music stadiums, and that's what it's created, because some people think there's still money to be made there and if you are making money in the job at the moment, in crime, it's because you're cutting corners and not doing the job properly. So this isn't just about sustainability – you probably will get people coming back through – but it's absolutely... I asked at the Bar council before for a whistleblowing line for some of the stuff that, whichever region you're in – it doesn't matter if it's Manchester, Liverpool, London or Birmingham – so that people could ring through and say 'look, we know this is happening' because it was on the increase. There's so much, Bob, that at one point you thought if I step forward and say this is what's happening then we're going to lose work, not off those firms, but by association. We shouldn't be in that. This is the legal profession for goodness sake... And that's the kind of level it's been dragged down to. Something needs to be done. One final thing on that – in relation to us being able to find money for Covid, etc., but lets not pretend this is just about Covid and we don't want to get political – I'm apolitical anyway – we've funded when there's been a need to do so: wars, some of which it's questionable whether or not they were even legal wars... we've always found the money to fund things, and that really, whether it's the Tories, Labour, or whoever, the Treasury really are in charge of this and they don't seem to think it's a priority, and I don't think they look at the impact, not just on the legal profession, but on Joe public who's trying to get quality representation. I think that's really poor, and the badge of 'oh, you're all key workers' is great, fantastic, superb... if lawyers are key workers then lets respect them and the NHS as well for that matter too, in the way that they should be respected. We know people aren't going to be crying over lawyers not getting paid. When we say £35,000 people say 'wow', but when you drill down into those figures these are people earning less, with all due respect, than plumbers. The qualifications that everyone has here on screen, you could have gone into commercial, you could have gone into private family work, planning law and all of these other areas, but you've chosen to operate in the criminal courts. It's a vocation, and nobody is asking to be paid the same as the big planning and commercial boys, but you should be able to make a living.

**Chair:** Just on that interesting point – you talked about the quality there, and obviously raised it with the Bar council. Do you get a sense that the Law Society are on the case with this sort of thing?

**Tony McDaid:** Really good question there Bob, can I just answer that for a second? I made the complaint some years ago, I'm talking five or six years ago, and I made it a number of times about that whistleblowing line. When I spoke to them, without naming individual firms and on a general basis, saying, 'what should one do in this situation?' There are examples out there in the market of people doing all sorts of things like payment for cases, and all the rest of the stuff that goes on. I was told by the Bar council, 'you need to contact the SRA Law Society.' So I phoned them and they said actually, 'some of the stuff you're describing is not actually a breach of our rules.' So I was knocked back from one place to another. It didn't go anywhere, and there's not been a whistleblowing line at either organisation I don't believe.

**Chair:** What I wanted to do, Michael, particularly as you made a point we're interested in... you made a point about capacity. We've been talking about sustainability and entrance into the profession and retention and so on, but you made a point about capacity which is a broader issue as well. What were the thoughts you had about capacity in the system? Is that physical capacity we're thinking of, or..?

**Michael Duck:** Can I just deal with current capacity at the moment? My immediate and most pressing problems are getting the system back up and running, reducing the backlog, and frankly getting my practitioners back in a position where they can make a living, and in combination serving the interests of justice. All the way back in April as circuit leaders we sat around and thought of how we're going to deal with what struck us to be an obvious problem - that we stopped doing any trials at all between March and May. Then obviously capacity started creeping up from I think May 16<sup>th</sup> when the Old Bailey started its multi handed trial, and then it's grown over the country. As long ago as April, one of our number came up with the idea of Nightingale courts, which obviously was exterior court capacity because it was plain to anybody that the current court system was not going to be able to cope with the demands over the next twelve months. Important to note that Covid has nothing to do with a very significant part of the backlog; that was being created by the years that preceded Covid, so that should never be used as a smokescreen. But the capacity problem we face at the moment is that multi-handed trials – on a personal level I welcome them, because it tends to be how I make my living – but I did flag up a long time ago that the moment you embark on multi-handed trials that take up three or four courts, or in fact five courts as one did in Birmingham in the very recent past, you consequently and necessarily reduce capacity for every other practitioner and other trials that have competing interests. You don't do anything about the backlog. You have to get rid of multi-handed trials because of the seriousness of the allegations and the importance of the trials frankly for public confidence in justice. As soon as you use up three or four courts, you've disabled yourself from reducing the backlog beyond what I call the day-to-day trials – the two day burglaries; the three day violent disorders, etc. – and it strikes me that unless you increase capacity by way of funding other buildings and increasing numbers of court rooms, that conundrum is unanswerable. You simply have to do multi handed trials because of the public perspective and confidence in the system. You have to reduce this backlog because you are going to be having cases listed not as they currently are, sometimes it's 2023, but it's 2024. I mean nowadays, something that any of us on-screen I suspect would regard as unheard of... you turn up for a case that's complex in it's own way, but by no means the most complex in our calendar, and you are expecting to be listed into the backend of 2022. A number of those are custody cases as well. The answer is you need more capacity.

**Andy Slaughter MP:** Can I ask a question?

**Chair:** Yes, go ahead Andy. It's physical capacity Michael is talking about.

**Andy Slaughter MP:** We've been wrestling with this and asking a lot of people about this, including the Lord Chancellor. I'm just looking at the figures going all the way back to 2010, and we've been at this level of backlog before, in 2014/15. The difference is there were at least double the number of trials taking place than there are now. We've got various suggestions, various ideas like virtual trials, cinemas, smaller juries, none of which find favour frankly. So do any of you have any suggestions - other than simply resources, because that's clearly one option? The government is not even reaching their rather modest targets in trial numbers, and they've now stopped setting targets. If we're not careful then the current backlog of around 55,000 is going to stick there or even go up.

**Chair:** Ok, any thoughts? Any bright ideas anyone that can help? Robbie?

**Robbie Ross:** Michael made a good point that if you're using up several courts for one trial it obviously decreases capacity. We don't see that so much in Wiltshire for the obvious reason that we haven't got big court centres; our big trials go to Bristol. But some of the trials that I've been involved in over the past ten years or so would need three or four courts at the moment. Andrew was asking how we deal with this problem, well there isn't a short answer to it. The only way to do it at the moment is to look at what you've got and say, 'well, if we're going to increase our capacity, we have to create more physical space to be able to do it,' because all the silly ideas about trying to do things virtually so far as trials are concerned are nonsensical. It's difficult enough running a jury trial when you've got jury members spread into two or three courts, and you've got people spread into two or three courts. You've got to create a situation where people are able to do it properly. The problem with say using cinemas is, as a judge said to me, we don't want juries to become spectators. They are participants, not spectators. I think you physically have to open up buildings, big buildings. It's not for us as lawyers to say how you should do it, but you need more space and you're also going to have to ensure that you can do it fairly quickly. You have to ensure that the people who you want to man it - in other words, the lawyers - are properly supported, and supported financially, and you're going to have to ensure that you keep your witnesses and your victims on side. Frankly what we're beginning to see in certain elements of the system at the moment is victims and witnesses saying, 'sod this for a game of soldiers, I can't wait until next year, I don't want to be involved anymore.' I'm not going to lie about it - a couple of weeks ago a client said, 'thanks very much Mr. Ross,' and I thought, just get out of my room before I say 'the only reason you're not going to trial on a serious matter, mate, which you're probably guilty of, is because the witnesses have just had enough!' That isn't the right way to be operating as a just society, is it? Either way, you've got to increase the physical capacity.

**Chair:** Ok, thanks. Kerry?

**Kerry Morgan:** Over the past few years, especially in Greater Manchester, lots of court buildings have been closed. Now those court buildings aren't being used for anything - Bury Magistrate's Court, for example, a perfectly nice building, plenty of court rooms, there's no reason why work can't be moved to there. We've got some courts happening in the Lowry Theatre, but there's plenty of other capacity, and we've got rid of all these court buildings that could just be used. They're already adapted.

**Chair:** Ok, fair point. Lucy?

**Lucy Welsh:** I was really just going to support the two points that Robbie and Kerry made. In relation to witnesses starting to withdraw from the process, I'm also starting to see similar kinds of reports coming through that the backlog is causing that. What that relies on is very early and thorough disclosure and review by the CPS, and of course the earlier the disclosure the better to enable those full reviews to take place. The other thing is, of course, in relation to magistrate's courts in particular, is how many of those cases still need to be in magistrates courts and could there be reviews for greater out of court disposals given the circumstances we're in, for some of the cases. I've got my own notes to say about the closing of various magistrate's court buildings that could be reopened. So just to support that point really.

**Chair:** Ok. Kerry?

**Kerry Morgan:** As far as capacity is concerned, we shouldn't be mistaken by the fact that there is a reduction an all-time high. I've got literally thousands of them in my drawer of cases which are released under investigation and will be charged at some point, but they're just not getting round to it. There is actually a delay in cases getting to court which would normally have been in court, and they are stopping cases going through in that way.

**Chair:** Ok. James, I know this is something that you mention on occasion...

**James Daly MP:** This is one of the problems when you talk about the morality within the criminal justice system, because one person's morality is different to someone else's. My view is that there's two ways to improve the situation. One is to up the fees, clearly that's what should happen. But the second thing is that more people should be charged. When I started sixteen years ago the custody sergeant charged everybody, literally everybody who went through. Now that may not be what people think is an efficient system, but it's certainly just, because even if they were overcharged they appeared before the court and a deal was done and you pleaded guilty to the lesser offence. Lucy said this in a different context, but from a criminal lawyer's perspective when you start discussing out of court disposals, that is a disaster for the criminal law profession. When I started off it wouldn't have been unusual at Bury Magistrate's Court for me to have seven, eight or nine shoplifters per day, and in Manchester I imagine it would probably be even more. But if you have a system which decides it wants to divert certain offences away, you are cutting out a lot of the incoming work that's coming through. Then you have release under investigation which is nothing short of a disaster. I'm glad that Kerry has the confidence that they will be charged, because I don't think some of them will. I think they'll just disappear in twelve months and just be lost into the ether. I think there is a fundamental problem, in my view, with pre-charge advice from the Crown Prosecution Service, and I think we have to have a more streamlined view for charging of offences. I cannot believe that we still have a system where if someone gets arrested for a reasonably straightforward assault in the centre of a town centre – what's the evidence, two statements and perhaps some medical evidence – you're released under investigation for twelve months on the basis of the same evidence that was available to the police at the time when X person was arrested. So I agree with capacity, I agree with raising fees, but unless the release under investigation issue and the way that cases are processed by the police prior to coming to court changes, I think the profession are going to have a tough time, because the reduction in work that it will bring will be substantially, in my view – I don't know if the practitioners agree with me on that?

**Chair:** Michael?

**Michael Duck:** Thanks Bob. I'm a pretty simplistic bloke when it comes to these things. One of the most important things we need in the criminal justice system is public confidence in the system we all operate in. The moment you start losing that we are doomed, and you end up with all sorts of problems with public disorder and lack of respect for the system. However you dress this up, in order to address the backlog we have got to increase capacity. Tony and I, who you probably know are associated through chambers, have conversations – I guarantee you, if resources were not a problem, we could given a month come up with three or four buildings that were suitable for taking work out of the court estate, even for example if it was taking tribunal work or magistrates court work out that freed up capacity within those buildings to then conduct custody cases. It can be done. So we can address this from as many different directions as we want. We have to maintain confidence, and the only way you do that is by reducing backlog because otherwise we bring the system into disrepute, and I'm afraid it's the age-old story – that has to be driven by resource. The facilities are out there, to answer Andrew's question, of course we can find capacity. There are buildings all over every city we're talking about, we have companies going broke on a weekly basis, tragically as a result of what's gone on, there is capacity increasing by the day. It can be found, it's got to be paid for. The costs are relatively modest. So I say, however you look at it those are the basics – we have got to address the problem, we can address the problem because we have the buildings, they can be made to work, whether it's long term or short term it actually doesn't matter, but it still comes back to saying to the Treasury, 'you have got to put your hand in your pocket,' because there is no other way around it.

**James Daly MP:** Sorry, can I come in? I agree with you in the short term, but you're speaking from an eminent barrister's perspective. What I'm looking at here is that unless that work comes through from what I'd call the shop floor... I mean as an MP now I get... there are shop workers in my constituency who are terrified, who essentially just let people come in and shoplift now, because people are wandering into shops with knives and there is no deterrent in respect to this. For this system to work properly, it's not just about prosecuting the most serious offences, it's ensuring those offences at the bottom end of the spectrum, which are causing havoc on a daily basis and which no longer appear before the court, have to be charged. My point is that these are simple offenses that can be investigated in two hours and charged on that basis if we change the sentencing framework. I suspect, Michael, that the cases you deal with compared to what Kerry's firm is dealing with and Robbie and the different ways they are going to make people a living within the system are different, if you understand what I mean. Unless we get the charging system sorted out we don't have a profession, because there is not enough work to sustain anybody, is my view.

**Michael Duck:** James, for what it's worth I totally agree with you. I'm in contact with people across the profession and have friends and colleagues who are involved in all branches of the work, and I absolutely agree with you. In many ways, again that's a resource problem. A lot of the reason people don't get charged is lack of resource.

**James Daly MP:** Michael, it's not lack of resource - they could charge them straight away. Most of these cases involve two witness statements and a bit of medical evidence after charge. Yes, there are some complicated cases, but 95% of the stuff that goes through the magistrate's court is very simple and straightforward to be investigated. The fact that we delay these things is beyond belief to me.

**Robbie Ross:** Can I come in? I think me and Kerry can probably comment on that quite importantly, because the fact is, I go back a long, long way from the point of view of when I used to do a lot of police station work thirty years ago. Before I stopped going to the police station, I probably dealt with 10,000 or 15,000 people in a police station. In all that time, because I stopped around about the time the Crown Prosecution Service were becoming involved in giving charging advice, we had drawers in our office where we had a few that were called 47/3 files which are now basically the RUI files. We were doing the same level of work thirty years ago as we're doing now, and we had about a dozen or twenty down at the bottom. We've now got a bloody great cabinet of the things, because... the jobs, as James just said, the jobs that are going into the police station, they haven't changed. But when you've got a client who admits a shoplift and the copper who's interviewing him puts him off RUI so he can get the CCTV, I throw my hands up! Or my staff throw their hands up. I had a client recently who's already in the Crown Court on serious matters, he gets caught with 200 wraps of crack-cocaine in his back pocket and they RUI him, they don't charge him with supply. Well it's bloody obvious he's supplying drugs; no one carries 200 wraps of crack-cocaine around in their back pocket if they're not supplying them. Now, he won't get charged for another six to nine months. I've got sex offenders who are being summonsed to court for 16 rapes – I dealt with one in Wolverhampton last week – 16 rapes this guy has been summonsed for, he's been on bail for two and a half years. That's the situation we're now in. A lot of these things need to police to get a grip, but again it's a resource issue. If you don't train them properly and you say, 'you can't make the decision, he's got to go to a Crown Prosecutor,' and it goes all the way round and round in a circle and it takes nine months or two years to get charged. You have to take a holistic approach to the whole thing. They're all important, from the person who's been shoplifted from at a corner shop to the person who's been raped or the person who's been murdered – they're all important to someone, and it's important we address them in the same way. Kerry over to you.

**Kerry Morgan:** We have a police station department and we do police stations 24 hours a day, 7 days a week, and I have my staff on call every night at the police stations. We can have twelve or thirteen police stations over a weekend and not have one person charged or appear in a magistrate's court. Percentage-wise, it's just ridiculous.

**Chair:** Michael, do you have anything to say on that?

**Michael Duck:** Bob, can I just say to reassure James before I part company with him that any suggestion about resource, well, I think we're arguing the same point. I don't want to fall out with him, but just on the point I'm making about resources – nobody's moral compass has changed over the last twenty or thirty years about what should and shouldn't be charged. Everybody recognises what's a crime or what's a potential crime and what's not, the difference is when it comes to assessments being made as to whether people are prepared to and willing to spend the money to see it through to what should be its logical conclusion, which is a criminal prosecution, and sort out the rights or wrongs. So the point about resources exists across the profession, I didn't want anybody to be thinking I'm suggesting resources ought to be focused on the other end of the market, and that that's where the problem is. It absolutely stems from the bottom. Unless you put resources into it, and start becoming rather more active in prosecuting cases, then it's systemic and it runs throughout the entire system. Again I'm with Robbie – it becomes a resource problem, that's the reason people aren't being charged, because one has to now prioritise where you're spending money. I entirely takes James' point, a lot of these are very simple and very

costed to effectively prosecute, and it should be happening. If people lose confidence in the system and they think they can shoplift at will, we all know the social consequences of that.

**Chair:** Point well made, yeah. Lucy?

**Lucy Welsh:** Thank you. Just going back to the reduction in workload point, I really don't think we can ignore the fact that it is connected to the change in fee payments for police station work a number of years ago now. Reduction in workload perhaps might not have been as pressing a problem as it is now... but perhaps this is exacerbated by the fixed fees at the police station which ought to be reviewed as well. Just on the capacity point, the other place that could be looked at is universities – many, many university law schools have moot rooms that are set up for mock trial purposes. When you don't need a secure dock, and there are many cases where you don't necessarily need a secure dock, that's another space that perhaps could be looked at for use to increase capacity.

**Chair:** Right, got some ideas around there – any ideas about what you might change on legal aid or court capacity that might improve the situation? Tony?

**Tony McDaid:** One thing that would help is more police officers, I'm afraid. We've talked about cases not being charged – many cases now go unreported because, for instance, if your car is stolen from the drive you'll ring it through to the police station in order to get a crime number, but other than that you never expect anyone to come round and have a look at what's gone on. The same thing is happening now with burglaries and things like that. There are lots of things, certainly in the inner-city – I grew up on a council estate in the middle of Birmingham, and I know a few people growing up in that area that have been into all sorts of stuff... but when you speak with people in that community they say there was a burglary last week and that's it, this has happened, and we've come to accept that for certain crimes now it's pretty much pointless phoning the police. If they did criminal damage or anything like that, damage to your car, theft, everybody sort of thinks 'why bother?' Not only are you not getting cases that are charged, but there's a whole lot of crime going on out there that's not even in the figures; it's not reported because joe public has become so disheartened by the response from the police, and the lack of police out there. Across the board, the whole profession, every aspect of it, I think is at an all time low in terms of public confidence.

**Chair:** Anything around fee structure or capacity you'd make a change to, Tony?

**Tony McDaid:** On fee structures, there just has to be more in there both for solicitors and the Bar. It's just woeful. I've been involved in the Carter review and all these things over the years, potential strikes... Whatever political party that are in cleverly divide and rule, they pitch solicitors against barristers. They go through all these consultation processes, and even with the Bar, the Junior Bar and Silk, and say 'oh, *they've* got the money, divide it up and do that.' We're dealing with Parliament and the Treasury, and they've got a brief, and the brief is: 'don't give them any more money, if we've got any more money to spend let's spend it *there* and *there*.' But without the money it's just going to go across all these areas that we've talked about and just spiral down. There has to be an acceptance that the system is not working at the moment, and that all these tenders where they're getting these firms that I said before, they'll bid in and do whatever but they're not doing the job right. Many of those firms are not doing it the way that the job should be done. It's impossible for it to be done correctly on those tender processes that they brought in before, where people were bidding peanuts for it, and it just seems to be that more and more money is being

sucked out of it with no increases. What other profession over the last twenty or thirty years has had to take hit after hit? We've had people in this country who, quite rightly so on occasions, go on strike for not getting an increase. With the legal profession, over about twenty or thirty years, it's been decrease, decrease, decrease – time and time again. The Bar has been frustrating because it's always worked on the basis that it's a gentleman's profession who won't go on strike, we've made our point, we've taken part in the consultation process and they know what power we've got now... Absolute nonsense. Nobody is interested in that. It's a numbers game, and the respect for the legal profession isn't where it should be. The contribution the legal profession makes to society and propping up government etc., isn't appreciated. It's at an all time low and they need to find the money. You've found it for other things – Covid is horrific and that's quite rightly where the money is going; money needs to be invested in the NHS. But for me, more important than sending people to the Moon, more important than building flashy buildings all around London at the taxpayers' expense and throughout the rest of the country, we have to invest money into the legal profession while it's still breathing. Because otherwise we won't have one five or ten years down the line.

**Chair:** That's great, thanks. Let's go round and start getting some final thoughts. Lucy?

**Lucy Welsh:** Thank you. Just on that point of quality, it seems to me, and having talked to many, many lawyers and had the experience myself of dealing with the legal aid agency, that really quality markets have been replaced by aggressive auditing, and aggressive auditing and the quality mark dig into what are already very narrow profit margins because of the time you have to spend dealing with those processes. When I was doing quality mark work that would take me out of court, take me out of police stations for a couple of months of the year, so I'm doing no fee earning for my firm while I'm trying to deal with all of those. But it becomes a series of tick boxes rather than actual quality work, and a lot of those things are about the way the firm is managed more so than they are about the quality of the work, so I think that's one issue that could be looked at. The knock-on effect of that is it's not just junior practitioners who are living hand to mouth; I've spoken to many senior practitioners who have these problems of having to management bureaucracy that eats into this very narrow profit margin that already exists. Again, the bureaucracy around the legal aid agency creates a real problem when it's coupled with cuts to fees. From the various bits of research that I've been doing, the 2014 cut seems to have been a real watershed for a lot of firms. 40% of people we've spoken to say they just can't afford to deal with it anymore since 2014. That's been a real watershed and there's been a dramatic reduction in capacity there.

**Robbie Ross:** Yeah, just three or four points there really to finish up on. First of all on the quality issue that Lucy just raised, she's looked at it and mentioned it from the point of view of firms having to attain every two years, I think, it is a quality mark which is rather daft bearing in mind... I'm a senior reviewer with the LAA, I peer review firms, in other words I actually look at the files, I look at whether or not things have been done properly, and then I grade the file and I grade the firm. Interestingly enough, someone at the LAA who will remain nameless indicated that all the LAA were really interested in was that you got a 3, which was 'adequate.' Well, we should be aiming for a little bit better than adequate. The problem is for many, many years we've been demanding 'Rolls Royce' quality from service but we're only paying 'Trabant' money, and that's a real problem. You can't run a Rolls-Royce if it's actually running like a Trabant. So quality is a problem – if you want quality then you have to pay for it, that's simple and it matters whether you're a police officer, a

probation officer, a court official or a lawyer. Within the criminal justice system or indeed the justice system, we're like an industry, we're a whole industry, we don't make a profit but we're an industry, and any industry will only thrive if you invest in training and people. It's as simple as that. If we invest in the justice system, we'll promote a fairer society for everyone. Finally I say this – I don't like talking just about money, but the fact is if any of you MPs went out to a builder and said 'I've got an extension that I need to be built,' and they came back and said, 'right, it's going to cost you £50,000 and you said, 'well that's fine, but I'm only going to pay you what it would cost for me to build it in 1997'. Now how many builders would then take on the contract!? Well unfortunately, people like me and Kerry have been taking on that bloody contract for years, and frankly Bob we're a little bit fed up. The fact that we haven't got out and done something else, every time I look in the mirror it astonishes me and I bet Kerry thinks exactly the same.

**Chair:** That's a good way of putting it actually, I like that. Kerry?

**Kerry Morgan:** The scary thing for me is basically staff in the future. All my staff are nearly forty; there's nobody new coming through; I don't know, in five years time... a few of my duty solicitors have had children, I don't know if they're going to stay in the profession. Where are we going to be in five years if there's nobody new coming through? There needs to be enough money to train people, and to give firms incentives to train people so that there are going to be people to do this job in the future, and people who want to do the job because they can earn a decent living from it. You know, £30,000 or £35,000, it's more than people working in shops get, but they haven't got to be woken up 24 hours a day, 7 days a week, go to work during the day then having to go to the police station at night whilst having young children or whatever – it's hard! If you want people to do it, you're going to have to pay for it.

**Chair:** Is there anything within the envelope of money that you do differently? We can take the point of more money, is there anything else to say about using the money more cleverly or targeting it better? Robbie?

**Robbie Ross:** I don't think there is a way, not being funny... on a couple of occasions they have taken... overnight they took 8.5%, then they took 17.5%, and they didn't give us back anything else at all. The government feels it's done us a favour recently in paying us for the magistrate's court sendings. Well actually they're paying us half of what they paid us when they took it away from us twelve years ago.

**Kerry Morgan:** I think the problem for me is fixed fees. When fixed fees came in they suddenly they stopped taking into consideration travel and waiting, and they're like, 'oh, your court costs are only this, you're actually getting paid a lot more for that,' but now they look at the swings and not the roundabouts. So the litigation fee – if you're a firm that's got some big Crown Court trials you'll make a lot of money. If you're doing the bread and butter stuff you won't make any money, and it is swings and roundabouts. When we used to get paid for what we did, the firms that did a good job, the firms that did the work, the firms that did the quality, got paid for it. And what's happening now is everyone is clambering for this big case and, 'the less work I do on that big case, the more money I'll make.' And that's not how it should be. But it was the cost of administering that system and having somebody assess your bills, etc., which is what they wanted to cut down. As a result of that I think quality has been reduced.

**Chair:** Right, so that was making a saving in the legal aid agency or whatever its predecessor was?

**Kerry Morgan:** Yes, admin costs.

**Robbie Ross:** Could I pick up on that point that Kerry has made please, because it's actually a very important point. When I was at university, oddly enough, I was involved with looking at how we provide – because it was a research project of mine even when I was a kid – we were looking at how we provide for unmet need, and I came up with an idea back in 1979, I think, for block funding firms. What does occur to me – you say how can we use the money; well, we still need more money – but there are the firms that we've heard about from other people who are really ripping people off because they're not doing the job. They have a huge amount of data – the LAA has a huge amount of data about my firm, about Kerry's firm. They know almost certainly, because one reason we're on here is because we have nothing to hide, they probably know that we know how to do a job properly. Now, they've rooted out, or are beginning to root out, those firms that do not do the job properly and who are not giving value for money, in the sense that they are cutting corners; they're not doing any work; they're not giving a service. They've got all this data, they could almost go back to paying us a decent hourly rate – and I'm not talking about £250 an hour, I'm talking about £100 an hour to actually do the job, minute by minute, as opposed to saying 'you're going to get £173 for litigating an attempt to pervert the course of justice in the Crown Court.' Well £173, that lets me send a couple of letters and talk to the client for five minutes, and I've got to hope I can do it quickly as I move the advocate to the Crown Court to even break even. Pay me to do the job properly, with all the data you've got, and I think you will make people feel that they're much more valued. And also, start thinking about looking at the numbers of firms you've got left actually doing this work, and think about block funding them, where you give them an amount of money and you say 'it's up to you how you get on with it, all we'll fund on top of that is maybe expert reports, psychiatric reports and that sort of thing, but how you use that money is up to you; if you make a profit, fine; if you don't then you go out of business.' That's another way of looking at it, and nobody's even bothered to look at that.

**Chair:** That's helpful, great. Lucy?

**Lucy Welsh:** On potential ways of using the current money a bit better – interim payments... I know there's been some emergency stuff as a result of Covid but I think that it could be improved. Revisiting fixed fees, I know that Robbie and Kerry have obviously already mentioned. But thirdly as well, looking again at the means test and basically scrapping it in all but the most extreme of cases. The administration of the means test is a cost in itself and could be revised I think.

**Chair:** Tony, anything else?

**Tony McDaid:** Just to say that on Lucy's point about quality mark, etc., it's more work, more procedures, more hoops, more resources – and this is for all law firms – for less money. That's one of the things with crime in particular, the auditing and everything else that's kind of going on with it, the amount of legislation over the last ten or fifteen years that's gone through, there doesn't seem to be any account or any reward for the extra work that criminal lawyers have had to put in over that period. What we've seen is more and more bureaucracy, whether it's tick box or otherwise, all that comes at a cost. Not only has there not been an increase in the rates, but firms are having to invest more into their firms

for all of these things even outside of the training aspect, just to be compliant with what the powers that be say need to be.

...

**James Daly MP:** I'm sorry that I keep going back to this, but I'm in quite a unique place because Kerry knows my wife very well, who's been a criminal lawyer a lot longer than me, and she now does probate law because it was simply unaffordable for her to continue as a criminal lawyer. So when I look back to when the system was first of all challenged, shall we say, this is why I come back to charging. Reasons were found not to put cases before the court, in my opinion, and since that time there's been an increase in ways to keep work away from the magistrate's court. Kerry made reference to the fact that she employs somebody as a higher rights advocate, and certainly when I was last in practice that was something, that most firms were trying to get higher rights advocates, because you can't make any profit on your magistrate's court work. So the thing that the Bar have to take into account, and I get back to the charging, if you don't have the charging, if you don't have the Section 47 and that lower level Crown Court work coming through on a regular basis, it's not just the criminal solicitors who are going to suffer, it's the Bar in particular, because Kerry and other firms will have no option but to have their own in-house advocates which will take the work of the independent Bar, in my opinion. You're quite right in saying we need funds, and I accept that, but there is no way that the present release under investigation, from the funds that the police have got in this moment in time, can be improved. More people can be charged, and more of these can be put through the court. My view is just in terms of the interest in justice and sustainability. Unless we get that charging issue sorted out, Bob, there's going to be continued issues going forward forever.

**Kerry Morgan:** Obviously if more people got charged and there was more stuff coming through the work, you could do more cases. I could have one solicitor at court doing four or five cases, and it's not efficient for them really to be doing one or two cases. So that's the thing, they've saved money by not charging people, and you could sustain it a bit more if more went through the court.

**Robbie Ross:** Could I raise one point? It's really throwing it back on the committee to some extent. I'm incredibly interested in what both the committee and what government... I'm interested in what you want. If you want a fair society, then you have to have a fair justice system. I mean, Paul Weller wrote the words, 'the country gets what the country wants,' well, you represent the country. Now does the country want a ramshackle justice system, or does it not want a ramshackle justice system? If you people really want one then you have to get a grip now because as Kerry said, five years isn't going to be soon enough; none of us will be here. If you really are serious about it please, please, from the bottom to the top, we beg you to do something about it quickly.