

One of the lesser-remembered facts about Magna Carta and its promise “to no one will we sell...deny or delay right or justice” was that King John really didn’t mean it. A month later John disavowed the ‘Great Charter’ and its bracingly progressive clause 40 with the enthusiastic consent of the Pope.

In the contrast between its platitudes and its policies, today’s government echoes more than a little of King John’s duplicity.

Justice Secretary Dominic Raab praised the “ancient right” of trial by jury in a Times article last month. Sincere though that admiration may be, Mr Raab could have added that the other “ancient” feature of jury trials in 2022 are the cases being tried, such are the endemic delays in the justice system.

In a recent case in which this writer, a pupil barrister, was involved, it took almost six years to try the defendant after his arrest. By comparison the attempted theft of the Magna Carta itself, at Salisbury Cathedral in 2018, took a mere 15 months to prosecute - still rather a long time, one might think, to try an offender who was caught red-handed and confessed to the police.

Even once trials start, sometimes they stop. In October, two major trials collapsed because of the prosecution’s failure to disclose evidence¹. In December a jury couldn’t be sworn in because there was no prosecution barrister available, a problem the judge described as typical². Through this winter, jurors have been sent home because the courtroom’s heating was broken and it was too cold to concentrate. This summer, like previous summers, jurors will be sent home because the air-conditioning is broken.

The common factor in these failures is the lack of time: judges, lawyers, officers and court staff are stretched, stressed and tired. The public are misled by the speedy resolution of high-profile cases, such as the murder of Sarah Everard, which are fast-tracked through the rickety system to give the impression of effective justice.

Public money isn’t the only solution to the problems in the criminal justice system but it’s a start.

Sir Christopher Bellamy’s independent review has recommended an increase in lawyers’ fees alongside a structural shift to pay lawyers for preparatory work. The current practice of paying for work only upon the conclusion of the trial stems from a previous era when trials happened swiftly and the barrister instructed at the outset would do the trial. Neither is true any longer: it is difficult to find trial slots within 12 months and the courts list cases on a loose, provisional basis that can change without consultation.

¹ <https://www.thetimes.co.uk/article/disclosure-week-marred-by-two-collapsed-trials-lmvpw00sd>

² <https://www.oxfordmail.co.uk/news/19760649.oxford-judge-paints-desperate-picture-trial-delayed-lack-lawyers/>

In fiscally-straitened times, the taxpayer is entitled to be sceptical of Bellamy's proposals. Yet, counter-intuitively, an improvement in the terms of criminal lawyers' remuneration may be cost-neutral. Many criminal trials over-run and incur greater fees to counsel because of the need to fix problems that could have been solved before trial. If lawyers were paid earlier to scrutinise evidence, consider disclosure and give advice, trials would be shorter. Trials might even be avoided altogether if guilty defendants are properly advised beforehand.

The deficiencies in the justice system that provoke the greatest public ire – lacklustre investigations, low charging rates – are the function of constrained police and CPS resources. Digital crime in particular is rocketing. The latest Crime Survey reveals that fraud rose by a third in the year to June 2021 and computer misuse (mainly hacking) rose by 85%. Only a fraction will ever be investigated, let alone prosecuted.

That raises the question of whether, as the writer is invited to consider, privatisation is the answer. For example the government could invite law firms to tender for contracts to prosecute all cases in north-west England for the next five years, or – to encourage specialisation – contracts to prosecute online frauds. The government would set targets for charging and convictions and replace the provider if it fell short.

Many in the justice system will wretch at the notion of turning the Queen's Justice into a game of for-profit cat and mouse. Yet the private sector is already part of the system. Crown Court advocates are mostly self-employed lawyers who charge fees set by their Chambers. Legal aid is provided to private solicitors to represent impecunious defendants. Moreover a growing number of offences, particularly white-collar crimes, are privately prosecuted by aggrieved and wealthy complainants. One cannot oppose privatisation as a matter of principle without rejecting the system as it is.

As a matter of practice, however, there are reasons to resist the State further outsourcing justice.

The first is that privately-paid prosecutors are no more likely to than public ones to call the shots correctly. The CPS has made many, well-documented errors in recent years. But the unfolding horror of miscarriages of justice executed by the Post Office against its sub-postmasters illustrates how private lawyers can be just as foolish.

Second is the risk of financial incentives perverting decision-making. State contracts with private prosecutors would inevitably link payment to volumes, encouraging them to overlook the evidential and public-interest tests that tie the CPS. Most lawyers can be trusted to quash hopeless or unethical cases in accordance with their professional obligations - but not all. In November a judge in Manchester criticised an animal welfare

organisation and its lawyers for launching “wilfully perverse” prosecutions and using them as “a vehicle for the recovery of fees.”³

Third, disconnecting prosecutors from a direct relationship with the state would weaken the public-service culture that, for all their faults, the police and CPS retain. Consider The Times’ expose of the scandal of ‘Action Fraud’, the police’s fraud-reporting service outsourced to an American company whose staff misled victims and disparaged them as ‘morons’⁴.

Ultimately the taxpayer will get what it pays for, whichever way justice is delivered. Privatising the public sector does not necessarily make it cheaper or better. Any organisation, public or private, will only succeed if it can retain talented and committed people to do the hard work.

³ Animal Protection Services (a private prosecutor) v (1) Alex-Kaye Carrigan, (2) Elisha Brown

⁴ <https://www.thetimes.co.uk/article/fraud-line-scrapped-after-times-expose-n2tlkbrv>