



The All-Party Parliamentary  
Group on Legal Aid

## Westminster Commission on Legal Aid Fourth Oral Evidence Session

### The Publicly Funded Bar

28<sup>th</sup> January 2021 10am – 12pm

#### In attendance:

##### Panel

Lord Colin Lowe

James Daly MP

Lord Willy Bach

Andy Slaughter MP

Gareth Bacon MP

Baroness Helena Kennedy QC

Baroness Natalie Bennett

Laura Farris MP

##### LAPG

Chris Minnoch

Rohini Teather

##### Witnesses

Shadow Secretary of State for Justice and  
Shadow Lord Chancellor, David Lammy  
MP

Adam Wagner, Doughty Street Chambers

Professor Jo Delahunty QC, 4PB  
Chambers

Dr S Chelvan, 33 Bedford Row Chambers

Natasha Shotunde, Garden Court  
Chambers

Michael Etienne, Garden Court Chambers

Marina Sergides, Garden Court Chambers

James Stark, Garden Court North  
Chambers

## INTRODUCTIONS

### James Daly MP

Member of parliament for Bury North, officer for APPG on Legal Aid. Chairing session as Karen Buck MP is unfortunately ill at the moment, passed on best wishes. Evidence session today on the publicly funded bar part of the ongoing inquiry into the sustainability of the legal aid session. We have some eminent witnesses today.

In terms of housekeeping, the next session on the 25.2.2021 is on access to justice. The inquiry will be hearing evidence from clients in family, community care and inquest. Inquiry has started the pilot of the workforce survey aiming to connect with all practitioners in the sector in order to learn what the sector looks like currently and may look like in the future.

Thanks everyone for joining. James Daly was a criminal defence solicitor for 16 years, legal aid is really on the line here and we want to be able to put forward some positive suggestions

to the government as to how we can improve the legal aid sector and make it sustainable going forwards.

Thanked David Lammy for taking his time to speak to us today.

### David Lammy MP (Shadow Secretary of State for Justice and Shadow Lord Chancellor)

Noted that it was important to say right from the beginning that the ability to access justice regardless of class, creed background or income is the bedrock of a fair and just society. It is his worry that we have lost sight of that when we look at the scales of justice and the idea of equity, everyone should be able to access and live under the rule of law. It is impossible to do that without a fair and just legal aid system. When we laid the foundations of a welfare state, Clement Attlee said it was to provide legal aid for those with slender resources so that no one would be unable to defend a prosecution or access a legal right. We have to ask whether that safety net is still there in the 21<sup>st</sup> century.

Also worried, very sadly, that as we come out of this pandemic and will be in the grips of a deep recession that will continue for a long time and build on the austerity that followed the 2008 crash. It is hugely important to address the vast advice deserts across the country, and the Government's agenda of levelling up must understand that access to justice is not fair and is not equal across the country. He noted the panel's familiarity with the start figures. That between 2010-16 there was 38% real term fall in legal aid spending, and that we are down from highs of 80% of the population eligible for legal aid in the 1970's to only around 20% of the population now able to qualify, almost half of law centres have closed in the last decade. When we worry about housing, homelessness, how people are accessing universal credit, when we fret about BAME communities dying at a higher rate during the pandemic or accessing the vaccine – it is advice and support in the legal community that those people need, access to justice and legal aid is fundamental to that.

Aside from those statistics are very human stories often of human misery as well. Unable to afford representation, many are left with no other option than to represent themselves as litigants in person. It is an extraordinarily large number and it is unacceptable. This week the Ministry of Justice boasted of putting £3m into the system to support litigants in person but it misses the point. David Lammy said that thinking of the state of the justice system reminded him of reading Bleak House.

David highlighted the case of Zane Gbangbola. On the evening of the 7.2.2014, 7 year old Zane, his mother and father were in bed in their family home. That night Zane died in his sleep and his father was left paralysed for life. The inquest determined that Zane died from carbon monoxide poisoning from a petrol pump in their home that was being used to drain floodwater. Many questions were raised about the inquest's finding and the reason justice is left undone and those questions were raised is because the family were denied legal aid for representation in the inquiry. It was deemed not in the public interest to fund the case. David noted this was an example of the everyday injustices that would never have happened in the past but are happening now.

David said that time and again the Government repeat that the size of the injustice in the system is due to the pandemic alone, but this is not the case. Along with LASPO, cuts in rates of pay, have all led to this problem. Now there is a situation where young publicly funded lawyers are left with £10's of thousands in debt along with an increasing loss of high street firms that people need to be able to turn to. David said that it is an increasingly sparse marketplace and that he struggles when advising constituents where they can go for support.

David also highlighted that this is a huge issue for BME lawyers and their communities. 3% of BME applicants get pupillage compared to 8% of their white counterparts. Over half of BME applicants go onto work in publicly funded law and therefore some of the issues that underpin inequality in our society are clearly linked to difficulties faced by BME lawyers in their profession.

David continued by stating that going forward we have to have a justice system that serves us all. We do not just need to revisit rates of pay and terms of schemes, we also have to look at scope. For example, look at families who are in crisis, particularly in domestic violence claims where scope has massively decreased and victims, in this case particularly men, are unable to access legal aid to uphold their rights. Scope for housing and homelessness is another area that is vital and has been lost.

David welcomed the work being done by the APPG and noted that the inquiry is hugely important work and hopes that we can work in a cross party way to reimagine and recreate a system that is as comprehensive as the architects of the system envisaged in the first place.

He also made a brief point about Labour's call yesterday, the 27.1.21, that the crisis in our courts requires us to move for a short while to a 7 person jury system. He noted that we are left with a question of what are we to do with this problem of court backlogs. David said that he would disagree with those who suggest that as backlogs have existed before, they are therefore not the problem people make them out to be and that frankly we should do nothing radical to deal with this one. He said he does not accept that proposition. David noted that when we had a backlog anything like this in the past, thinking back to the early 2000s, the truth was there were substantially more sitting days in the system, substantially more courts and courtrooms in the system and substantially more judges. The system could deal with a backlog of that size. Given the Government have committed to 20,000 more police officers, that will result in more arrests and people going through the system, in light of that and the current problems he does not believe we can look at this this backlog without worry.

David discussed several measures that have been suggested to deal with the backlog. The Law Society suggested last week we should pause crown court cases entirely. This would have a significant effect on those on remand. This would be disproportionately felt by BME persons. 90% of people on remand in London come from a BME background and the impact on those communities would be catastrophic. Another suggestion is to move to a judge led system and suspend juries all together, he noted that would be a fundamental departure from our democratic system. Some have said the Lord Chancellor should tweak cases triable either way, giving Magistrates a greater say on when they would retain cases. He said this too would cause huge issues in terms of proportionate justice outcomes. David said that what we need are the promised Nightingale courts but they are slow and come at substantial cost. That is why Labour have suggested that in volume, but not serious cases, we move to a system of 7 person juries as was adopted during the war.

#### Questions from: Baroness Kennedy

Baroness Kennedy said that it was heartening to hear David Lammy's analysis of the failure to provide justice up and down the country. Access to justice is more than about welfare. When welfare was cut during austerity and attacks were made on public funding in lots of areas, justice took the biggest cut. Partly because for many it is hard to see how legal aid and justice are relevant to their lives. Yet, Baroness Kennedy noted, access to justice is one of those fundamentals in the rule of law that makes for a good society.

Baroness Kennedy put several points to David Lammy. Firstly, she wondered whether in addressing the access to justice issues, that there could be a rejuvenating short order of creating pop up community-based law projects that could support local people.

Secondly, she took issue with the suggestion of 7 person juries. Baroness Kennedy noted that when this was done during the war, it was under very different circumstances. The motivation then was that men had gone off to war and at the time juries were predominately made up of men, thus there was a significant shortfall in potential jurors. Baroness Kennedy stated that she was concerned with just and fair outcomes and noted that research has shown there is something important about the numbers on a jury. When things go wrong, for example a jury foreman pushing jurors to come to a finding one way or another, someone needs to feel confident of being able to call that out. All the evidence is that 12 jurors is the best number for enabling that to happen. Further, she stated that a reduction to 7 won't actually save that much time and that it opens the door to sacrificing one of the most precious ways that people in our communities contribute to justice. Sitting on a jury is one of the vital contributions people make to society, equal to the contribution made by voting. Baroness Kennedy stated that she thinks almost everyone at the bar will oppose this and that she is concerned that allowing it to be introduced as a temporary measure could nevertheless result in it remaining for some time after. She encouraged David to look at the research, perhaps run a pilot, but discouraged suggesting this without trialling it.

Baroness Kennedy suggested that what should be looked at is running a review panel made up of a representative section of the public to look at cases being charged and deciding how many really need to be prosecuted at all. She stated that really, we should look at only putting serious cases through the system. There are other ways of looking at this and asks the Shadow Lord Chancellor to look at them.

### David Lammy MP

David stated humorously that it is tough when your mentors reprimand you in public. He agreed that Baroness Kenney was quite right about the points made on law centres and said that we need to look at how we can get back to a situation where we have properly funded CABs and Legal centres. He also suggested there is perhaps more we can do along the American model of legal clinics to support young people studying the law and that there may well be more we can do for pro-bono legal support. Particularly as there are many lawyers working way outside the legal aid sector that want to be able to do that work. David noted however that pro-bono cannot be a substitute for properly funded legal aid and that this point is underlined by the huge deserts that exist across the country. No point talking about levelling up if these are precisely the areas without a law centre or a legal aid lawyer left, we will not have levelled up if that remains the case.

On the issue of juries, the Lammy review found the jury system was absolutely essential in dealing with some of the issues of disproportionality. The Review also found widespread disproportionately across the system. He noted that 53% of young people in our youth detention centres are from a BME background and that juries alone clearly didn't fix that problem. David stated that what would make the problem worse is a judge led system, barristers would be up in arms about that. What would make the system worse is changing the threshold for Magistrates considering either way cases, that would have a huge effect. Pausing the system would have a huge effect on remand figures as the law society suggested.

David further stated that reducing the number on juries can only be for an emergency in certain cases but that Labour's estimates are it would increase capacity somewhere from 15-20%. In Scotland they have converted lots of cinemas and theatres as forums for courts which is

another option. However he noted there are issues around judges and juries ending up being located in different places within the building which can be deeply problematic when the interaction is reduced to a video link. David acknowledged that none of this is great and that he hears the Baroness' panel suggestion but doesn't know what effect it would have.

### Baroness Kennedy

Baroness Kennedy further encouraged David Lammy to really closely look at having panels to determine whether there are other ways to do with this. She also suggested that we should look at offering defendants even more substantial reductions in their sentence if they plead guilty during the Covid pandemic.

### James Daly MP

James thanked David for his contributions and reiterated the importance of cross party working by stating it is so important we find a way to make legal aid sustainable by working together. James then welcomed Adam Wagner, barrister at Doughty Street Chambers.

### Adam Wagner, Doughty Street Chambers

Adam first provided his background. He has been at the bar for 12 years, now at Doughty Street but started at 1 Crown Office row who are much more of a Government focussed set. As a result he has been on both sides of the publicly funded equation. He was on the Attorney General's panel [***one gets on a panel by way of application and panels are where the Government typically choose which barristers they will instruct***] for 5 years and acted a lot for the Government. After this, Adam said he decided he wanted to stop being a gamekeeper and run with the foxes so he moved to Doughty street to work more from a claimant focus.

Adam noted that his main areas of law are; public law, inquests, inquiries and actions against the police. He also noted he has a side-line in public legal education as a visiting professor at Goldsmiths University and organisers of a number of projects aimed at increasing public understanding of human rights law. He said that his work involves talking to the public about how well people understand the law and how they view the law and he said he would try to bring that experience to bear in the points made to the injury.

Most recently Adam has been working on the Covid regulations which have quite an interesting dynamic around them that Baroness Kennedy touched on. He said that one of the reasons that the public have not been as interested in cuts to legal aid as they have been to cuts to the NHS, for example, is that a lot of people don't touch the legal aid system. It comes up in crisis points in people's lives and as it is increasingly difficult to get, fewer and fewer people experience the benefits of legal aid and therefore do not understand or support it at the point it is being taken away. Adam said that one of the interesting things about the Covid regulations is that they have meant law has become an integral part of the vast majority of all our lives. Before, one would not encounter the law unless they were in trouble or in crisis, now we have to consider the legality of going for a walk outside, how many people can you be with before it is a crime etc. Adam said he wonders if that is changing people's understanding of and appreciation for the law and whether that this presents an opportunity to put across the importance of legal education and legal aid to help when people need it.

Adam also highlighted the difference between acting for and against the Government in publicly funded cases. He said that whilst there are a lot of barristers who have acted on both sides there are also an awful lot who haven't. Adam said that the interesting thing to understand is that the vast majority of public interest cases with legal aid have the Government or a Public Authority on the other side. The Government or Public Authority get their pick of

lawyers and can generally get who they want, through the panel system. Whereas there has been a hollowing out – with all due respect to practitioners – of legal aid providers at the bar. There has been no such hollowing out for Government focused chambers and lawyers meaning the Government still has pick of the prestigious end of the bar, particularly given being on panels is seen as a prestigious route to get ahead in public law. The rates for Government work are not great but if you are acting for Government you know you will be paid for your work, on time, about a month later. The difference with claimant side legal aid funded work is that the payment is far less certain and far more delayed.

Adam also noted that claimant side, you cannot get payment without permission from the legal aid agency in judicial review cases which he said is absurd. The consequence of this is that very often you can't get legal aid at all and you might not know until quite late on in the process. Claimant side work is thus fundamentally different to how the Government get to deal with its lawyers. Adam said this was a clear indication of a structural imbalance in publicly funded work. Both sides are performing publicly funded work they are just being paid from different pots. The Government has a very beneficial and straight forward system that means they get to pick and choose whatever barrister they want. Whereas on the legal aid side, the number of legal aid representatives is falling away.

Adam stated that it looks more and more that the Government has the upper hand in getting to pick and pay for lawyers when the individual on the other side can neither pick, nor often pay for lawyers in many cases. The result is that the Government lawyers find themselves increasingly going up against litigants in person. Unless something badly goes wrong in the Government's case it is then usually a straightforward win for the Government. Adam says he completely understand why the Government would be motivated to support that dynamic but it is very unfair for individuals.

Adam's second point is that it is obvious that the legal aid sector is already hollowed out and has been decimated with the last 10 years of reforms and reductions in funding. He says he cannot see how that can be repaired in the same time. Even if the Government were to restore the budget now, there has been a whole generation of legal aid lawyers that have disappeared. Chambers and pupillages have disappeared and it will take another decade just to rebuild what was there. The approach to dealing with the hollowing out of the sector is something that has to be really carefully thought through and Adam noted that simply restoring funding is likely not to be sufficient.

Adam's third point was on the public perception of legal aid lawyers. He remembered when he was talking to a journalist once about the first set of LASPO reforms. Ken Clarke QC MP was Lord Chancellor at the time and speaking to journalists he said that legal aid was by far the easiest policy to cut through Parliament because he could simply say it was all about hitting the fat cat lawyers by cutting their pay. Adam noted that is how, generally, the public perceive the entire issue and that is how it has been successfully framed by Government and the media over several decades. He drew parallels with coverage of the Human Rights Act where there have been decades of issues with newspapers framing them in a specific way. With the Human Rights Act, newspapers say it is all for the benefit of criminals and terrorists who are represented by lefty lawyers. There is a huge cross over in the narrative about legal aid. Headlines like "killer given £50k in legal aid" put forwards a complete nonsense that the client or lawyers will actually pocket that money and they perpetuate this idea that the legal aid sector is full of fatcats.

Adam's final point about this was on a principles level. Both David Lammy and Baroness Kennedy touched on this as well, and it is that we have lost sight of how a properly funded legal aid system is one that works in the public interest. There is a comparison to be drawn

with how we have changed our perception of the NHS over Covid-19. We have begun to understand the importance, not just of high-quality healthcare when people are in trouble but needing a high-quality system overall. The legal aid system is like public health, we need a high-quality legal aid system to protect us all and to support the rule of law.

Adam concluded with an example of an entirely publicly funded case he was recently involved in. The case of AB, a case that went to the Supreme Court about a child held in solitary confinement in prison and deciding in what circumstances this would be compatible with their human rights. Both sides were publicly funded, you had the top of the legal aid bar and the top of the Government funded bar arguing points of principle that will affect thousands of children in the justice system. The case is an example and a tribute to this public health type approach to the law. You can achieve public interest outcomes if you properly fund the system, make sure you have the right lawyers, the right access to justice and ensure claimants who need them have the right access to those lawyers. Adam stated that it is not a zero sum, “spending more money to pay lawyers more” argument, the discussion about legal aid is all about ensuring the public interest is furthered.

### **James Daly MP**

Thanked Adam for his contribution and apologised that there was no time to ask him questions. James said that we need to look at lawyers as forces for good in society and as standing up for something important. He noted his experience as a solicitor himself, representing several generations of families and that he felt his role had been to support those generations. With that the session moved on to questions to the witnesses.

## **QUESTIONS TO WITNESSES**

### **1. Professor Jo Delahunty QC, 4PB Chambers**

Jo said that a public platform has to be used to good effect and that words are important but what we really need is deeds. David Lammy has identified the huge issues facing the profession and that unless we do something now there won't be a proper publicly funded bar in the next decade. Jo was called to the bar in 1986, took silk in 2006, became a Recorder in 2009, professor in 2016 and an emeritus professor law in 2020 and does this alongside her silk practice. She is a mentor for Bridging the bar, a Patron of the Association of Lawyers for Children and a Member of Speakers for Schools. Jo said the last three are hugely important for her and are part of her putting something back into the education system she came from, having come from a comprehensive school background.

### **Questions from Baroness Kennedy**

Stated that Professor Delahunty is a legal aid family lawyer and asked her to explain to people what that really means, what is the nature of your work and what is the public perception of it?

### **Professor Jo Delahunty**

She describes herself as a family law barrister because if she describes herself as what she really is there is a lack of comprehension. Specifically, Jo's job is as a child abuse silk, pretty much respondent based in cases involving serious sex abuse, death of babies, radicalism cases, witchcraft, instances where children have been harmed through care or lack of it and the state has intervened to protect these children from future harm. As soon as those are mentioned, the horror is so great it stops people engaging with why you were a barrister in the first place. For Jo this was to invest back into the society she came from. If we are going to encourage the public to understand the job we do, we have to ensure the public and the press

understand the bar is a resource that is vital to protect the fabric of society when things go wrong and they need someone to turn to.

Baroness Kennedy

Too often there is a difficulty for the public in understanding that justice requires the person facing heinous charges has a voice too. Do you have difficulty persuading the public of the need for legal aid for the people you deal with and how do you justify that when talking to people?

Professor Jo Delahunty

Jo said that she turns the argument on its head. How can you possibly defend someone who is guilty becomes how can you possibly not allow someone innocent not to be represented. When taking a case we don't know if the person has or hasn't done what they are charged of. In many cases the parents charged with child abuse have it discovered during the process that their child died of natural causes, albeit ones that gave rise to the investigation. The barrister is there to prove the case of their client. Taking away the ability of the respondent to have representation takes away the point of having a trial. Unless there is equal handling of, or representation for, each side then our trial process cannot identify what it is that has occurred thus whether a remedy or punishment is required.

Baroness Kennedy

How much of your 30 years of work has been publicly funded?

Professor Jo Delahunty

99.99%.

Baroness Kennedy

Why did you choose to do this?

Professor Jo Delahunty

Jo said it's because it is a vocation. One becomes a legal aid lawyer because they strongly believe they have skills that should be employed for the benefit of the most vulnerable in society. You start with simple cases and then progress, often through working years of long hours and late nights, to a stage in your career where you know there is no other area of work that you could be doing. No one does it for the money, you do it because you passionately believe in the representation of people for a fair and just society.

Baroness Kennedy

How has the representation of people changed over the 30 years you have been in practice?

Professor Jo Delahunty

Jo said that when she started there was no support from technology and so your practical knowledge was limited to what you could get from your chambers or colleagues that you met. Now we theoretically have no limit to knowledge that we can acquire. Today, we should have the type of bar and judiciary that are representative of the people they represent. However, we do not have that, the legal aid bar is increasingly no longer a viable career and this results in an unrepresentative bar. It is hugely costly getting to the stage of pupillage, if you're lucky enough to get pupillage your award at a legal said set will be around £18,000, if you're then lucky enough to get tenancy you're left with uncertain workload and low pay. That has been a

huge disincentive for people wanting to come into this line of work. We are driving candidates out of the profession.

It is shameful that we don't have more equality in the profession and that we cannot mirror the society we serve but that is driven by the fact it is unaffordable to be a publicly funded barrister.

### Baroness Kennedy

You have described what is happening and it is effectively the de-professionalisation of the profession, we have driven down the pay to such a level that people cannot survive and therefore we will find people doing cases often without being able to put the time in to prepare and having to multiply the cases they do to make an affordable living. That results in a lower standard of work for those they represent. How has Covid affected what you are doing?

### Professor Jo Delahunty

Jo noted that she had grown up reading Kennedy's work, would give lectures and cite Kennedy. When Baroness Kennedy wrote 'Eve was framed in 2005' she identified the four apocalyptic horsemen that are keeping women from work practice bias, status, income and parenthood to which Jo said she would now add caring responsibilities. Jo said that it is not acceptable we are still seeing those horsemen today in areas and that they are continuing to lead to a division in the profession for women but increasingly also BME communities. Jo thinks that we need to expand the apocalyptic horsemen to include inequality of education.

On Covid, Jo said that it has had a huge impact on the way we practice in child abuse. Family and home have connotations of safety but under covid we have been unable to get access to women and children who need to be supported. If children are trapped within a home where the mothers are being abused, that is a double whammy of intolerableness. Covid has made it harder to make those people visible and protect them.

Jo also noted that family courts have had to proceed and move to a remote form of hearing. Barristers were particularly worried about working for vulnerable clients where their ability to communicate with those clients is particularly based on physical contact, sight, intuition and appearance, ultimately for these clients the barrister is often the first person in a suit who is on their side. Communication and eye contact are vital in those cases. Moving into an online environment as a result of covid has resulted in a move to a second-class system where those vital elements of contact are lost and it cannot become the norm. The medium being operated in also has its risks. For example, how much knowledge can you really gain of a client by simply viewing them from a screen? Jo also said she was concerned about what personal information barristers were giving out, whether unintentionally through technology e.g. the example of Lord Lowe's phone number being visible in the inquiry, or as a consequence of having to get in touch with clients e.g. by a barrister having to provide their provide phone number. Ultimately in family law Jo said that seeing clients through a screen is not good enough.

Jo noted that it has also promoted a huge level of inequality for junior barristers who are training, they miss out on the vital out of court room discussions which have always been where a junior would learn skills, hear news and make connections.

### Baroness Kennedy

What would your one takeaway for the inquiry be?

### Professor Jo Delahunty

Jo said it would be that there needs to be a recognition that a properly funded legal aid system has to be as integral to society as the NHS. You don't know you need a lawyer until you are in crisis and when that occurs they have to be sufficiently funded and able to be there.

#### James Daly MP

On remote hearings, James expressed concern that the junior bar will be penalised because eminent QCs may be instructed to do far more of their own cases. How would the increase in remote hearings impact the junior bar?

#### Professor Jo Delahunty

Jo noted that you can't get a silk on legal aid unless the Government are persuaded of the necessity of it, so James' question was potentially focussed at the wrong 'target'. Jo stated that it was a valid concern when it came to work being undertaken by solicitors. What is happening to the junior bar is that solicitors are conducting so many more of hearings themselves, taking work away from the junior bar. The search for each crumb for those who operate in the legal aid world means that the tiny cake of funding is just not sustainable.

#### Baroness Kennedy

Back in the day the situation was that young barristers built their experience on less demanding cases before taking more complex and demanding cases when they became senior. Now the less demanding cases are being dealt with by solicitors who, in order to survive, are doing huge volumes of work, which also destroys the quality of what is on offer by solicitors. These pressures are all in place because of the absence of funding.

#### Professor Jo Delahunty

Jo was keen to note that you cannot blame the high street firms for trying to keep that work, the bar need them to keep going. At the same time she recognised the approach is strangling the junior bar of the work they are trained to do. You need a barrister when you need specialist advice and specialist advocacy skills – you need both sides of the profession. Legal aid cannot currently sustain either side of the profession and that's why we need to fund it.

## **2. Dr S Chelvan, 33 Bedford Row Chambers**

Called to the bar in 1999, head of immigration and public law at 33 Bedford Row. Proud to be a legal aid lawyer.

### **Questions from Andy Slaughter MP**

Tell us a bit more about why you started at and remain in publicly funded work, what is your experience and how has it changed in your time at the bar?

#### Dr Chelvan

Dr Chelvan said that legal aid lawyers have a passion for their work and that he sees the role as two-fold.

Firstly, as a story-teller for their client. The ownership of a case belongs to the client and a barrister is simply there to tell their story. Secondly, as an interpreter for their client to interpret their words and their story into the law. Representation is need in order to do both.

Dr Chelvan stated that he works in the field of asylum and immigration and that he is proud to call himself an activist lawyer, this is especially after the Government attacks on 'activist lawyers' last year. Dr Chelvan said that even Parliamentarians are activists, their aim is to change the law and as an activist lawyer his aim is to change the law to empower clients.

That's what Dr Chelvan says he sees legal aid as enabling, that without legal aid those clients would have no access to justice. He said that he is proud to be an activist lawyer to be the mouthpiece of those who know the words but have no voice. That is why it is so important to have expert legal advice, it is essential to be the mouthpiece between the individual and state.

Andy Slaughter

How do you view the de-professionalisation that has gone on in the court system and the reliance on the increasing number of litigants in person, what difference does that make for clients getting justice?

Chelvan

In respect of litigants in person, in immigration and asylum, representation could be the difference between life and death. In immigration the Government pays for an individual to be represented in an asylum hearing for a day as well as having prepared 9 – 10 hours before hand at a fee of ~ £320. That is all the Government pays for a person who faces a real risk of death if they are not granted asylum. Without proper representation individuals who appear as litigants in person are at huge risk of being deported. LASPO caused immigration to go completely out of scope. Dr Chelvan also responded to Baroness Kennedy's suggestion that to deal with the criminal court backlog, defendants could receive greater reductions in sentence for pleading guilty early. Dr Chelvan noted that you couldn't view this in isolation of the Home Secretary's recent suggestion that the deportation threshold upon receiving a prison sentence should be reduced from 12 months to 6. In light of this, moves to encourage early pleas would mean a huge number more people at risk of deportation.

Dr Chelvan gave a number of examples where clients were only able to avoid deportation thanks to legal aid but that their route to legal aid was heavily restricted. He represented an individual from Jamaica who had to wait 5 – 6 months to get legal funding for his asylum appeal after having had to pursue judicial review to challenge the LAA's initial refusal for funding before making his claim. A case for another client, TDS, was a situation where the Home Office had catalogued a host of injustices. The client was born in the UK to a Jamaican parent, the client had received a criminal conviction and the Home Office were trying to deport them. The Home Office fabricated evidence about that child's entitlement to Jamaican citizenship in order to try to deport child to Jamaica. Both clients are only here because they got access to legal aid funding.

Dr Chelvan said that everyone in the UK who is originally from outside the country faces a risk of separation from their family because of the Government's hostile environment policy, injustice and cuts to access to justice.

Andy Slaughter

Things often take longer because lawyers aren't present. Is it sometimes the case that justice isn't done in the court?

Dr Chelvan

Dr Chelvan said that he is an optimist. He always believe that in the end there is some way of ensuring justice is being done. It is all about ensuring that individuals have access to and knowledge of the law. One message he would like to put to the panel is that it is not just about improving legal aid for legal aid lawyers' sake, it is about improving legal aid to ensure everyone has access to justice.

Andy Slaughter

Both David Lammy and Adam Wagner identified different levels of problems, the backlog, LASPO impacts and institutionalised problems resulting from cuts to funding making training more difficult. How different is your practice now than when you started?

#### Dr Chelvan

Dr Chelvan said that he sees the same issues now as when he started at the bar, but the difference is that people are no longer putting up with those issues. E.g. Alexandra Wilson a black barrister who court staff mistook for a defendant. Dr Chelvan said that he remembers when he started working and went to Leeds Court for a case and he was told that the “interpreters’ room is over there”. Dr Chelvan said that these issues are still here but that we are no longer putting up with those examples of racism.

Dr Chelvan also highlighted the figure that 50% of people from BME communities end up at the public funded bar, he said that this is not a negative. Persons from BME communities, like himself, often see themselves as advocates of those communities, it is important not to negate the fact that so many choose to do publicly funded work because of the thrill and the ability to empower clients.

#### Andy Slaughter

What next steps need to be made to support the bar and get the system working again?

#### Dr Chelvan

Dr Chelvan noted firstly that backlogs were there well before Covid and that he is frustrated by any attempt to blame this on the pandemic. In relation to the publicly funded bar he said that we should bring immigration back into legal aid scope. Dr Chelvan also said that we should look post Brexit at what has happened to EU nationals as well.

Dr Chelvan further noted that whilst it is very easy to look at this discussion as being over purely monetary figures we also need to look at how the system works. He raised, for example, the Government looking at making it harder to appeal to the Court of Appeal by requiring applicants to prove their case is one of “exceptional public interest”. Dr Chelvan said that steps like this show the structure and ethos around these areas of the publicly funded bar need to change.

He further added that perhaps we do need to look at positive discrimination and quotas to get BME persons and women into positions of power. For example he highlighted the fact we only have one BME judge on the Court of Appeal as indicating it is clear there are structural issues. He added that whilst we concentrate a lot about people entering the profession we need also to look at career progression within the profession.

#### Andy Slaughter

What is the solution to the problem set out – those who have been in the bar for some time, how are they affected and how do we ensure diversity at a senior level?

#### Dr Chelvan

Dr Chelvan admitted that it was slightly controversial, but that positive discrimination and quotas need to be looked at. He said that we talk a lot of about the bar being a meritocracy but we also need to look at positive discrimination and assimilation, people thinking there is a set way to look like and behave as a barrister and that this restricts some from progressing within the profession. Dr Chelvan said that need to have discussions about routes to senior positions in the profession.

## James Daly MP

James said that Dr Chelvan should be the advertisement for every young person who wants to be a lawyer in this sector and thanked him very much for his evidence.

### **3. Natasha Shotunde, Garden Court Chambers**

Natasha is the Co-founder and chair of the Black Barristers Network. She was called to the bar in 2013 and moved to Garden court in February 2020. Her practice encompasses crime, extradition and civil work. Her current focus is on family and human rights as well as particularly looking at inquiries. She stated that she is an elected member of the Bar Council's Equality and Diversity panel but that she was giving evidence solely as an individual barrister and also as chair of the Black Barristers Network. Natasha further emphasised that she is keen on furthering social mobility and improving the profession for black barristers.

#### **Questions from Baroness Bennett**

What do you see the role of a publicly funded barrister for improving society, what motivated you to come to be bar and what is a good day like for you?

#### **Natasha Shotunde**

Natasha said that she sees the work of a publicly funded barrister as upholding people's rights. She gave a number of examples including making sure asylum seekers get refugee status or ensuring someone has a roof over their head.

Natasha said that the work done involves serious and difficult issues, late night working and can lead to vicarious trauma but that it is also incredibly enjoyable and rewarding to give a voice to the voiceless. She stated that the complexity and importance of the work done is not reflected in the amount paid. It seems in general in our society the closer you work with people, the less you are paid. Natasha said that lot of junior barristers have to take on privately paid work to supplement their legal aid work. She used her own family law work as an example, between 15.10.2017 and 15.10.2019 publicly funded family work represented 49% of workload but only 31% of earnings, with the rest coming from private or locally authority funded work.

Natasha said the discussion is not just about barristers and their earnings. The reduction and removal of legal aid has caused huge issues in terms of access to justice and harming equality of arms. She noted that whilst litigants in person can cause huge delays in an already underfunded system, it is also unjust to expect litigants in person to be dealing with these difficult areas of law that also deal with hugely personal aspects of their lives.

Natasha said it is also important to note the serious cases we deal with that have no funding. She gave an example of a case she took on pro-bono. The case involved 2 children disclosing allegations their father had sexually abused them, the father had paid for representation and the children were represented by their guardian but the mother had no access to legal aid or representation. Natasha took the case on pro-bono. It was a 3 day trial outside of London that took at least an additional 3 days to prepare and she had to pay out of her own pocket for travel out of London. Natasha said that if she had not taken the case the mother would have had to prepare and handle the whole matter herself. Pro-bono is not enough to cover clients in those cases and that's why a properly funded legal aid system is crucial.

Natasha said that when she has a good day it is because she feels like she has done well for her client. For her this means making sure she has been able to give them a voice and for her client to feel like they have had fairness in their case, she said this is not always linked to a good outcome for her client but that often this is important too.

## Baroness Bennett

What are the issues you have faced as a junior barrister at the bar? Considering fees but also in terms of behaviours and attitudes and if you could give examples of experiences of inequality from your own experience and as chair of the Black Barristers Network.

## Natasha Shotunde

Natasha said that she started pupillage in 2014-15, she had a £12,000 pupillage award. £6000 in her first six months and £6000 guaranteed earnings in her second six months. During her second six she did a lot of Magistrates work at extremely low fee rates which have not changed since then. The rates were £75 for a half day trial, £150 for a full day trial and £50 for all other hearings. If you were in court for 3 hours or more for a hearing other than a trial you may be lucky to get £100. She noted there were also issues with the speed you would receive payment. For criminal work you rely on your solicitor paying you, that necessarily depends on when solicitors bill. Sometimes they can be quick, sometimes they take months, sometimes years and sometimes solicitors refuse to pay at all, using higher paid Crown Court work given to senior barristers in chambers as leverage. Natasha's chambers made it a point not to take work from solicitors who refused pay but many of her peers have faced those issues. At the time she said she wondered why the LAA couldn't pay barristers directly.

Natasha said that because of the fee issue some barristers feel they need to take on a huge volume of cases. This can lead to burning out and also not having enough time to prepare cases which causes an impact in the quality of work you can do. She noted that many barristers have to take on private work as she said she has had to do herself.

Natasha also talked about the nature of work undertaken. You are working with people who have complex needs, difficulties and vulnerabilities which can put barristers in physical danger. She gave a couple of examples from her own practice. On one occasion she was dealing with a sentencing case in the Magistrates' court, so being paid £50 for the day. Her client had mental health issues and he told her that he not taken his medication. After the hearing he came out of court shouting and screaming at Natasha directly in her face. The Magistrates' court security were located around the corner but did not come to assist her. She said by the grace of god the client did nothing more than scream at her. Natasha said that the security came over only after the client had stopped screaming, to effectively 'hear the gossip'. Another example was when meeting a client in the cells who was hugely aggressive and violent, when she arrived the client had to have 5 court staff holding him back. A member of court staff said that "you should have a conference with him yourself Ms Shotunde, that might calm him down". Thankfully having a conference did calm the client down but Natasha said she was put in a clear and unnecessarily risky situation.

Natasha then went on to discuss the impact of Covid. Firstly, in respect of safety at court, she said that whilst she had not had to go into court during the pandemic she had heard from peers and through the Black Barristers Network of those who had. They gave examples of people not wearing face masks, courts that were not being thoroughly cleaned and over listed Magistrates' courts leading to crowded buildings. Secondly on the issue of fees. Natasha had spoken to barristers who had to claim universal credit due to a drop in income and that would not have survived without Inns of Court benevolence fund payments. She added that so many junior barristers did not qualify for the Government's self-employment support as they did not have 3 years' worth of tax returns. Natasha said that her heart goes out to those juniors who are having to go into court regularly during the pandemic.

In respect of her position as chair of the Black Barristers Network she discussed a survey undertaken of black barristers to find out about their working lives within self-employed

practice. This covered all practice areas but of those surveyed 34% worked primarily in family and 33% primarily in crime. The survey covered issues of racism and Natasha noted that because it is so often covert and difficult to demonstrate racism was the cause of someone's behaviour the survey had yes / no as well as maybe / not sure answers.

- 59% of respondents felt relations with chambers were or may have been affected by race with only 45% of respondents saying they did not feel they were affected.
- 86% of respondents felt their experience before judges, magistrates and panels had or may have been affected by race.
- 61% felt their relations with solicitors were negatively affected by race.
- 51% definitively said they had felt inappropriately treated by the other side due to race.
- Many respondents reported feeling patronised, subject to bullying, name calling etc.
- Just over 50% felt treatment by court staff had negatively been affected by race.
- 33 respondents had been assumed by court staff to be the defendants in a criminal trial and 23 were assumed to be a social worker.

Natasha said that when you look at all of these things that we, as black barristers, have to experience alongside everything else stated it makes this job particularly hard. You also have to remember when talking about legal aid lawyers, you are talking about people who have come into this profession with a desire to help people. When you consider all of these issues, low fees, racism, Natasha said it makes it extremely difficult for us to continue working in the profession.

### Baroness Bennett

What can be done to help improve on the issues affecting the profession now? Consider issues of intersectionality coming into this too, what steps can we take to get to a non-discriminatory, representative bar?

### Natasha Shotunde

Natasha said that the intersectionality point is hugely important and highlighted that a number of black female barristers responding to the survey had identified more instances of discrimination than black barristers.

Natasha said that there are clear issues of diversity in the profession and issues of progression. The Diversity in the Bar report by the Bar Standards Board reported that only 1% of QCs are black. As of the 1<sup>st</sup> December 2019 there were a total of just over 1000 QCs at the bar, 3 were black women, 18 were black men. In the beginning of 2020 Natasha said the news that 6 black females had taken silk provided a lot of hope for her. Announcements last year in December showed a dip in that with only 14 BME QCs appointed. Natasha said that as far as she was aware only one of those individuals was black.

Natasha said that there are still clear issues of discrimination when it comes to the profession. She noted that there are some things to be optimistic about. For example; the Bar Council are hot on the issue and need for diversity, Natasha sits on various committees talking about these things, the Black Barristers Network are constantly pushing for equality and race is firmly now on the agenda. Natasha said that we need to look at attitudes towards black people, need to look at work allocation and also need to look at recruitment for pupils as there are massive issues about the number of black students that can become pupils. She also highlighted the positive action guide recently released by the Bar Council. Natasha concluded by saying that the fact we're talking about it and looking at the issue, that provides us hope that things will change.

## James Daly MP

Thanked Natasha for her contribution. At this point the inquiry took a short break until 12:55pm.

## 4. Michael Etienne, Garden Court Chambers

Michael said that he had quite a long association with legal aid. Before he got anywhere near the law he said that he had went through state education in Luton. He said that he was a barrister with a disability and had started out education at a special needs school.

He was called to the bar in 2012, secured pupillage in 2016, spent two years as a pupil, qualified in 2018, secured tenancy in the summer of 2019 and in October 2020 joined Garden Court chambers. Between being called to the bar and getting pupillage he was a paralegal at Deighton Pierce Glynn and Bindmans and joined the legal team at Liberty before starting pupillage.

## Questions from Laura Farris MP

Wanted to try and pick up on practical points about what the APPG could submit to the MOJ, what would reasonable earnings and legal aid rates be? Also, as a baby barrister, a phrase Laura said she was not a fan of but noted that it is commonly used for junior barristers within their first three years of practice, talking about the work done – civil actions against the police so on – how much of your earnings are from publicly funded work?

### Michael Etienne

Michael noted that he worked at the same chambers with Natasha and had also sat on the committee of the Black Barristers Network. He said over the past year only a small amount of his work has been from legal aid practice. He added that he had been undertaking privately funded work over the past year simply for the practical reason that is the only way he can support his legal aid work.

### Laura Farris MP

For someone at your level, what would an average earning be for a junior practitioner working exclusively in legal aid?

### Michael Etienne

Michael said that you would be looking at around £20,000 - £30,000 earnings exclusively for legal aid.

### Laura Farris

Would that be before deductions?

### Michael Etienne

Michael said that in some cases that would be after. The method and amount in which you pay in to your chambers depends on the chambers you are in. He added that the £20 - £30,000 earnings are what one would be very lucky to get in that time. Further Michael noted that given you are entirely a self-employed professional in that period you are left without any support beyond what work you can get in yourself and that it is an uncertain financial position.

### Laura Farris MP

What are the standard differences between privately paid work and publicly funded work?

### Michael Etienne

Michael said when talking properly privately paid work, directly from a client, you would be receiving that payment in a matter of months. In terms of legal aid work you are talking far far longer, Michael said that he had only just received a payment in January 2021 for work done on legal aid in January 2020.

Laura Farris MP

Is that period you waited within the range of usual payment times and would it be on the upper end of the timescale?

Michael Etienne

Michael said that it is within the range but that he would not necessarily even say the upper end. When you are not doing complicated work, you are also not eligible for interim payments during that period of waiting, you have to somehow find a way to sustain yourself. When working and trying to sustain yourself and any others dependant on you, that is an additional pressure that adds to all the pressures already on junior barristers from the work alone.

Laura Farris MP

To what extent would you say you have to skew your practice towards privately funded work? What proportions do you split and how would you prefer to work if money was no object?

Michale Etienne

Michael said he would be delighted to have a 100% legal aid funded practice, he noted that legal aid practitioners come into this work because we recognise the importance of the work and that although that sounds rather grandiose it is truly where the motivations come from. Michael said that what needs to happen is that we need a model in place that at the very least allows you to have a sustainable cashflow. The current system is not sustainable. There needs to be a commitment to certain practical things, for example a commitment that the legal aid agency will pay legal aid claims within a certain period and that there would be consequences for the LAA if payments were not made in that time such as interest for the payments.

Laura Farris MP

Laura said that she understood that the uncertainty in payment time can have a huge impact on your earnings. After three years a pure legal aid salary would be in the region of £20-£30,000. If the Ministry of Justice was inclined to work backwards would it be reasonable to expect someone to earn £40-£50,000? Laura said that she feels in a way we ought to be quite explicit about what junior barristers work is worth.

Michael Etienne

Michael said that what the number is requires real consideration and thought. Young Legal Aid Lawyers have looked in detail about the specific numbers we have talked about. He said that really what we need are commitments to certain principles, one is a recognition that barristers providing publicly funded work are providing an important service. Denigrating them as fatcats avoids being able to have the necessary conversations about income. Michael said that he thinks a barrister three years call should be in a position of financial stability.

Michael said there is also a racial impact on the figures of pay. Beyond the junior levels of practice, as a white male barrister you are much more likely to be earning far more than your colleagues of colour – particularly when compared to female black barristers.

Laura Farris

Do you think it would be desirable for the bar council to require chambers to publish the earnings of their barristers in chambers? There is an issue of transparency there.

### Baroness Kennedy

These things are always difficult and there is always a reluctance for people to talk about pay. There is no reason why the bar couldn't conduct a piece of work with a university where they would be inviting this kind of information without chambers having to list exactly what they earn. Inside chambers these kinds of discussions are already happening.

On the money, a member of public will see £100 of earnings as quite a lot of money, the public don't see the costs that are incurred on the £100 of income. This is an issue particularly faced by young barristers. No political parties have clean hands on this issue.

### Michael Etienne

Michael said that he agrees with the essence of what Baroness Kennedy said. On the publication of figures, discussions about specific figures are important but they will be arrived at and discussed against a longer backdrop around the myth that legal aid lawyers are fatcats. He said that if legal aid practitioners were the fatcats they are so often portrayed as, the profession would have ceased to exist already. It denotes a level of greed that is an anathema to the motivation so many barristers have for entering this profession.

Michael said there should no longer be a question of which party got us into this position but rather the question is which party or administration will have the courage to repair this problem. If we don't repair it then public confidence in the profession will continue to drop and we will see the number of young persons entering the profession drop too. In its current form the independent bar is one of the most important assets this country has, without it we would lose a hugely important contributor to the rule of law and access to justice in this country.

### James Daly MP

Noted that the same issues of low pay identified by Michael are faced by young legal aid solicitors to which Michael agreed and said that both sides of the profession are in it together. James thanked Michael for his contribution.

## **5. Marina Sergides, Garden Court Chambers**

Marina introduced herself. She has been a barrister for 20 years specialising in housing law – homelessness, homes at risk and standards of accommodation - and community care – representing people who lack capacity. She has also spent a number of years working on inquest law. She is a visiting professor at Southbank University. Co-chair of the Housing law practitioners' association, part of the Garden Court outreach mentoring scheme. She also qualified as a mediator in 2020, partly out of concerns regarding the financial sustainability of her practice.

### **Questions from Lord Bach**

Why did you choose housing law as a priority area of practice, what is it about that area that gets you?

### Marina Sergides

Marina said she chose housing as part of a wider decision to practice in legal aid and the public interest world. All barristers entering into the legal aid world do it out of a sense of conviction and social duty. She said she chose housing law specifically because as a child of

the 80s she saw homelessness all around her, it didn't make sense to her then and it doesn't make sense now.

Marina stated that housing has always been political, a bit of a football, it has come back into the social debate in recent years partly as a result of the Grenfell Fire causing discussions about the standard of housing. Also as a result of the sheer number of homeless people we have seen in the pandemic and seeing that the 'everyone in' scheme has had to accommodate far more people than we expected.

Marina says that for her, housing is about how we as a democratic society treat the most vulnerable, our response to that is important and a measure of how we are as a decent democratic society.

### Lord Bach

Tell us a bit about your route into the profession, what was it like then as a junior barrister and how has it altered?

### Marina Sergides

Marina says she has lived through the period where legal aid barristers were paid a decent rate, lived through the reductions and is now living through a period where the rates are static. She says she is now probably earning less on legal aid rates than she was when she started.

Marina said she came to the bar from state school, having funded her way through university and law school and ended up with around £30,000 worth of debt. She said she was confident that she could pay that debt. She did her pupillage at Garden Court and has remained there. She was confident that she could pay that debt and sustain a living in her chambers. When she started there was a wide solicitor base, she was properly paid and she was not worried about the possibility of starting a family.

Marina says the same is simply not true today. She said the best way to explain is by giving an example she has experienced as a mentor at Garden Court. One of her mentees is a young woman who is unsure whether she wants to go to university and what she would like to do after that. She is reluctant to go to university because of the debt she will incur, a problem Marina says the mentoring scheme sees time and time again. Marina said that she has persuaded her mentee that she should go to university because of the number of career and life benefits one can have. Marina said the next issue is whether her mentee wants a career at the bar as well as what kind of work she would be doing. Marina said she was aware as she was having this conversation with a young enthusiastic woman of Pakistani heritage from East London and not of large financial means that Marina was really unsure whether she should encourage her mentee to go into the legal aid bar.

The issues of huge debts, fees remaining static and an ever reducing number of solicitors practicing in legal aid really weigh against those who want to enter the profession. Marina says her additional worry is that as the legal aid bar has a proud history of better representing BME communities than other parts of the bar that this too could be lost. She said her experience coming to the bar in debt is far different to that faced by young practitioners today.

### Lord Bach

On diversity at the bar, how much has that changed in your practice? Has there been a change in the class and background of people coming to the bar?

### Marina Sergides

Marina said that over the last 20 years we have seen efforts by the Bar Council and chambers to really improve diversity. Of late we have seen, in particular, efforts at the commercial bar. Her concern is now that we seem to be going backwards, people from poorer communities are now increasingly attracted to areas of the bar that are better paid. The impact of that is the legal aid bar may lose its proud position as being the most representative part of the bar.

When she came to bar she did so knowing that at some point she wanted to start a family. For anyone with children or caring responsibilities, life at the bar today is very difficult. She said that was made significantly more difficult due to LASPO. Marina said working conditions are more difficult there are longer hours and one needs to take on more cases because of the reduction in rates and also because there is a demand from clients that is simply not being met.

Marina said she now receives work very differently to when she started practice. She no longer receives a well organised and tabbed folder well in advance, it is now increasingly received last minute and, in a state, requiring additional organisational work. She added that a lot of that preparatory work is now out of legal aid scope for both barristers and solicitors and yet that work needs to be done which means practitioners are having to do that work pro-bono. It puts young people off, particularly those wanting to start a family.

#### Lord Bach

What is the biggest challenge facing you as a leading housing law practitioner now and what would you do about those challenges in this area?

#### Marina Sergides

Marina said that there is a culture of refusal in the LAA that needs to be addressed, simply trying to get paid for the work you do is a job in itself. A colleague told Marina that when she applies for work through exceptional care funding it is almost a given that it will be refused and will require an appeal. She said more generally that it is almost inevitable fees will be assessed down.

Marina said the culture of refusal affects not only the way barristers get paid, how long it takes and how much they get but that it also affects morale. The publicly funded bar are public servants, paid from the public purse, performing a public function and yet not considered to be public servants. In contrast to others in the public facing world such as teachers or doctors, publicly funded barristers are attacked for the work they do by the Government – that damages the bar and causes morale to plummet, ultimately resulting in barristers leaving the profession entirely or leaving legal aid work behind.

Marina concluded by saying that the hostile environment, culture of refusal and the inaccurate narrative being put forward by the Government are what need to change.

#### James Daly MP

Thanked Marina for her contribution. James apologised but said that he had to leave as he had another meeting to go to but said he was incredibly grateful for everyone's contributions. He welcomed the final witness before handing over chairing the meeting to Andy Slaughter MP.

### **6. James Stark, Garden Court North Chambers**

James said that he practices predominately in housing law but also public, human rights and community care. He has been a lawyer for nearly 30 years, originally he was a housing solicitor in a local authority but that after doing that for 5 or 6 years he wanted to be defending people

rather than evicting people from their homes and wanted to be acting for the disadvantaged. He trained as a barrister in 1998 and joined Garden Court North in 1999. James said that he practices across all areas of housing law but that his primary area of work is homelessness. He said he also has experience in acting in possession claims for individuals with severe vulnerabilities, such as serious mental health problems, that mean they lack capacity to defend those proceedings themselves and so James finds himself instructed by the official solicitors in those cases. Examples include cases where clients are financially exploited and left facing eviction or cases where a client's mental illness causes them to conduct themselves in a way deemed antisocial. He said that he has a varied diet of housing law but those are the predominant areas.

### **Questions from Gareth Bacon MP**

How much of your work is publicly funded?

#### **James Stark**

James said that nearly 100% of his work is publicly funded. He said the vast majority of his work is for tenants and homeless people. Sometimes he has acted for local authorities in their disputes with government or for local authorities seeking to enforce private rental standards against landlords. Vast majority is publicly funded for tenants.

#### **Gareth Bacon MP**

What changes have you seen in your practice since 1999?

#### **James Stark**

James said that the work we can do has decreased substantially due to LASPO. Disrepair work has fallen away hugely because it is only in scope when it presents emergency health concerns. There is other work that cannot be done anymore, for example previously you could make an application to get someone's tenancy status confirmed before any claim was made against them, you have to now wait until an eviction claim is brought before that person is eligible for legal aid.

The disappearance of early advice has also been a huge area of impact. James said that he is regularly asked to get involved to defend a claim that, had early advice been available and given, could have been resolved long before a barrister was needed. Issues that could have been dealt with by resolving a client's welfare benefits issues through advice are now ending up with a situation where clients are facing the loss of their home and this is the first occasion when legal aid steps on.

James said that as a housing lawyer he finds himself in many ways acting as a coordinator particularly for people who lack capacity. He often finds out that people have been discharged from mental health providers due to missing one appointment or encounters people who have had no help from mental health services at all. The lack of support from adult social care is also apparent in these cases due to the huge stress placed on the social care sector. However he said this is not helped by a culture in some of these places that if someone is refusing help the provider will treat that as the end of the matter. Social care providers assume that the offer of help is enough to discharge their duty, whereas this is often not the case as there is a specific duty of care owed by social care providers to help if someone doesn't have capacity to refuse.

James gave an example of a case where a social worker was successfully involved to go to a client with hoarding condition to assess their housing situation. The client refused the social worker entry and so because they had been unable to get entry the social worker reported the

client had a safe housing situation that required no intervention. James said this specific decision was successfully challenged through judicial review but it was a situation that should never have happened in the first place.

James said that increasingly eviction is being used in situations where what a person really needs is care.

James added that increasingly housing lawyers are having to help out the Ministry of Justice themselves because the court system cannot keep up to date with filing and so the obligation falls on to the barrister to keep court files up to date otherwise their case may be unable to progress. He added that all of that filing work is additional to what a barrister is expected and paid to do when working for a client.

### Gareth Bacon MP

What has been the impact of the pandemic on your practice?

### James Stark

The moratorium on possession claims and current moratorium on evictions has vastly reduced workload however there continue to be a large number of homelessness cases. James said there have been other issues such as Local Authorities failing to consider their housing duties to the homeless in their area and simply housing everyone temporarily under localism act powers without conducting an assessment required by statute.

James added that there has been an increase in the number of injunctions sought for anti-social behaviour cases, particularly where otherwise a landlord would have pursued a case for eviction. A key example has been injunctions sought for a tenant's failure to comply with covid regulations, a use of injunctions that James said he was unsure was even correct and that these situations should perhaps more correctly be dealt with under public health regulations.

### Gareth Bacon MP

What changes would you like to see?

### James Stark

James said properly funding legal aid for a start and returning disrepair case to scope for legal aid, the availability of conditional fee agreements does not fix their removal from scope because only a handful of solicitors will take those agreements in the first place. The situation in disrepair cases is that because you cannot claim legal aid for disrepair damages cases, it is only when the damage gets so bad that it forces a person out of their home that they are eligible for legal aid and assistance.

The culture of refusal in the LAA also needs to be addressed, particularly when it comes to refusing legal aid for appeals. As an example, James discussed the recent case he was involved in of *Samuels v Birmingham CC*. The LAA refused funding for the permission to appeal hearing on three separate occasions as they claimed it had little prospect of being granted. The permission application was made pro-bono, granted and ultimately the Supreme Court granted the appeal in favour of the applicant.

James questioned the logic of the LAA because a permission application is cheap with limited fees that can be charged, but nevertheless higher court cases are fought tooth and nail by the LAA.

James also discussed unlawful eviction cases that only involve damages, the LAA are trying to get these dealt with under conditional fees agreements despite the LAA producing no evidence that after the event insurance will be available in these circumstances. James said that such an approach ignores the vulnerabilities of the individuals involved that led to them being put in scope in those first places. James further noted that there are no costs shifting schemes for this area unlike in personal injury cases. He stated further that the LAA's attempt to have these dealt with under conditional fee agreements followed on from the LAA's earlier attempt, unsuccessfully, to argue those cases were not in scope.

On the issue of Advice Deserts, James also noted a further issue of advice deserts is that it leads to local authorities and local judiciary in an area not being challenged on the way they deal with cases. The lack of legal advice and legal representative means points are not being taken in a way that would help people who are really vulnerable. James gave an example of a woman facing an injunction to stop her begging in Worcester. Begging is a crime punishable only by a fine but the woman who continued to beg after the injunction was sent to prison as a result of breaking the injunction. Upon her release she was sent back to prison for a further 6 months after she asked for 50p from a local authority ranger. The woman in the case was not able to get any legal aid for either the initial injunction hearing or her sentencing. The impact of the lack of available advice was that firstly, she had no ability to challenge the injunction being made and secondly, that the judge was not challenged on their excessive sentence.

James further noted that when practising in a court in an area with limited legal aid assistance available, courts in those areas will simply miss relevant law because there are no legal representatives drawing the court's attention towards them, thus leaving behind both judges and the vulnerable who end up in their courts. James gave a particular example of a case where a judge handed down an order that was simply copied verbatim from a standard draft available to the judge, a practice that had been heavily criticised by higher courts many years prior. When James brought up this case the judge was shocked that he had not had his attention drawn to it earlier, it was simply because there had not been a legal professional before him on that issue due to the lack of legal aid providers in the area.

#### Gareth Bacon MP

In the absence of changes, how sustainable is the housing and social sector?

#### James Stark

James said that if fixed costs recovery comes in, the housing sector is doomed, particularly solicitors. He said that solicitors survive based on the cases they succeed on where they are awarded inter-partes costs and a move to fixed costs would cripple them.

James further discussed the dearth of recruitment opportunities for chambers seeking housing lawyers. He said that his chambers are in a situation where they find themselves only able to recruit housing lawyers by growing their own pupils. The issue with this is that their pupils tend to be more interested in the other areas that Garden Court North are involved in such as inquiries, having been involved in high profile work on the Hillsborough and Manchester Arena Inquiries. James said that the consequence is that areas of work are completely hollowed out, there are areas of housing where it is incredibly hard to get a barrister to represent you. James raised the example of beneficial interest cases, cases where someone is being evicted from a property they have a beneficial interest in which raises additional issues of complexity. In previous years when such cases arose James said he would get a barrister in who typically dealt with beneficial interests in privately funded practice, for example mortgage disputes, but who occasionally did legal aid work. He said that increasingly with these specialised areas

barristers have completely given up the small legal aid side of their practice, leaving the area with little publicly funded representation.

**Andy Slaughter MP**

Taking over the chair from James Bury, Andy thanked James Stark for his evidence before bringing the session to a close by thanking everyone for attending and taking part as well as encouraged attendance at the next inquiry session in February on Access to Justice.