House of Commons
Justice Committee

Government's proposed reform of legal aid

Third report of Session 2010–11

Volume II
Oral and written evidence

Additional written evidence is contained in Volume III, available on the Committee’s website at www.parliament.uk/justicecttee

Ordered by the House of Commons
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The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General’s Office, the Treasury Solicitor’s Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

Current membership

Rt Hon Sir Alan Beith (Liberal Democrat, Berwick-upon-Tweed) (Chair)
Mr Robert Buckland (Conservative, South Swindon)
Christopher Evans (Labour/Co-operative, Islwyn)
Mrs Helen Grant (Conservative, Maidstone and The Weald)
Ben Gummer (Conservative, Ipswich)
Mrs Siân James (Labour, Swansea East)
Rt Hon Elfyn Llwyd (Plaid Cymru, Dwyfor Meirionnydd)
Claire Perry (Conservative, Devizes)
Yasmin Qureshi (Labour, Bolton South East)
Mrs Linda Riordan (Labour/Co-operative, Halifax)
Elizabeth Truss (Conservative, South West Norfolk)
Karl Turner (Labour, Kingston upon Hull East)

The following Members were also members of the Committee during the Parliament:

Jessica Lee (Conservative, Erewash)
Anna Soubry (Conservative, Broxtowe)

Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via www.parliament.uk.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/justicectee. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Tom Goldsmith (Clerk), Emma Graham (Second Clerk), Hannah Stewart (Committee Legal Specialist), Gemma Buckland (Committee Specialist), Ana Ferreira (Senior Committee Assistant), Henry Ayi-Hyde (Committee Support Assistant), and Nick Davies (Committee Media Officer).

Contacts

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Witnesses

Wednesday 15 December

Rt Hon Kenneth Clarke QC MP, Secretary of State for Justice and Lord Chancellor

Tuesday 1 February 2011

Emma Baldwin, Free Representation Unit, Rebecca Scott, Legal Advice Manager, Royal Courts of Justice Advice Bureau, and Sally Denton, Senior Solicitor, Nottingham Law Centre

Julie Bishop, Director, Law Centres Federation, Gillian Guy, Chief Executive, Citizens Advice, and Paul Newdick CBE, Trustee, National Pro Bono Centre

Monday 7 February 2011

Rt Hon Sir Nicholas Wall, President, Family Division, Rt Hon Sir Anthony May, President, Queen’s Bench Division, and HHJ Robert Martin, President, Social Entitlement Chamber

Campbell Robb, Chief Executive, and Simon Pugh, Head of Legal Services, Shelter

Tuesday 8 February 2011

Christina Blacklaws, Chair, Law Society’s Legal Affairs and Policy Board, Steve Hynes, Director, Legal Action Group (LAG), Laura Janes, Chair, Young Legal Aid Lawyers, and Paul Mendelle QC, Member of the Bar Council

Monday 14 February 2011

Professor Roger Bowles, University of York

Sarah Albon, Director for Civil, Family and Legal Aid Policy, Ministry of Justice, and Carolyn Downs, Chief Executive, Legal Services Commission

Wednesday 16 February 2011

Jonathan Djanogly MP, Parliamentary Under-Secretary of State and Sarah Albon, Director for Civil, Family and Legal Aid Policy, Ministry of Justice

Wednesday 2 March 2011

Nick Hurd MP, Parliamentary Secretary (Minister for Civil Society), Cabinet Office
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Oral evidence

Taken before the Justice Committee
on Wednesday 15 December 2010

Members present:
Mr Robert Buckland Claire Perry
Chris Evans Elizabeth Truss
Ben Gummer Karl Turner
Mr Elfyn Llwyd

Examination of Witness

Witness: Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State, Ministry of Justice, gave evidence.

Chair: Welcome to the Lord Chancellor. We have to go through the declaration of interests before we start. I will start on this side of the table.

Mr Buckland: My declaration of interest is that for 20 years I have been a legal aid barrister. I am still in receipt of payments for criminal legal aid for cases completed before the election, and I am a recorder of the Crown Court.

Mr Llwyd: I practised as a solicitor and barrister. I have done legal aid work, both civil and criminal, and since April I have been non-practising.

Karl Turner: I practised as a solicitor and before being elected to this House I was a barrister in my local chambers in Hull.

Q1 Chair: I don’t think the Lord Chancellor has practised for some time, have you?

Mr Clarke: It is a little over 30 years since I put on robes in anger and appeared in a court, but I enjoyed it when I did. I was able to combine it with being a Member of Parliament in those days. It is infinitely more difficult now.

Chair: We have quite a lot of things to get through this morning—two main subjects but also a little bit on the Magistrates’ Court—which means we have to drive along quite energetically. In that spirit I am going to ask Claire Perry to open the questioning.

Q2 Claire Perry: Good morning, Lord Chancellor. When you met us last time you kindly discussed some of the underlying cost drivers of legal aid, which was clearly of great concern. We in Britain seem to be spending far more on legal aid than other countries do for not measurably greater results. Now that we have some more clarity on the proposals, by the Department’s own estimates we see a potential reduction in cases coming before the civil courts of over half a million a year. Clearly, there are great concerns that that means we will be denying access to justice to many people. Could you comment a little on the thinking and application of the policy?

Mr Clarke: Access to justice is not directly affected by anything we are doing because access to justice by every citizen is fundamental in this country, but the amount of access financed by the taxpayer will be affected. What we have done is try to ensure that no one of limited means is remotely barred from access when their life, liberty, home or something of fundamental importance to them is affected. We think the range of legal aid has got too high; we think it has encouraged people to take a more litigious approach to problems, some of which would perhaps be better solved in other ways. We are looking at simpler and less costly ways of resolving disputes for everybody, for example, by mediation where possible rather than adversarial litigation, but it is necessary to address the costs. The costs of legal aid rose by over 20% in real terms from 1993–94 to 2009–10. The last Government had stopped it rising. I remember Ministers complaining that it has now become the fastest rising single item in Government expenditure. We do have far and away the most generous system in the world. Even if the changes that we have proposed and on which we are consulting have the effect we intend we will still have the most generous system in the world, but in some areas we have to look at better ways of resolving disputes. Certainly, the taxpayer should not pay for unnecessary or pointless litigation.

Q3 Claire Perry: Could you give us examples of some of those unnecessary or frivolous forms of legal dispute? Clearly, there is a lot of talk about ambulance chasing. The last thing we want to do is drive people into the “no win no fee” model, if you like, which in the past has been responsible for a lot of anguish, certainly in the Committee. What are the examples where legal aid is being granted vexatiously?

Mr Clarke: In all areas of law sometimes you do have frivolous cases, but we are not saying that all the cases on which we are cutting back are frivolous. That is at its extreme. You provoke somebody to make a claim which they would not conceivably make. There are such things as ambulance-chasing lawyers who encourage people to make claims which probably they would not make until they are told that it would be paid for by the taxpayer. That is the fringe of it; that is not our main target. The vast growth is particularly in the family courts. I think that is where our changes are most marked. There are lots of very difficult, emotional problems often following the break-up of a marriage or partnership, particularly surrounding the children. We think that in public law child care...
proceedings it is terribly important to keep legal aid, but in private disputes between parents over access, contact and so on we are not at all sure that thousands of pounds’ worth of lawyers on one side or the other, or both, necessarily reduces the conflict, resolves matters, and makes it easier to decide how the best interests of the children are maintained and that both parents’ rights are respected. We are looking at mediation there where we think it doesn’t necessarily have a legal solution. There are other areas, for example, education. You need the advice of educational experts; you do not need adversarial lawyers necessarily to resolve it. Welfare cases are a matter for the expertise of people who understand the welfare system and get the right details out of the claimant about his or her circumstances. To turn it all into litigation has been done to too great an extent because people think of legal aid and lawyers—lawyers’ letters and lawyers’ claims—and those are the areas where I think change will come. Obviously, it has to be reinforced by the courts, and that is why I have a wider study of family law going on.

Q4 Claire Perry: The Committee has heard evidence and many of us would agree that mediation is absolutely the way to go, but does that imply, therefore, that there will be increased funding streams for less litigious ways of resolving disputes?
Mr Clarke: We are continuing to fund mediation and we expect people to go to mediation first in far more cases than has been the practice until recent years. It has been growing steadily.

Q5 Claire Perry: But will there be greater funding for increased levels of mediation?
Mr Clarke: I am not sure we are increasing the total level of funding for mediation; I am advised that we are maintaining legal advice for mediation.

Q6 Claire Perry: We have a concern, again, that it is often the people who are furthest from the justice system who might need help. It is not the middle class, well-versed professional litigants we are worried about; it is the people who come into the Citizens Advice Bureau in Devizes who have real contact and so on we are not sure how they simply don’t know where to turn. My concern is that, if we are trying properly to divert people out of the legal system and into mediation but not increasing the funding for that, we will see a shortfall and people will simply throw up their hands in despair and more people will come to my surgery in despair and more people will come to my surgery to violence between adults. Would you agree that there needs to be a very careful definition of what domestic violence means so that when decisions are made about whether cases come into scope decision

Q7 Mr Buckland: Lord Chancellor, just developing some of the points you made in regard to special educational needs, you quite rightly made the point that it should not be adversarial. We are at a position now where the Department for Education is to issue its Green Paper on SEN in February. I understand—this has been trailed by Ministers in that Department—that they want to look seriously at the whole adversarial system when it comes to appeals, particularly those to the upper tier tribunal. That is important work. Would you accept that that work needs to join up with the work being done by the Department when looking at removing the scope of legal aid for representation at SEN tribunals? How much joined-up thinking is going on here so that parents don’t end up being disadvantaged?

Mr Clarke: I believe and hope that we are in close contact with the Department for Education. I agree with the point behind your question, Mr Buckland. We all encounter some of these cases in our constituencies. It has always seemed to me that they are very legalistic almost from the word go. I think that some of the voluntary bodies that help parents, which is very important, tend to take a rather legalistic approach. We have drifted into a tradition where it becomes very adversarial. Is that the best way of resolving the very serious and important question of how best to further the education of a child who is suffering from some particular disadvantage? I don’t think it is. Underlying the whole thing is the question of educational expertise that should be objectively applied, not who has the best legal arguments and who can best master the process. I think that the Department for Education and ourselves are going in the same direction, both believing that it is an extremely serious subject. There is no more serious problem for some families than making sure their child is not disadvantaged in his or her education by some special problem.

Q8 Mr Buckland: I move to a slightly different issue relating to family legal aid and what I will call the domestic violence test: in other words, no legal aid unless domestic violence has been present within the particular scenario. There is a problem, is there not, because there does not seem to be a unified definition of what domestic violence means? I think that in the guidance issued by the MoJ there is one definition of domestic violence which looks rather wide; it talks about violence against the family, which could involve violence against children, but the definition that has been agreed between ACPO, the CPS and the Government is a somewhat narrower one and relates to violence between adults. Would you agree that there needs to be a very careful definition of what domestic violence means so that when decisions are made about whether cases come into scope decision
makers have very clear parameters, practitioners know where the parameters lie and we don’t end up with appeals to funding review committees with lots of adversarial arguments about whether or not cases fall within scope?

Mr Clarke: I agree with the points you are making; I can see all those dangers. We are not consciously changing the definition of domestic violence. We are retaining legal aid availability.

Q9 Chair: There are several definitions of that.

Mr Clarke: That is right. As Mr Buckland has said, there is no fixed and certain one. I think he is right to say that we will probably have to start developing this in practice when people say that a particular case has an element of domestic violence and another one does not. There are those who argue that domestic violence goes beyond physical violence, but they become particularly difficult to define. We are consulting. If I may say so, you raise a very real problem—if we are restricting it to domestic violence cases, what exactly is meant by “domestic violence”? I take on board the point that we will probably need to be more precise in the definition we are applying as long as we do not make it too pedantic.

Q10 Chair: Are you not looking for an objective definition as opposed to one which might appear to be a perverse incentive to allege domestic violence as a passport to legal aid?

Mr Clarke: We have thought about that problem. There is a risk that some people will suddenly decide there is a domestic violence content to a family dispute and they might not have said there was any domestic violence if they could have got legal aid without alleging that. We will just have to guard against that. Let’s face it: the law is full of occasions where the parameters lie and we don’t end up with a passport to legal aid?

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Q11 Karl Turner: I think you said that we are particularly generous with legal aid in this country, but is it not right that you compare us with countries which use very different systems of law: inquisitorial systems as opposed to our own adversarial system?

Mr Clarke: I agree that some comparisons are open to that argument. If you compare the cost per head with continental Europe I accept that people could come back with the argument, “But that is not an adversarial system.” I am a supporter of our adversarial system in criminal trials, ordinary civil cases and so on. Therefore, we have made comparisons normally with Commonwealth countries with the common law system. If you compare us with Australia, New Zealand and Canada, the same figures emerge. Not only are we more expensive; we are usually miles more expensive, although it may be—we must be cautious with all the statistics in this area—we are not comparing exactly like with like, but we are miles ahead. The only jurisdiction anybody in our Department has been able to find that is possibly more expensive is Northern Ireland. It appears to have a slightly more generous system than either England and Wales or Scotland. But the gap is quite substantial; it can be quite a small number of pounds per head to over £20 per head.

Karl Turner: I am not sure that many publicly funded solicitors and barristers would agree with that, but I am grateful for what you have said.

Q12 Ben Gummer: Lord Chancellor, just following on from Mr Buckland’s questions, there seems to be an omission in scope and that is judicial review. I wonder what attention is being paid to the rising cost of judicial reviews, particularly given the fact that many areas of law where legal aid is being removed, for instance in exclusions and SEN tribunals, do end up as expensive judicial reviews.

Mr Clarke: We are retaining judicial review in scope. The reason we propose to do that is that you are talking about cases where the citizen is challenging the state or one of its agencies—central or local government or a quango—on some administrative decision. It is key that no citizen should be barred from that, so we keep it in legal aid. I share your concern. Mr Gummer, about the rising cost of judicial review; it has exploded. Judicial review is really a judge-made principle going back a quarter of a century. I have always defended it. With the modern Executive, with modern Government, with the powers at the hands of officials at every level in so many bodies, it is absolutely essential that every individual citizen should be protected against aberrant or arbitrary decision making, but it has exploded. Therefore, partly encouraged by lawyers who are active in the field, no doubt with the best possible motives, every time a decision is taken which any citizen disagrees with, the next thing you are talking about is judicial review. Leave is given for judicial review over and over again in a vast number of cases by the courts.

We looked at that and shared all those concerns and were driven back to the point I made when I started. If we start saying that the legal aid authorities are to distinguish between which people of limited means get legal aid for judicial review for this but not for that, we will get into a complete nightmare. Therefore, the proposals on which we are consulting are that we keep judicial review in scope for all legal aid open to argument, so perhaps in consultation you can find some way of restricting it to get rid of the more trivial cases that does not give rise to serious doubts about whether poor people will be stopped from challenging what might be an arbitrary or unfair decision.

Q13 Ben Gummer: To move on to the issue of litigants in person, Helen Edwards in evidence two days ago said that the MoJ expected no additional cost as a result of moving various areas out of scope. That seems to be completely contrary to the evidence of a research paper done by the DCA in 2005 which confirmed what seems to be the opinion of every barrister and judge—I am not a barrister—that litigants in person considerably extend the time taken in court. Why does the Ministry of Justice seem to take a contrary view?

Mr Clarke: Broadly, our expectation is that if there is an increase in the number of litigants in person it will
be balanced by a reduction in the number of cases where people have decided not to proceed with the claim at all, because they will not proceed with actions that are no longer in the scope of legal aid. That is broadly the argument. Otherwise, you are into a very uncertain area of prediction. I doubt whether Helen Edwards denied that when you do have a case of a litigant in person it takes longer. I have known in my time very experienced litigants in person who did it as a hobby and were very good; they knew what was relevant and got on with the case. But I personally accept that every court dreads suddenly discovering that there is a difficult case where one of the litigants insists on appearing in person. I quite agree with your point that it will take far longer, because not only is the litigant not well versed in the law and procedure, but the main problem is trying to get across to the litigant what is relevant to the particular question before the court. I hope there is not a surge in litigants in person, but in cost terms cutting scope will offset, probably, any slight increased cost given the fact that some cases—we don’t know how many—might take a little longer because you have litigants in person.

Q14 Chair: It is not true at every level. One judge in the small claims court told the Committee that if the parties in a case we watched had not been represented it could have been concluded in half the time it took.

Mr Clarke: That is true of tribunals as well. I think in some of the family courts it is most helpful for the judge to listen to the actual parents. Tribunals were designed with the whole point that you would not need lawyers. I have been here even longer than you have, Sir Alan. We probably both remember the debates about employment tribunals. A great virtue claimed on all sides was that you would not need lawyers making long addresses to the court on both sides; it would be sensible men of the world sitting on the tribunal who would listen to the two parties and give a ruling. They take longer once you have great learned submissions being made on both sides at a level that no one ever contemplated when the tribunals were set up.

Q15 Ben Gummer: May I ask one final question about the differential between the criminal and civil bar? Everyone is aware of the pressures that the criminal bar has been under over the last 10 years. Is the Department sensitive to the considerable concerns that there are, especially amongst the judiciary, about the quality of representation?

Mr Clarke: Yes. My anecdotal experience is that all the judiciary complain that the quality of representation is not what it was. How far that is because the older generation always say that things are not what they were in practically every walk of life I am not sure. We are quite sensitive to the pressures that what we are proposing will impose on the legal profession. They have already been subject to considerable squeezes in recent years and the freezing of fees and we have regard to that, but plainly it is not sustainable to have a situation where such a high proportion of practitioners are so dependent on so much legal aid for their living. The first purpose of legal aid is not to keep up the numbers of the legal profession but to provide access to law for the most vulnerable in the most serious cases. I think the quality of advocacy is being addressed. There is a lot of talk about addressing the quality of advocacy which I am sure the courts and the professions themselves will address if they are persuaded it is a serious concern.

Q16 Chair: You talked a moment ago about tribunals not needing lawyers, but the people who advise those affected in tribunal cases, for example, if it is not done by lawyers, are often experienced people in CABs, neighbourhood law centres and other voluntary organisations who at the moment are assisted by contracts with the Legal Services Commission. It is not clear from the statement so far how they are going to be supported in this kind of work. Even though it draws quite heavily on volunteers, there are perhaps still significant costs and there need to be some full-time and well-trained people to provide that kind of advice but not necessarily lawyers. How are they going to fund it?

Mr Clarke: On employment law trade unions provide a lot of advice and employers can have access to advice from the local chamber and so on. I think that the role of citizens advice bureaux predominantly and other organisations of that kind is very important. We will have to keep an eye on the impact of changes generally. They are facing pressures mainly because of the acute financial problems and the fact that there are to be reductions in public expenditure. Not every citizens advice bureau receives any legal aid funding; only some do, but because of the changes we are making in scope I accept that citizens advice bureaux may see some withdrawal of that.

We are not the Department that is the biggest supporter of citizens advice bureaux; the main source of grant aid to CABs is the Department for Business. I think that most citizens advice bureaux also look to their local authorities overwhelmingly to provide finance. I am conscious of the problem. I think that the role of CABs is becoming more important, not less. All of us as MPs are conscious of the fact that if you have a good citizens advice bureau, which I happen to have in Nottingham next to me, it is quite important to the people we are talking about. Therefore, the Government as a whole is trying to deliver that; it is part of trying to ensure that the necessary reductions in public expenditure don’t bear down too heavily on parts of the voluntary sector that need financing as long as they are efficient. But I think that legal aid was extended to them less than 10 years ago and it is not the principal source of the funding of CABs.

Q17 Claire Perry: The welfare and benefits system has become incredibly complex; I welcome our proposals to simplify it. I too have excellent CABs in Devizes, Pewsey and the central Wiltshire area. I send to them lots of cases where people are struggling with a very complicated welfare and benefits system. I believe that that tribunal advice in particular is funded through your support for those organisations. I would like to make a plea for unring-fencing as a minimum so that the very valuable services they provide do not
have to be cut to comply with the budget cut for one Department versus another. I think it is the joined-up nature of the advocacy they do that is so vital for so many people. I worry that what we will do is simply divert people away without support.

**Mr Clarke:** I accept the underlying point. I don’t think legal aid should be the major source of their income. It goes into the general pot; it is not legal advice that a lot of their clients need; it is debt advice and a much wider range of general well-informed advice that they require. Ministers collectively are concerned about this. We have been in touch with each other and we will have to see what we can do with citizens advice bureaux, which at the moment are mainly alarmed by what local authorities are doing to them. We must look at that.

**Q18 Chair:** You should hear the ones that are having problems with the Legal Services Commission.

**Mr Clarke:** I quite accept that the Legal Services Commission and its successor will withdraw a great deal of the legal aid funding that at the moment goes to tribunal work and so on that we are taking out of scope. We have to make sure that one way or another the right level of advice, as long as it is provided efficiently, is available for the whole range of family, employment and debt problems that take so many citizens to the citizens advice bureau which serves a very valuable function.

**Q19 Mr Buckland:** You have answered the point about CABs, but may I press you on law centres, the majority of which will have their funding from the LSC? The Wiltshire law centre in my constituency has about £400,000 of funding for welfare, debt and housing advice. Quite rightly, they are worried about their future funding streams. Without law centres we will have advice deserts when it comes to those areas of advice and representation. I would like to press you about how we can make those law centres viable in the future and whether we must have a special arrangement or a different way of looking at funding them, as opposed to funding them per head of type of case, because of the invaluable work that they do.

**Mr Clarke:** We will consider that as part of the consultation and I accept that they are an important part of the picture. Law centres are not universal. There are some law centres across the country, so it tends to be a local thing. The first thing we will discover is the impact on particular law centres of the changes in scope that are proposed. Assuming it is a good law centre that is delivering efficiently—in my limited experience of them they are a bit variable in quality—we will listen to their representations. Obviously, what we cannot do is start altering the scope to make sure that particularly law centres are protected if it undermines our intention of concentrating the reduced amount we intend to continue to spend on legal aid on the more serious cases.

**Q20 Chris Evans:** The Jackson review endorsed before-the-event insurance. In what specific cases do you think that would be most effective?

**Mr Clarke:** I don’t think there will be a huge take-up of before-the-event insurance, but at some stage we will try to discuss this with the insurance industry to see if people can be made more widely aware of it. The trouble is that people don’t think they might be involved in litigation so they don’t think of taking out insurance beforehand on the off-chance they would. But it is available on a limited scale. It doesn’t cost you much if it is added to a household or similar policy. It would be interesting to see whether, in reaction to the changes that we are making following Jackson’s recommendations, a market is stimulated for before-the-event insurance. That would have to be considered with the insurance companies to see whether they can produce a product which they think they can market.

**Q21 Chris Evans:** If you introduced it, would it be a licence to print money for the insurance companies?

**Mr Clarke:** One relies in the insurance business as in others on competition, so I trust it will not be a licence to print money. Insurance is not an easy business to make money because the rise and fall of claims is unpredictable. I hope not, but my view is that before-the-event insurance is worth exploring. Contact with the insurance industry will make one more aware of whether it is likely to take off on any scale.

**Q22 Chris Evans:** What specific steps could you take to stimulate the market? Have there been any discussions with the insurance companies about stimulating the market?

**Mr Clarke:** I haven’t had any direct contact, but we have talked about having contact with the Association of British Insurers. I don’t know whether any official in my Department has. We undoubtedly will at some stage as part of the consultation on the Jackson proposals.

**Q23 Chris Evans:** How would you respond to criticisms that it is usually sold as an add-on or an afterthought and fails to cover specific circumstances when it is likely to be needed?

**Mr Clarke:** Before-the-event insurance?

**Chris Evans:** Yes.

**Mr Clarke:** Yes. I am sure that the scope of cover provided isn’t totally comprehensive. Frankly, I haven’t considered the case; I don’t have a strong view on whether what is provided at the moment, which is very limited in scale, meets what would be desirable to make sure that people cover themselves for the eventuality.

**Q24 Chris Evans:** You say you do not have a strong view on it, yet in the past you have supported before-the-event insurance. How have you arrived at this support if you do not have a strong view on before-the-event insurance?

**Mr Clarke:** We support it, and it may grow. It is worth exploring and discussing with the insurance business. That is where I am on before-the-event insurance. I don’t think we have ever held it out as necessarily something that is likely to take off as a total alternative solution to the problems of changing the nature of “no win, no fee” at the moment.
Chair: We will turn to Magistrates’ Court closures.

Q25 Mr Llwyd: Yesterday’s announcement was greeted with great dismay by many Members of Parliament and many people outside. In his response to the consultation the Lord Chief Justice suggested to the Ministry of Justice that more information was required on 79 of the proposed 157 court closures. What further information was sought by the Ministry of Justice before it took the decision announced yesterday?

Mr Clarke: The Lord Chief Justice was not trying to usurp decision making in this field. What he and others did was to pass on the comments and concerns of the judiciary, in his case, across the country about particular things. The whole point of the consultation we carried out was to see whether people thought we were putting forward the right information and to collect more information. The impact assessments that will now be available have been brought up to date, in some cases no doubt changed, in the light of the response that we got. I think the process that we undertook once we announced we were consulting was quite exhaustive—far more exhaustive than would have been followed 20 years ago in cases of this kind. The result was that before taking the decisions we were, I have no doubt, much better informed than when we started. That was the whole point of the process.

Q26 Mr Llwyd: He did say, did he not, very strongly in terms that 32 of the courts should have been retained? Was there any further consultation or dialogue with the Lord Chief Justice before the announcement?

Mr Clarke: I have quite regular contact with the Lord Chief Justice but we did not ever get into court-by-court conversations. He made his representations really collating the views coming in across the country, but I am quite sure the Lord Chief Justice didn’t believe that somehow he would lay down some ruling, target or decision on exactly how many had to be closed. I don’t think anybody has challenged the rulings we were, I have no doubt, much better informed than when we started. That was the whole point of the process.

Q27 Chair: I think it is slightly misleading to suggest that the covering letter sent by the Lord Chief Justice was in the form, “Here are some views which have been passed on to me that I thought you might like to see.” They seemed to me to be general concerns.

Mr Clarke: No; all right, but that was what it was based on. The underlying information was a collation of what had come in from all over the country. We had got a lot of it ourselves directly.

Q28 Mr Llwyd: He also gave evidence to this Committee and was very forthright in suggesting that certain courts should be kept open, one of which happened to be in my constituency.

Mr Clarke: At Pwllheli?

Mr Llwyd: Yes.

Mr Clarke: But, quite interestingly, there were local people who supported the closure of Pwllheli. I am sure you will admit, Mr Llwyd, that the facilities or usage at Pwllheli are not the best and most up to date.

Q29 Mr Llwyd: Since we are talking about a Welsh court, may I put it to you that your figures for back maintenance costs of Welsh courts were an absolute fantasy? I had to table two parliamentary questions and eventually found that the figures were inflated by over 150%. Do you call that a reasonable consultation?

Mr Clarke: First, I will admit that I do not have in my head figures about maintenance backlogs on courts in Wales, but it is a perfectly relevant consideration when it comes to looking to the future of the Estate. If better information was produced, that’s fine. It sounds as though it was before the decisions were taken and as part of the consultation. Consultation is not flawed if, when you go out with your draft proposals and the best evidence you have to support them, people come back and point out that some of it is wrong. We did take into account the information that came back to us before taking the final decisions. This probably isn’t the time and place to go through it court by court in Wales and I understand there is anger in some sections of the population, but opinion on some of them was divided. For some of the Welsh courts we got positive support for closing down what were old-fashioned, out-of-date and underused courts.

Q30 Mr Llwyd: You said earlier on that it was such a detailed consultation compared with what would have happened 20 years ago. I am saying to you that the Welsh consultation was predicated on a load of nonsense in terms of the figures.

Mr Clarke: I am pretty certain you put that in quite pointedly the moment you discovered that the proposals were made. What happens when people claim that is that you go back and re-examine what you believe is the case for the proposal.

Q31 Mr Llwyd: I do not want to reargue the case now, but the point is that it took two different parliamentary questions to obtain adequate information from your Under-Secretary. Initially, the inflated figure was 150% higher than what was discovered after the second parliamentary question was answered. That’s not very good, is it?

Mr Clarke: I hope you concluded by reaching agreement with the Parliamentary Under-Secretary of State on what figure was relevant for arrears of maintenance.

Q32 Mr Llwyd: I do not know upon what basis they were arrived at anyway, which brings me to another question. It is alleged that the £41.5 million savings exclude closure costs. How much will these closures cost?

Mr Clarke: Off the cuff, the short-term cost of the closures is a little over £20 million.

Q33 Mr Llwyd: Therefore, yesterday’s statement was not exactly forthright, plain and honest because it should have been £21.5 million, should it not?

Mr Clarke: I was there for yesterday’s statement. I don’t think anybody held back the fact that there was
a cost of closures. If you go to the costing as a whole, you have to draw a distinction between the long-term continuing savings resulting from the fact that you are no longer maintaining a building, there are savings in staff costs and you are no longer facing the risks of large maintenance bills against the one-off costs that tend to be incurred when you first go into closure.

Q34 Mr Llwyd: What weight was given to the impact on police time in regard to Magistrates’ Courts closures and, I add, the extra travel time incurred by the Probation Service, legal aid lawyers, victim support, etcetera?

Mr Clarke: In each and every case that was a perfectly relevant and important consideration. It cut both ways court by court across the country. In some cases there was how the cases the court chose were fitting to see courts closed because they had to keep travelling to remote courts in inconvenient places. For others, the police and Probation Service would come up with the opposite argument and talked about the inconvenience of having to go further. In each case what you have to do is weigh up a whole lot of factors before coming to a balanced view of how best to provide a modern, efficient court system. Certainly, we had to have regard to the views of all those agencies that support the courts on the impact it might have on them. The main thing we want to do with police and probation is cut down the amount of court attendance anyway. Proper use of video conferencing and virtual courts and better management of cases so that abortive hearings are minimised are all things to which we attach great importance and which we will pursue.

Q35 Elizabeth Truss: Lord Chancellor, I also have a Magistrates’ Court that is to be closed in Thetford, in my constituency. I am particularly interested to understand how the court closures fit with the devolution agenda in terms of where the decision is being made and also how we improve the efficiency of the overall criminal justice process within that. Is it being considered in the light of the overall devolution agenda, payment by results and so on, and how does that fit together?

Mr Clarke: I agree that the localism and devolution agenda is extremely important and has to be applied to courts in context. Most members of the public rarely go to court in their whole lives. One can meet quite a lot of people who have never been to a court in their lives at all as a witness or in any other way. It is not like a post office or the village pub; it is not something that people associate with their daily lives. Large numbers of witnesses or members of the public when they do go to court find themselves in very unsatisfactory conditions. There is no proper place to wait; you hang around all day; the victim’s family is muddled up with the accused’s family and all of the witnesses are standing around as well. The facilities can be good or quite primitive; and far too many people find themselves towed along to a court for an abortive hearing and must go away and come back on another day. All those things need to be addressed. Although I am laying on the failings where they exist in the worst of the system, the fact is there is no point in keeping all that on the basis that it is all part of local justice; it is not. It is a system that requires modernising and needs to be more efficient. People are now used to doing things on the telephone. If you have proper video conferencing facilities they will handle things more effectively. Norfolk had a lot of courts and there was a range of opinions on how best to provide the best facilities.

Q36 Chair: If you look at counties like Northumberland, there are large distances left without courts. Distance does not seem to have been a big factor.

Mr Clarke: I don’t claim that everybody is within 60 minutes by public transport; we didn’t achieve that, but we had set that as an aim. I accept your obvious knowledge of Northumberland. There are places where we haven’t quite made it, but we did have regard to that. In most cases, the overwhelming majority of the population will be within 60 minutes of a court, but in scattered rural areas it was tricky, so Wales and Northumberland were difficult.

Q37 Mr Llwyd: Have you considered the effect upon the magistracy? In other words, it has come to my knowledge that many people now will either resign in the patch that I am referring to or good people will not put their names forward to travel an hour and a half to a distant court they know nothing about.

Mr Clarke: I hope that doesn’t happen. A lot of the responses to the consultation were, not surprisingly, from magistrates who wished to retain the courts with which they were familiar and associated themselves and so on, but I don’t think justice will lose its local quality, not least because the magistracy is a unique and very important institution in which local lay people from a wide range of backgrounds volunteer to contribute to justice. I am not talking about any particular case. Quite a lot of the complaints I received about particular courts, even round the House from Members of Parliament, were about inconvenient journeys. I don’t know Wales so well, but I am pretty certain that in many cases most of their constituents made those journeys quite frequently, because the places that they objected to the distances of were ones that most of the population went to shop and for practically every other local purpose in their daily lives.

Q38 Chair: You can’t say that about Bedlington.

Mr Clarke: People sometimes lay it on. Salford and Manchester is the classic example. You can walk from the Salford court to the Manchester court. I believe that the Manchester court—I am open to correction by Hazel Blears—is nearer Salford railway station than the Salford court. People did slightly exaggerate the distances being brought in, but before you all come back at me I quite agree that Northumberland, Wales and Norfolk are somewhat different.

Q39 Chair: If a bench of magistrates decides that it is becoming rather remote from some part of its area, is there any reason at all why it should not decide to convene in another town and hold some hearings there, either because the court room happens still to...
be there because it is being used by the coroner and others or because there are other premises which are reasonably suitable for the purpose, especially if the case does not have some of the difficulties to which you have referred? My assumption is that they do have the legal power to do that. Is that the case?

Mr Clarke: There is no objection to that in principle. It has been considered and it will continue to be considered. You run into arguments about security and suitability, because you expect a modern court to have a reasonable level of security—somewhere to hold the accused sometimes and the ability to separate out the various witnesses and so on, so that they are not all thrown together. We will look at that. The irony is that the idea that the Magistrates’ Court sits in the local pub, or above the police station, is what the whole system has spent the last 50 years trying to get away from by modern, purpose-built courts, but if in the interests of localism the magistrates can find some practical means of finding more informal court settings I certainly would not be against it.

Q40 Chair: But that is where many of the courts are. Many of the courts that you are closing are in fact on top of police stations.

Mr Clarke: Quite a few are on top of police stations. There used to be some very primitive ones on top of police stations. There are a few left that are on top of police stations. I am sure that at one time it was thought to be frightfully important that we got away from these rooms above police stations which were thought to be inadequate for the purpose.

Q41 Elizabeth Truss: In response to the point about people not going to the court in the way they go to the post office, should not one of the objectives of the justice system be greater openness and justice being seen to be done so people are able to go into court and see the proceedings? I feel that too often justice is something that people believe is very distant; they do not necessarily have confidence in the system. Would not people have more confidence if courts were more open and they could see what was going on?

Mr Clarke: I agree with all that. I think public confidence in justice and the transparency of justice is a perfectly sound agenda. I was merely pointing out that when it comes to inconvenience of travel, 99% of the population don’t have to make such a journey more than once or very occasionally. It’s not something that most of us hope to do very often. Most people don’t find themselves inside the local court and large sections of the population have probably never been in the local Magistrates’ Court in their lives.

Chair: We need to turn to sentencing issues.

Q42 Mr Buckland: I want to talk about the rehabilitation revolution with particular reference to cross-departmental working. Lord Chancellor. The area of great interest has been mental health diversion, whether it be at the police station or, most importantly, at sentence. I will give you an example with which you are probably very familiar, but it is important to put it on the record. The Criminal Justice Act 2003 created a community order with a mental health rehabilitation condition. It is hardly ever used because there is just no provision available. Therefore, a judge will not have that option open to them on a pre-sentence report. I note that the Green Paper makes reference to it and talks about piloting. What degree of work has been done with the Department of Health on that issue? For example, has there been any economic modelling so that we have an idea of the unit cost of these proposals so that sentencers are in a more informed position going into the future?

Mr Clarke: It is absolutely essential that we work very closely together. Andrew Lansley and I and our colleagues are working very closely together on commissioning for the mental health services which people in prison and offenders require, but also on developing our proposals for diverting into either secure or community services those who ought properly to be diverted because that is the best way of minimising the risks of future criminality. We haven’t reached the stage where we can start to produce any economic modelling. Obviously, we are both working on that within our respective budgets, but there is no problem between the two Departments. Both Departments give very high priority to developing this. As far as I am aware, it is widely alleged that at the moment we have too many people in prison suffering from mental illness. The services are probably much better than they used to be, but in many cases it’s not the best and most adequate service one can provide now and the public would be better served if we tackled the mental health problems more effectively.

Q43 Mr Buckland: At the moment if you have an acute problem, beds are available under the Mental Health Act. Very often we are putting people with, frankly, less acute problems into that particular regime inappropriately, and it is in the community provision that is desperately needed. Cutting to the chase, by, let’s say, 2014, the end of the review period, will sentencers be in a position where they will have as part of their menu of options mental health treatment as part of a community order?

Mr Clarke: I hope so. As you say, they do now but it varies enormously. In the end, everything depends on the local availability of service, the better flow of information to sentencers and making sure that commissioning is joined up—that there isn’t a difference of approach between commissioning for offenders compared with commissioning for the general population, certainly in terms of tackling the mental health element of their problems.

Q44 Chair: Are you having a tough time with some of these issues? Do you have cross-Cabinet support and understanding of the kind of gains that you seek to make?

Mr Clarke: Total cross-Cabinet support. I don’t know about having a tough time. I am used to having a tough time; it is the reason I enjoy doing it. I have never had a popular policy to implement in my life, but the mainstream part of this one is largely popular. As to support, the Government is run on particularly collective lines and it is run very well collectively, so all the policy, including the documents I have consulted on and announcements I have made on the
courts system, legal aid and sentencing, have been cleared by all my colleagues. They have been discussed in Cabinet Committees and with the Prime Minister. It is all clear. There is no dissent. I have not been producing this in isolation in the Ministry of Justice and waiting to disclose it to my colleagues until we have thought it through. This is a collective approach. The mainstream of the policy does not seem to be attracting any great resistance. I have been complaining about the very high level of reoffending and the failure of the system to reduce it. I have been emphasising that we should develop, therefore, ways of tackling this. That takes one into areas like mental health, drug and alcohol abuse, failure to train and prepare people for employment and so on. It’s not possible in this world to have something that is nem con, but I am not aware of any great criticism of that. Therefore, it’s right to give that priority. Of course, there’s criticism of some parts but they don’t come from within the Government and they tend to be rather theoretical arguments that the drift of this, which we estimate will lead to some reduction in the prison population, is somehow flawed because it might lead to a reduction in the prison population. I regard that as a rather fringe view and it is not one that is going on inside the Government.

Q45 Chair: Are some parts of the Government less willing to take on uninformed press comment than your Department?

Mr Clarke: I am sure that every member of the Government is perfectly willing to take on uninformed press comment from wherever it comes.

Q46 Claire Perry: Would you, therefore, like to put on the record that you share my view that prison works often but is not the total answer to securing rehabilitation?

Mr Clarke: Yes. Prison works as a place for sentencing people. It saves people from crime while they are inside; where it is failing is that too many people released from prison reoffend. That has been my mantra all the way through. When I heard this morning that apparently the Home Secretary had finished their sentence because they had nowhere to put them. We are quite determined to avoid a situation where people have to sentence people to a short term of imprisonment when everything else has been tried and there is no way you can deal with them and protect the public without imposing a short prison sentence. What we all expect every level of the judiciary to do is to send people to prison when it is essential to do that for public protection. In some cases it is obvious because of the severity of the offence that they have committed; in others you form a judgment as to whether it is really acceptable to deal with them in any other way and whether there is any alternative from which they are likely to benefit. The policy is not based on some general objective or target of reducing the number of people in prison. What I think has been the unintended explosion in prison numbers in recent years has to be stopped and contained for financial reasons. The last Government was solemnly planning for 95,000 prisoners by the end of the Carter review period. The prison population exploded so quickly during the last Government that they wound up having to let people out before they had finished their sentence because they had nowhere to put them. We are quite determined to avoid a system of early release to make room for newcomers in the prisons. If we manage to stabilise the population at that population which must be in prison for the protection of the public, that seems to be an intelligent
and sensible development of policy. But I share your description of how the bench approaches it at every level; I agree with you.

**Q49 Karl Turner:** In relation to indeterminate sentences I agree with what you say in the Green Paper. I think I am right in saying that currently over 3,000 people are serving indeterminate public protection sentences who are past tariff point. First, why did you not do away entirely with IPPs? Quite honestly, I do not think they work. Secondly, what will you do about reviewing those people who are still serving IPPs? Can you not deal with that situation?

**Mr Clarke:** We have over 3,000 who have finished their punitive sentence. We have about 2,000 who are post-tariff. Since the system started, only 190 have been released once they have an IPP. This isn’t remotely what anybody ever intended—that we have a growing population of people sitting in prison without the first idea of when or if they are to be released. They are told they will be released if they can satisfy the Parole Board that they are a minimal risk to the public, but it’s quite difficult to satisfy anybody when you are sitting in prison serving your sentence. So I think it cries out for reform.

You suggest total abolition and you are not alone; there are quite a lot of people in the legal system who think they were a mistake and should be abolished. The reason we decided not to do that was that some of these 3,000 cases—neither you nor I would deceive ourselves—are quite dangerous and serious high-risk prisoners, so they are not 3,000 easy people. To let them out suddenly without any assessment and say they have finished their sentence would have been unacceptable. We are going to address how the Parole Board should now deal with these 3,000 people. Is the present test a very difficult one for anybody to discharge? Should we expect the Parole Board to assume a level of risk which is one they probably can’t feel about anybody in prison before letting them out? That is how we hope to get back to an IPP system which—We are going to keep an IPP system but for the most dangerous people—those for whom Parliament originally intended it—a very much smaller number of people. That is where we are. Again, we are likely to have support for that because nobody who argued in favour of IPPs can really claim they expected it to produce what is now being produced. It wasn’t what anybody intended.

**Chair:** I want to move on to an important innovation about which we need to question you particularly.

**Q50 Elizabeth Truss:** Lord Chancellor, I was interested in the rehabilitation revolution and the evidence that has been collected internationally about how successful these types of strategy are. Perhaps you could highlight any particular countries that you think have successfully undergone this kind of change.

**Mr Clarke:** Presumably, every Government looks at policy when crime is going down and up. When crime goes down the tendency is for the Government to claim credit for it; when it goes up the Government of the day says it is nothing to do with them and it is a matter beyond their control. Crime is very difficult to predict. The statistics are in my opinion very unreliable. It is one of those areas of debate where the statistics are used more casually, shall we say, to support certain arguments than most. Obviously, the aim of policy is to drive the level of crime who have taken drugs or been involved in alcohol abuse or whatever. We hope to give further incentive to that. I can’t name a country—it is an interesting question and I will try to find out—that does spectacularly better than we do. I also don’t know whether anybody anywhere has tried to use payment by results to quite the extent we intend to do to stimulate the best of all these efforts. What I like about payment by results is that we will pay for what works. What delivers the outcome you want will grow more rapidly and what was well-intentioned but fails to deliver the outcome will not get the payment from the results that are achieved. We are extending it outside the criminal justice system as well; we are using a similar approach to drug dependency problems amongst the non-offending population as well as offenders. I don’t know. As far as I am aware this is not based on an international model.

**Q51 Elizabeth Truss:** My understanding is that reoffending rates can often be very persistent.

**Mr Clarke:** Yes.

**Q52 Elizabeth Truss:** Some efforts can be made to drive them down but once you get to a certain level it is difficult.

**Mr Clarke:** I quite agree. I am being slightly frivolous in saying that I do not underestimate the British criminal classes. There is a section of the inhabitants of prison who are dishonest or violent people and, whatever you do, some of them will have to be locked up because they will come back. We have to be real. When we look at the fact that 50% of prisoners reoffend within 12 months, we are probably talking about whether we can get that down to 40%. Some of the voluntary bodies make amazing claims for what they can do on reoffending and would far exceed that, which is fine. We would wind up paying a lot of money to help them with their efforts. I am a bit cautious about the figures. I have to say that I think to take reoffending down from 50% to 40% will probably prove quite challenging. I hasten to say it is not a target; I just want it to come down. But there would be considerable public benefit from that. It will still leave you with your 40%. They are villains and they are people who will keep being sent to prison because the public expect them to be sent to prison for punishment and to give them a break from their activities.

**Q53 Elizabeth Truss:** If after a few years of trying this approach we find that there is a rise in crime, would you be willing to relook at the policy and change the approach?

**Mr Clarke:** Presumably, every Government looks at policy when crime is going down and up. When crime goes down the tendency is for the Government to claim credit for it; when it goes up the Government of the day says it is nothing to do with them and it is a matter beyond their control. Crime is very difficult to predict. The statistics are in my opinion very unreliable. It is one of those areas of debate where the statistics are used more casually, shall we say, to support certain arguments than most. Obviously, the aim of policy is to drive the level of crime.
downwards, certainly relative to what it would otherwise be compared with other factors. The difficulty when you look back and try to analyse it or decide what’s happening at any given moment when it moves is that there is no certainty. Political debate tends to lead people making absolutely crystal clear, simple assertions; we have to in order to engage in public debate. No area is more complicated in terms of working out cause and effect—what actually is causing a crime to rise or fall—than law and order, and people will tend to argue what suits their case. I have my case; you know what I believe or I don’t because of what I am asserting, but I tend to qualify it by saying, “but you can argue it either way and you can’t prove it either way.” That is the more sensible resolution to the debate.

I remember years ago a recorder of Birmingham who claimed to have saved the telephone boxes of Birmingham from having their boxes broken open by his savage sentences at Birmingham Quarter Sessions. Somebody pointed out that the Post Office had just changed all the boxes and put in secure ones that the guys could not get open. He still believed that it was his sentence that had saved the phone boxes. A man and a bell and then the second one.

Q54 Elizabeth Truss: When the Permanent Secretary of the Ministry of Justice appeared before the Committee on Monday he told us that prison numbers and the capacity designed were predicated on the policy working. What happens if the numbers do not come through? What is plan B?

Mr Clarke: Plan A is to have an adequate cushion; that is what central planning has. You obviously plan policy on the basis that you will achieve your best estimate of the outcome of the policies that you are following; but I am sure he also explained that the number of residents in prisons at any time has a cushion above it in terms of capacity. At the moment I think there is a gap of 3,000 or 4,000 between the number and our capacity, but you can’t count on that because it varies quite unpredictably and you just need an adequate cushion.

We are still building new prisons; new supply is coming on stream in the next year or two. We hope to get rid of some of the older, less suitable and more costly prisons which in part will be replaced. But in the end you have to keep an eye on numbers. That was what caught out the last Government. I think they had a lot to provoke the rapid increase that was taking place in the numbers in prison and then it overtook them. There were good stiff sentences which people were not serving in full; they were having to be released before the end to make way for others.

Q55 Chair: How can you be confident that there will be enough providers of payment-by-results services prepared to take the considerable financial risk involved?

Mr Clarke: That’s what we are testing. We expect to have at least six pilots starting next year. As soon as we took office I started getting in touch with potential providers from the private sector, the not-for-profit sector and charities—I had a look at what is happening in Peterborough which keeps being cited—to try to gauge the level of interest. Our judgment is that there is a very great deal of interest. Obviously, there is a lot more work to be done to produce a proper framework contract which can be used for a whole variety of providers that meets the policy need and gets people satisfied that they will be paid properly for their success.

Q56 Chair: Do you recognise this situation: that when a sentencer is sitting on a bench as a judge or magistrate he knows that if he passes a custodial sentence there will be a van outside ready to take the person away and that, however difficult the situation is, a place will be found somewhere, whereas if he wants to do some other form of sentencing, for instance if he believes that alcohol or drug treatment is central to dealing with that person, will he inquire whether there is adequate provision locally, and, if not, the default option is prison, whether or not it is most likely to reduce the reoffending potential of that person?

Mr Clarke: That was why I said effort is put into providing the best information and range of options for sentencers one possibly can. That is why half the support services devote themselves to. I would have to agree with you; that is exactly what the person imposing the sentence must be satisfied of. What we hope to do is give courts a good range of credible options so that in the judgment of the person passing the sentence they choose the thing in the public interest because it is most likely to deliver the outcome of less reoffending.

Chair: There are a couple of quick points before you are saved by the bells. We will go through the first bell and then the second one.

Q57 Ben Gummer: Lord Chancellor, I think there is an emerging consensus across the House of support for your proposals. I also think that that might be an eminently winnable argument with the public. It is made more difficult by the rather lunatic application of the human rights agenda within prisons. We had one recently about the name a prisoner might be called, on which I invite you to comment. In a youth prison local to my constituency prisoners will throw their televisions out of windows and claim to self-harm the next day unless they get a television back. All of this undermines public confidence because it is associated with reform. I wonder whether you could comment on that broadly.

Mr Clarke: I agree. Briefly on the wider point you quite rightly raised, it is true that the areas of human rights and health and safety both arouse a great deal of scepticism amongst the public because they get cited in such ridiculous situations. Actually, I don’t know anybody who is not in favour of promoting health and safety; and I have not met anybody who will admit that they are flatly against the application of human rights. Usually, it is not the courts; it tends to be officialdom, circulars, advice, consultants and insurers who make the daftest possible claims about what is necessary in the name of health and safety and human rights and then produce, as you say, widespread public disapproval. We have to address these cases and make sure we stick to our human
rights obligations but that the words aren’t debased by being applied to ridiculous claims by ridiculous people who get themselves publicity by getting them taken on. As to Mr Gunn, he is a serious local criminal from my part of the world. He is quite good at getting himself publicity; he seems to enjoy that nowadays.

Q58 Chair: Does he call you Mr Clarke?
Mr Clarke: What he is called doesn’t seem to be a matter of huge importance. He seems to be so unpopular that if he wanted to be called by his Christian name, which I think is Colin, no doubt the press would have objected to such friendly greetings and would have preferred that he be called Mr Gunn. Mr Gunn and his media advisers seem to regard the matter as of huge importance. He is not a person I hold in very high regard and I am very glad he is in Belmarsh.

Q59 Claire Perry: Perhaps I may also return to the revolution agenda, if you like, although perhaps it is a little early to call it that. I think there is a huge appetite, as you say, on the part of providers, in particular the St Giles Trust and other organisations, that are doing such good work and proving that their interventions really do reduce reoffending. How can we get that common-sense approach and break down some of the institutional barriers, particularly those potentially coming out of the Probation Service, to make sure you can scale up those contracts and start to see some measurable results? I fear there will be such resistance lower in the system from existing organisations that we will not be able to get the results we really need.

Mr Clarke: I agree that is quite a danger and has been a bit of a problem in the past. I am told by various people who have done work in this field that sometimes this is quite difficult. A lot depends on the governor of the local prison or the attitude of the local probation trust. We have to make sure that unnecessary obstacles aren’t put in the way. I think there is a changing climate. To go back to the first work on the rehabilitation revolution, we have focused attention and raised interest in this field in a new way, and where there are obstacles put in the way of a bureaucratic kind we will have to get rid of them. It is a danger to be aware of and I hope it will be reduced. The best probation trusts are not remotely resistant. We have to make sure that the general atmosphere throughout the Probation Service is that this is not a threat but something of an opportunity, because they can be paid out of the savings; they can participate in these schemes just as much as anybody else.

Q60 Chair: There is a bit of confusion about the role of the Probation Service as to whether it is a provider or a commissioner.
Mr Clarke: Yes, I agree; we are working on that. We have to be absolutely precise as to who is commissioning these things at what level and we have to be absolutely clear about the basis on which the providers will be rewarded. This is all the detailed work that has been going on ever since the new Government came into office, and it must continue before we put it into practice. That is why we have had lots of discussions and ideas. We will be running pilots in 2011. The reason we must have pilots is that we have to work it out. The more local it can be the better, but it must also be robust. I think that some probation trusts would be quite keen providers and would go into partnership with other people to provide it.

Q61 Chair: So, we may come up with a different model in the end?
Mr Clarke: We may. We are working on it; we are consulting on all these things. This is a Green Paper.
Chair: Lord Chancellor, thank you very much indeed for being with us today.
Tuesday 1 February 2011

Members present:
Mr Robert Buckland
Chris Evans
Mrs Helen Grant
Elfyn Llwyd
Claire Perry
Yasmin Qureshi
Elizabeth Truss
Karl Turner

Examination of Witnesses

Witnesses: Emma Baldwin, Free Representation Unit, Rebecca Scott, Legal Advice Manager, Royal Courts of Justice Advice Bureau, and Sally Denton, Senior Solicitor, Nottingham Law Centre, gave evidence.

Chair: I must first ask colleagues to declare any interests they might have.
Mrs Grant: I would like to declare an interest as a senior partner of an existing legal aid firm. We have a legal aid contract.
Mr Llwyd: I have practised in family law, which is publicly funded, both as a solicitor and a barrister, but I do not intend to practise at the moment and have not practised since April.
Yasmin Qureshi: I have two declarations. I am still a barrister but I used to practise and did receive legal aid receipts. I do occasionally still receive them now, although not many. Secondly, many, many years ago I used to be one of the volunteers for the Free Representation Unit.
Karl Turner: I have not practised publicly funded work since before the election, but I am still a member of my local chambers in Hull.

Q62 Chair: Thank you very much. You can assume the rest of us do not have any interests, unless we finish up seeking your help for any kind of trouble, and I am sure that won’t happen.
Emma Baldwin, Rebecca Scott and Sally Denton, welcome. Between you, you represent the Free Advice Bureau, and the Nottingham Law Centre. We particularly asked you to come along—and we are very grateful to you—to look at how things work out on the ground and in practice. The second half of today’s session is more about the views which organisations working in this field take nationally. I will start by asking whether, on the basis of your practical experience, you think there is no alternative to the present or similar levels of spending on legal aid, or whether you accept that in the financial situation we have ways to be found of limiting the costs of legal aid and advice. Do you have any thoughts on that?

Emma Baldwin: Yes, we do. We are concerned about these proposals because of the wider effects that they are going to have. In terms of the money saving, our first concern is that we do not think the cuts, as proposed, are going to save money. We think that idea is based on a false premise as to what the effect of legal aid is in the sector at the moment. We think that legal aid practitioners are diverting cases away from tribunal because they are solving the issues before it gets to that stage. That is a saving because tribunal time is very expensive, and if those cases weren’t diverted they would end up in tribunal. Of the cases that do get to tribunal, if there has been some representation at an earlier stage, that means the cases are dealt with more efficiently when they get to tribunal, and again you are saving court time and the time of the respondents as well because there is an easier case for them to understand and deal with.

Q63 Chair: Do you have a rough picture of how much of the income of your organisation depends on legal aid at the moment?
Sally Denton: In terms of Nottingham Law Centre, in the financial year 2010 to 2011 legal aid comprises 58% of our total income. It is £308,000 out of £528,000 income. It is fundamental to us being able to provide specialist advice to people that really need it. If we didn’t have that legal aid funding, we wouldn’t be in a position to deliver specialist debt and welfare benefit advice, which in turn ensures that people don’t face possession proceedings and homelessness, and that people can continue to care for their children and don’t need to involve social services in their lives. It enables us to nip problems in the bud, getting people advice when they need it.

Chair: Do you have a supplementary point, Elizabeth Truss?

Q64 Elizabeth Truss: I do, yes. I just wanted to understand what you think the cost drivers are of legal aid. Is it partly the legal system and the way we go about things? Is it the cost of lawyers? Is it broader social issues that are driving the cost? What are the key cost drivers of the legal aid bill?
Sally Denton: Some research that we undertook within the Nottingham advice sector identified that about 42% of the work we did was caused by system failure in other organisations. That was poor decision making in other organisations such as the Benefits Agency and housing benefit departments.

Q65 Chair: This is a systems failure rather than an unsatisfactory judgment being made?
Sally Denton: But there are lots of examples of delays within the housing benefit department, which then cause rent arrears and possession proceedings. We have had cases that have necessitated three or four adjournments at County Court level to enable housing benefit issues to be resolved, which represents a huge cost in terms of court and social landlords’ time and legal aid spend.
Q66 Mr Llwyd: Can you give us examples of private law cases which will now be outside the scope of the legal aid scheme? What, in your view, will be the impact on the families concerned?

Rebecca Scott: I can give an example of that type of case. I don’t have a legal aid franchise at my charity so I contacted a colleague at another charity. She is a family lawyer with a legal aid franchise. She gave me a case study of the new proposals. Basically, in this case her client had suffered long-term domestic violence from her partner. They had children. She had left her partner and he did not know where she lived. She came to us for advice a year after he had left, because he wanted contact with the children. Under the new proposals she would not have been able to get legal aid because the partner had never been convicted and she had never obtained a previous injunction against him. Because he didn’t know where she lived, she wouldn’t be entitled under the new system for legal aid, as there wouldn’t be any merit. In that situation now, under the new proposals, she would have to go to court alone, face her abuser alone and probably not defend the case very well. In that situation under the new proposals, full contact order might be made, which would be wholly inappropriate for a partner who is violent. As it was, they defended the proceedings and a supervised contact order was made. The contact takes place in a supervised environment. That, hopefully, highlights the difference under the new and old proposals and how potentially dangerous these changes will be.

Q67 Mr Llwyd: That case is not unique by any means, is it?

Rebecca Scott: No.

Q68 Mr Llwyd: Does anybody else want to address the point?

Sally Denton: Certainly in terms of the work that we do, we would be very concerned about some of the proposed cuts in terms of welfare benefits because we see people who are experiencing periods of time where they are, for example, in receipt of nil income because of decisions that have been made regarding their right to reside and immigration status, which are very complicated issues. If we can resolve those, then we can prevent those people from falling into rent arrears.

Increasingly, we are seeing people who are living in private rented accommodation, where there are mandatory grounds for possession available where there are rent arrears. Even though under the proposals possession proceedings will still be covered, the reality of the situation is that once it gets to the possession proceedings stage there won’t be anything that we can do to prevent an order for possession being made because it is mandatory. The only way to prevent those people from being evicted is to get involved at an early stage, to help them to deal with what can be extremely complicated welfare benefits issues. If we can’t get in there, then there is a huge cost in terms of the cost of eviction and, if it involves a family, the cost of re-housing that family as homeless, the knock-on costs in terms of their education and the implications for social services. We get referred clients with welfare benefits problems by social services because they know that, if the clients don’t access assistance in obtaining their welfare benefits entitlement, the costs to the social services department will be increased because they will be the ones that have to pick up the pieces under, for example, Children Act duties.

Q69 Mr Llwyd: The Green Paper, of which you will be aware, states that “the provision of legal aid in this area is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases”. Further, it says that “people should take responsibility for resolving such issues themselves and that this is best for both the parents and children involved”. How do you respond to those statements?

Sally Denton: Before we can take on a case that is publicly funded we have to undertake a sufficient benefit test. We have to look at the case in terms of the costs relative to what we can achieve for the clients and the likelihood of success. We have to apply a test as to whether a private paying client with moderate means would be advised to take on that case. We also have key performance indicators that require us to demonstrate that we have achieved a successful outcome on 40% of our cases. We will not take cases on that do not have sufficient benefit. Our service is oversubscribed as it is at the moment, which drives us to try to achieve early resolution. We do not want to go to trial if we can settle a case appropriately before then. In fact, what we would say is that the reverse is true to that. Clients whose cases are appropriately funded and are prepared appropriately right from the start are likely to resolve without the need for litigation. Certainly, even if litigation has started, they are likely to settle without the need for trial. I would say that the provision of adequate funding prevents more litigation than it causes. A significant proportion of the cost drivers are from outside our organisation in terms of the system failures within other organisations that drive litigation.

Q70 Chair: Can I check something with you that arises from that? You have talked of your key performance indicators as if they are measuring a successful outcome for the client. But from the public point of view and the disposition of public funds, surely a successful outcome is that the interests of the child are best looked after and public money is not wasted in competitive processes between two parents arguing over access to their child, who ought to resolve this issue without getting into legal proceedings.

Rebecca Scott: I disagree there. I think that’s where the law is there to protect children, and early intervention in family proceedings can reduce protracted litigation.

Chair: I am talking specifically about private law cases now.

Rebecca Scott: We are concerned with the withdrawal of funds from legal aid funded cases.

Q71 Chair: The statement which Mr Llwyd quoted the Government made about private family law cases.
**Sally Denton:** There is certainly a very strong argument to say that involving advisers at an early stage takes quite a lot of the acrimony out of issues. It enables people to step back and deal with things in a much more rational way. I don’t do family, but I take action against private landlords. Sometimes those cases are much more protracted because of an unreasonable or entrenched position that those people take. If they are legally represented, it generally means that cases are resolved much more satisfactorily and much more quickly. If the parties are going to have to have some ongoing relationship with each other, then it is in everybody’s interests that those relationships are the least acrimonious going forward as they can be.

**Q72 Mr Llwyd:** But it still remains, of course, that there will be a percentage of the hard cases where nothing can be agreed and it will have to go to tribunal to be resolved. Nothing can be done about those, presumably.

**Rebecca Scott:** Yes, but it is still a better resolution for everybody if there is equality of arms when the parties go to tribunal. If one party is weakened by being unrepresented and they are forced into a terrible settlement for them and their children, you then have all those secondary problems of debt issues, mental health issues and possibly, worst-case scenario, having to rehouse someone who has been made homeless. Children suffer far more in those circumstances than by having a parent with a lawyer who presents their case fairly.

**Emma Baldwin:** Sometimes you do need the court or the tribunal to settle the matter.

**Q73 Mr Llwyd:** This follows on from what Ms Denton said earlier on. How much of a contribution do you think mediation is making, and will be making in the foreseeable future?

**Rebecca Scott:** We think it is a valuable component of legal advice, but we don’t think it is the only component. We have concerns that only a small amount of mediations do resolve issues. There has not been much research on mediation and we think the impact is unknown. We are concerned again that some parties might be pressurised into settlements that might not be suitable for them because they don’t have proper representation when they go into the mediation. Ultimately, that might result in parties going back to court anyway to try and enforce agreements that were made in the mediation. Our position is that there isn’t much research on mediation and we think it is a valuable component, but we don’t think it is any substitute for proper legal advice.

**Q74 Elizabeth Truss:** On the subject of legal aid, you mentioned that there is a lot of cost coming from external agencies. It seems to me, if you look at the international statistics, that we are not only expensive in terms of the numbers of legal aid cases that are fought but also the cost per case. Why is the cost per case so much higher in Britain than it is in equivalent countries with similar legal systems? That can’t be the fault of the Benefits Agency or external parties. That is an issue to do with the legal process, is it not?

**Sally Denton:** If you take a case involving possession proceedings for rent arrears, if, as frequently happens, we have our first contact with that defendant as duty solicitor because they have not been able to access legal advice prior to that, then that case will need to be adjourned to enable housing benefit issues to be resolved. Potentially, if those issues are not resolved quickly because of delays within other organisations, then that case will be adjourned again, and potentially again, and on some occasions three or four times. That will, in turn, drive up the cost of that case. For a social landlord to get possession where there are rent arrears, they have to establish that it is reasonable for a possession order to be made. It is not reasonable for an order to be made whilst benefit issues remain outstanding. So those issues have to be allowed to catch up before a decision can be made in relation to the claim.

**Q75 Elizabeth Truss:** Is that the only reason that costs are so high per case? Are there things that can be done within the legal system to reduce the cost per case? I wonder if the other witnesses could comment on this as well.

**Rebecca Scott:** My answer is more of a question. I wonder if the Government have considered legal aid cuts. It seems that they have considered it in isolation. I wonder if they have been looking at the efficiency of the Legal Services Commission and the way it is administered, because it does seem to be quite a bureaucratic, inefficient system that frustrates solicitors and legal practitioners. It seems that the Government have just considered these cuts in isolation without looking at other savings across the board.

**Q76 Elizabeth Truss:** What would you do to the Legal Services Commission to make it efficient?

**Rebecca Scott:** Not being knowledgeable enough about it, I would have a look at its processes and ask practitioners what is slowing the process down and where it is going wrong basically.

**Elizabeth Truss:** So you are saying it is—

**Chair:** I really must give Yasmin Qureshi a chance to come in.

**Q77 Yasmin Qureshi:** Typically, what kind of people do you assist with legally aided social welfare cases? If free advice was not available to them, what would be the impact on those people?

**Sally Denton:** A high proportion of the clients that we see at the Law Centre in Nottingham fall within the vulnerable bracket. They are people with long-term health problems, including a significant number of people who have been diagnosed as terminally ill. We see people with learning disabilities and with mental health problems. We see a large number of people with substance and alcohol dependency issues. We see people with language problems and people who have recently come to this country and are not familiar with the systems. We see single parents with little support networks who are very isolated. Increasingly, we are seeing people who have totally lost confidence in their own ability to deal with their problems. We see people in debt who have got to the point where they won’t
even open their post, answer the door or answer the telephone because they cannot deal with the situation any more. We see people in relation to benefit problems who have no income at all, and they have no income at all for protracted periods of time. These are not people who can be bothered to take responsibility for their situation; they are people who can’t take responsibility for their situation, and sometimes they just need a bit of help to get back on the right track. These are people whose circumstances frequently impact on their ability to maintain a basic standard of living for themselves. It impacts on their ability to parent their children, to maintain a roof over their head, which are fundamental and basic needs that they have. In our view, a continuation of the situation impacts on their health and the cost in terms of maintaining their health and healthcare services. It impacts on the cost of their children’s education and it also impacts on their chances of returning to work and returning to play a productive role in their community.

Q78 Chair: Is it legal advice they need, if those are the circumstances?

Sally Denton: Yes, because quite often you will find that what underpins the problem is somebody who has repeatedly tried to secure the benefit entitlement that they should be receiving and they have not been able to obtain that. It is set in place as a safety net for people, and there are people for all sorts of reasons, including poor decision making, who have not been able to access that basic level. It is the same with debt. There are people who are struggling to deal with debts, where a lot of those debts are challengeable and where the practices of the lending institutions are questionable. People need an opportunity to be able to challenge those and to be represented, because those issues are underpinning their whole lifestyle or their finances, and they have a massive knock-on effect.

Q79 Chair: Do any of the others want to add to that?

Rebecca Scott: I was just going to add to that that when people come to see us they are at a crisis point with their legal problems, but resolving the legal problem can be the first step in turning their whole lives around. My advice centre has a very holistic approach to problem solving. We have different projects. Once you have resolved court proceedings, hopefully satisfactorily, we will refer out and they will get debt advice on how to maximise their income and manage a budget. Hopefully coming to us can be the first step in turning things around, even though it might be seen as legal advice.

Emma Baldwin: The advice we give is legal advice because people have legal problems. They have cases in front of the Social Security and the Employment Tribunal. Their cases often deal with complex matters of law and they have to present evidence and their case in a way which they are not able to do. They are not used to the normal processes of tribunals in terms of fact-finding, putting forward the important points that need to be made and evidencing those when they can. People don’t know how to do that without assistance. It is not something that people naturally know, so it is legal advice that they need, and that is what we provide for them.

Q80 Yasmin Qureshi: Leading on from that, would you therefore accept—and we have received written evidence to this effect—that helping somebody at the earlier stage prevents more expensive problems occurring later on? Would you agree with that?

Rebecca Scott: Absolutely.

Emma Baldwin: Yes.

Sally Denton: In terms of debt, I see a lot of clients who are facing, for example, mortgage possession proceedings. Had they been able to get debt advice at an earlier stage they would have prioritised the roof over their head. They would have been able to explore challenging other debts, maximising their income and other ways of resolving the situation such as capitalising arrears or extending the term of the mortgage. None of these things are available by the time we see the person at possession proceedings stage. Quite often the situation has become so entrenched by then that we can’t avoid them being evicted. That then has huge knock-on costs in terms of other departments. Similarly, the issue of getting early advice in relation to benefits saves all sorts of costs in terms of possession proceedings and eviction.

Emma Baldwin: Cases are referred to us when they have a hearing date, so we get involved quite late on in proceedings, when often there are only a number of weeks until the hearing. But we still find, in that window of time, that we can make quite a big impact. Sometimes with our welfare benefit cases, when submissions and evidence are made, the judge decides on the papers in favour of the client and the hearing can be vacated. With our employment cases, we find that about 50% of them settle. We manage to settle them between the point at which we get them and the hearing date that is scheduled. Intervention at any stage can help to resolve the matter, and the earlier the better.

Q81 Yasmin Qureshi: One of the reasons given in the Green Paper for removing welfare benefits from scope is that “these issues are of lower objective importance (because they are essentially about financial entitlement) than, for example, fundamental issues concerning safety or liberty”. How would you respond to that?

Sally Denton: As I have already said, we increasingly see people who are excluded from benefits in their entirety. That is likely to increase as we see increased Jobseeker’s Allowance sanctions, which will potentially be for up to three years. Those people are therefore receiving no income, which must have implications in terms of their health and safety. Additionally, we see people who are not in receipt of nil income but, because they are not receiving all of their benefit entitlement, are not receiving the protection that the benefits entitlement safety net should be providing to them. There is a safety net for people, in the form of welfare benefits, which depends on their circumstances. There are a significant number of people who are not able to access that safety net. That may be due to language or health problems or poor decision making. It is fundamental to their whole
life that they are given help to resolve those issues. These are not necessarily straightforward issues. The welfare benefits legislation in some areas is incredibly complicated. The right to reside issues are changing all the time. It is very difficult for somebody who is not a specialist adviser to keep abreast of the changes. Housing benefit legislation is terribly complicated.

Q82 Chair: Can I just clarify something from that? It is on the question of whether you need to be a fully trained and experienced solicitor in order to handle these matters, or is the practice, even in your organisation, that much of this advice will be given by people who specialise in it but not on the basis of being legally qualified either as a solicitor or indeed as a legal executive?

Sally Denton: Within our organisation we have some generalist advisers. They are able to give advice in relation to some of the more basic issues surrounding benefits. So those are not issues that are dealt with by our specialist team. The specialist team is dealing with interpretations of legislation, which is incredibly complicated. They are looking at case law and law not only in the area that directly relates to the benefits but in relation to associated issues like immigration. It does need people with a high level of qualification.

Q83 Mr Llwyd: Relatively speaking, there is a very small percentage of solicitors who are adequately qualified.

Rebecca Scott: Yes.

Sally Denton: Yes. There are not very many people that deal with welfare benefits at all, which is why, for example, in Nottingham a lot of work has been done in mapping need and making sure that advice is delivered by the right people. We try to avoid specialist advisers giving a basic level of advice, because there are not enough specialist advisers. We want the specialist advisers to be dealing with the complicated issues that involve interpretation of legislation.

Emma Baldwin: I would add that in the social security sector some practitioners are legally qualified solicitors or barristers and others are not, but the specialists in that field are all highly skilled and highly experienced. It is not so much your qualification that matters. It is your knowledge and experience of that particular area of law, because it is so specialised. It is an entirely self-contained statutory scheme. General legal concepts about against it from time to time, but essentially it is a universe of its own and it is your knowledge and your ability to keep up to date and to work around and within that knowledge base that is important.

Q84 Claire Perry: I think we all suffer as well, as MPs, from the complexity of these issues. I know I certainly refer many of my constituents to the CAB and their legal teams. If we start from the premise that we have to reduce public spending and work out the best way to do that, one of the things I am struck by is that all three of your organisations are doing similar things and helping similar people. Of course, the CAB is also doing that through its specialist teams. What do you make of the proposals for potentially streamlining, working together and potentially using a telephone advice service? Have you considered those as a collective group or have you rejected those entirely? I think we would like to keep this access available, certainly to people who find it difficult for various reasons to access what is increasingly a very complex world of benefit entitlement. What we would like to see is whether there are ways to do that in a more streamlined fashion. I would be very interested in your comments on that.

Sally Denton: It is important that things are dealt with at the correct level. I do accept that there are basic queries that could be dealt with at a generalist level. I do not think that the telephone gateway is the appropriate way of directing people to advice. There is room for telephone advice to complement face-to-face advice, but I have considerable concerns about the proposals in terms of telephone gateway. There is both the idea that that will be the only way into advice and also there is an assumption that a lot of specialist level advice can be delivered by telephone. That is going to present considerable problems to a lot of the clients that we see. Telephone advice does not suit everybody. It does suit some people very well, but it does not suit everybody. It does not suit people who lead chaotic lifestyles or people who do not speak English very well or have other barriers to their communication.

Telephone advice is only as good as the information that that adviser is given by the client. There are lots of situations where clients do not present their issue in a particularly coherent or accurate way. Therefore the advice that flows from it is not going to be particularly helpful or accurate. Clients, for example, inevitably say, “I’ve got an eviction,” but that can be a letter saying that they have rent arrears right through to the bailiff appointment. Unless you can correctly identify the stage that they are at, the advice that flows from that situation is not going to be helpful and the decisions about where that person needs to go for advice are not going to be appropriate.

There are also issues because we are, as a law centre, firmly entrenched in our local community. We understand the pressures that people are under. We understand the organisations. We have a lot of referral networks who bring clients to us. We have clients that come back and we know the background of their case. We are able to address issues that crop up time and time again because we can see patterns. Then we can campaign generally in relation to those, which resolves issues and saves costs. All of that local knowledge, understanding, communication networks and ability to settle cases early because we know the people involved will be lost by the telephone gateway.

Q85 Claire Perry: Forgive me, I must challenge that. It is a little bit like being an MP in a way, in that you do have the same clients that present again and again with problems. Clearly there are some people who do not understand the documents and the immigration law, but you can also polish off an awful lot of people with a phone surgery who perhaps present slightly less complex cases. Is there not a role for perhaps triaging a little bit more to ensure the face-to-face resources
They could have more hard evidence to support that.

Chair: We need to keep the questions fairly brief because we have a lot more things to get through.

Rebecca Scott: We think it has a role, but it is just one part to play in a whole provision of legal services. Also, there is an assumption that we are all going to be here to provide a service but all our funding is under threat. That is a decreasing picture and our services might not be here next year. I would disagree with the assumption that we are all going to be here to pick up the pieces. The pro bono sector is under attack at the moment and all the services that we rely on are being cut.

Emma Baldwin: We are not all doing the same thing. At FRU we provide representation in tribunals. That is not covered under legal help or legal representation. We are providing a joined-up service with legal help providers and agencies that have some of their funding from legal help, some from the local authority and some from charitable funds. Our business model is based on agencies of that type sending the appropriate cases to us at the appropriate time. They make sure it is the right type of case, that the client wants to be referred, they photocopy all of their documents and they send those in to us. We get 1,600 of those a year in the Greater London area. A lot of that work is done by our partner agencies. Sending those cases in is a big chunk of work that they do. If they do not survive, with legal aid funding going, because if it is a strand of someone's funding that could be the final straw, if that goes, the business could then become unviable or certainly it might have to restructure and become smaller and limit the type of work.

Q86 Chair: Presumably some of them have already had their matter starts reduced by the LSC. Have you had that experience?

Emma Baldwin: Yes.

Q87 Yasmin Qureshi: I have one final question. It seems that a lot of immigration cases will be removed, bar those who are detained, from the scope of legal aid. What do you think will be the impact of removing those cases?

Rebecca Scott: We welcome the fact that asylum and detention has been kept within scope. We think that is vital. For those that are out of scope, all I can say is that I can't think of any support services that are going to be there to support them. They are a very vulnerable client group because generally English isn't their first language, just to start, but I can't think of any other charitable agencies that are going to step in and fill that gap. To my knowledge there just aren't any. I wonder if that will make the Immigration Tribunals more or less efficient. My suspicion is that it will make them less efficient, although I have no hard evidence to support that.

Q88 Yasmin Qureshi: They could have more appeals, couldn't they?

Rebecca Scott: Absolutely, yes.

Q89 Chris Evans: The Green Paper recognises that its proposals will lead to an increase in the number of litigants in person. What potential problems do you see arising out of this?

Rebecca Scott: The research shows that people without legal representation are more likely to pick a more formal route to resolve their problem rather than consider ADR. They are more likely to litigate less effectively, to make mistakes and to request an adjournment. All this racks up time and cost for the courts and also for the represented client. They are more likely to have a less fair outcome and therefore more likely to appeal. They are more likely to put pressure on court staff to provide legal advice, which they are not qualified to do, which again leads to mistakes. There is nothing to support having a client without representation. Early intervention and early proper legal advice is always beneficial. If a client has proper legal advice at the start, they can get advice on whether there is merit to the case, and with that advice they might be less likely to litigate than going into it blindly without that early intervention. There is nothing to support having someone going to court without representation. I would say for 95% of the clients I see it is impossible for them to do that, for a variety of reasons.

Q90 Chris Evans: I want to explore that point further about clients not being able to represent themselves. The Green Paper says that tribunals are user-friendly. I come from a trade union background and I had a number of my members, experienced trade union representatives, who frankly found the whole experience very daunting. How would the people you work with find that process? If all three of you could comment, that would be very helpful.

Emma Baldwin: We think that in tribunals, panels and the judges, in particular, do make a great effort to enable litigants to take part in the process. They are less formal than a court hearing, but that is only in relative terms. They are less formal but they are still formal fora, and for many of our clients that will be the most formal meeting that they ever have to attend. People do find it daunting and frightening, and sometimes can’t face going. One of the values of having a representative present is that the client is then going to turn up because there is somebody with them. That is going to enable the tribunal to use their inquisitorial jurisdiction and find out what is going on. We would also say that the formality, or lack of it, is not really the most important point. The reason that conducting litigation is difficult for people is because they have a very real problem that is very important to them that they are trying to resolve. They are in a situation where they often do not understand what is going on and they cannot follow proceedings. That is the problem. It is not whether the tribunal are friendly or whether they are sitting on a raised dais or on the same level. It is the ability to engage with what is going on.

Q91 Chris Evans: The experience I found was that, when you are mixed up in a case and it is your case, you take ownership of it. It becomes very emotional. A lot of the problems that I faced when I was a union
official was that people still felt, even if the panel was very friendly and they were dressed down or whatever, that they were sitting in judgment on them. That was a huge problem. I don’t know if that is the same thing with your clients as well. Do you feel like that? I know that is more of a statement than a question.

Emma Baldwin: Yes, they are, but that is the judge’s role. The judges can be as friendly and as enabling as they can, but they have a number of roles to play in the tribunal. One of their roles is controlling the court. That often involves controlling the litigants. They do have a judgment role and people do find it very upsetting and very emotional. Often having representatives involved immediately helps to lower the emotional temperature in the room. It lowers the emotional temperature in discussions, particularly with employment cases. Your chances of settling if you have both parties represented absolutely skyrocket. It is just much more difficult if even one of the parties is not represented.

Q92 Chair: Weren’t many of these tribunals intended originally to be fact-finding bodies which did not expect to have representation at them? Is it not the case that, increasingly, we see the need for there to be some kind of appeal mechanism for all kinds of decisions, and so a tribunal is set up for that purpose but not on the assumption that there is going to be a vast expansion of legal representation commensurate with this growth in appeal mechanisms?

Sally Denton: Just because the procedure is straightforward, it does not mean that the law that underpins the decision is straightforward. That is why people need representation. It is not always to stand up and speak; it is to assess what the basis of their challenge is before they even get to the tribunal.

Q93 Mr Llwyd: In industrial tribunals, as Sir Alan Harvey on Industrial Relations and Employment Law says, the whole idea was a fact-finding tribunal to keep it simple. It has now developed almost as a separate system from the courts. When I began in practice, Harvey on Industrial Relations and Employment Law was the main book. It was a single volume. It is now five or six volumes long with much case law as you like. It has just become so complex that it is daunting for any individual without help, isn’t it?

Sally Denton: Yes.

Yasmin Qureshi: It is the EC law as well.

Mr Llwyd: That is right.

Chair: I am sorry. We took the questioning from Mr Evans.

Q94 Chris Evans: I will finish here because time is moving on. In tribunals where the DWP and most employers have legal advice, would it be fair to say that taking away help in preparing for hearings would put appellants at a severe disadvantage?

Rebecca Scott: Yes.

Emma Baldwin: Yes, it would, but I think it is important to bear in mind what is being provided at present. People get legal aid which helps them to prepare their case, but they don’t get help with representation. Some solicitors do representation pro bono. Some law centres and other organisations match-fund so they can afford to attend the tribunal with their client, but it is not being met by legal aid. Then there are organisations like ours that do representation.

Q95 Chair: That leads me on to a point for you, Ms Baldwin, which is that your website says that the Green Paper gives a misleading image of the Free Representation Unit when justifying the removal of legal aid on the basis that there are alternative sources of assistance like you available. What would you like to say about that?

Emma Baldwin: The issue we had with the statements in the consultation document at paragraph 4.218 and at page 193 was that there was an implication in what was being said that the cuts in welfare benefits provision could be ameliorated by our organisation and organisations like us. The first point we wanted to make was that we are very proud of the work we do but we do not provide initial advice, so we do not do legal help work, which is what is being proposed to be cut, and in any event the pro bono sector has a small role to play. In terms of welfare benefits, we represent in about 500 tribunals a year, but currently there are 339,000 social security tribunal cases in the system. The work we do is small in comparison to the overall picture. As far as pro bono organisations go, we think that the volume of work we do is very high. We are not aware of anybody else doing work at that rate or at that level. We were concerned about the scale issue and an implication that we might be able to fill the gap. We are just not in a position to plug the gap that would be left if welfare benefit provision was reduced to the extent that we fear it might be if these cuts go through.

Q96 Chair: Yours is a service which is essentially provided entirely voluntarily by those involved.

Emma Baldwin: Yes. We have round about 500 volunteers active in any one year. They are largely students and young lawyers, and they do the bulk of the representation that we provide.

Yasmin Qureshi: That is what I did as well years ago when I was a law student. I started doing free work.

Q97 Chair: Is there more scope for expansion of this kind of voluntary help?

Emma Baldwin: FRU help. We are keen to expand as much as we can. We currently have a small pilot project running at Nottingham Law School, where they are undertaking a small number of employment cases a year. We are in fairly advanced talks with Birmingham Law School and we have also been speaking to Manchester, although I understand some difficulties occurred there because of the last legal aid bidding round that did not turn out as we had hoped. We are trying to expand, but, as I said, this is going to be small numbers of cases overall and it is not the answer.
Q98 Chair: Have you had any discussions with any part of Government in the context of the consultation—either the Ministry of Justice or any other Government Department—about the role you might play if these changes were to go ahead?
Emma Baldwin: I don’t believe so.
Rebecca Scott: We have responded to the consultation paper. We would like to make the point that all these law centres and charities that you rely on as an alternative do require funding. It is a small amount of funding, but they need an infrastructure and they need to be well organised. The law firms that volunteer for us say they will only participate if it is a well-organised scheme that is funded and has an infrastructure. They are not going to spend their time on pro bono work if they are not committing to a scheme that is well run and funded. All pro bono agencies are under threat of funding at the moment. The Financial Inclusion Fund was abolished last week, and seven of our debt advice workers were immediately made redundant. The image that we are all going to step up and fill the gap is dependent on funding. A lot of that funding is legal aid funding or Legal Services Commission funding. We are under threat just as much as legal aid firms.
Emma Baldwin: Charitable giving is also under threat. Since the credit crunch we are one-and-a-half down already, so there is already a contraction because of the wider economic situation.
Sally Denton: If we look in Nottingham, if these proposals go ahead, then in terms of welfare benefits and debt there will not be any specialist providers because they are all Legal Services Commission funded. Generalist advice is local authority funded. The county funding has all gone. The city council is not going to provide additional funding to meet that gap; if anything, it will cut its funding. These are not clients that can afford to pay for advice from private practice firms. It is not the type of advice that is attractive in terms of CFA arrangements. In terms of advice through supporting people and tenancy support, that is all going too. If we are not there, there is not going to be anybody else.

Q99 Chair: When you talked about debt advice you said that there would not be any debt advice. You would not be able to provide it because it is based on an LSC contract.
Sally Denton: There won’t be any specialist debt advice; exactly. Similarly, the specialist debt advisers in Nottingham are all the people, for example, who are DRO accredited intermediaries. So they will go. In terms of that as a solution to people’s debt problems there won’t be advice for people in relation to that.

Q100 Claire Perry: But there will still be provision again via CAB caseworkers who are trained often in debt and welfare issues. That is my understanding, and indeed it is in their submissions.
Sally Denton: The specialist advice from the CAB is funded by Legal Services.
Claire Perry: Exactly.
Chair: We are going to be talking to the CAB in the next part.

Q101 Claire Perry: Again it gets back to the Chairman’s point—I am not disagreeing with you, and this is clearly a huge problem—that there are levels or, if you like, gradations of debt advice. Again, often you reference people in chaotic situations who don’t have particularly tricky legal problems but have issues about sorting out what is a priority versus a non-priority creditor—and we have read your very good examples in the submission—which does not require a solicitor’s qualification to do that. That is what an experienced caseworker could do. The statement that there is no debt advice available is perhaps a bit misleading. There will be less funding for legal assistance with debt advice but there will still be debt advice available.
Sally Denton: It will not be funded debt advice.
Rebecca Scott: They still need paying.
Claire Perry: Yes, but only 15% of the CAB’s income stream comes from the Legal Services Commission.
Chair: We have the CAB in later, so we can ask them that question. Thank you very much, the three of you. We are very grateful for your help.

Examination of Witnesses
Witnesses: Julie Bishop, Director, Law Centres Federation, Gillian Guy, Chief Executive, Citizens Advice, and Paul Newdick CBE, Trustee, National Pro Bono Centre, gave evidence.

Chair: Ms Guy, Chief Executive of Citizens Advice, Ms Bishop, Director of Law Centres Federation, and Mr Newdick from the National Pro Bono Centre, welcome. We are very glad to have your help with our inquiry. I am going to ask Mr Turner if he would begin.

Q102 Karl Turner: Thank you very much, Chairman. Very generally, the Government are saying that legal aid must be cut and that it facilitates, as it stands, more unnecessary litigation. Generally, what would you say about that?

Gillian Guy: I think there are issues that have to be dealt with around the legal aid budget—we don’t deny that—because of the way it has grown over the years, but the issue with regard to where the cuts will fall is that early intervention and advice will cease to be given and that is very often the advice that stops matters going into litigation. Therefore there could be further costs as a result of stopping that early intervention as things go into court.

Q103 Karl Turner: It seems to me that the CAB have received a triple whammy: legal aid cuts, both...
Julie Bishop: My answer would be fairly similar to Gillian’s in that we do not know the full extent of local council cuts, but I have prepared today—and I can leave this behind—the impact of the announced funding cuts on law centres right now. With regard to the announced cuts from the legal aid budget, before you factor in the telephone gateway of 55% of law centre funding, out of a budget of £8 million, over £5 million will go. That is the announced scope cuts. But, if you add in the impact of the telephone gateway where it is foreseen that 80% of clients will go through that gateway and may not reach what is left in scope, it could be almost 90% of that funding.

In terms of the multiplier effect, law centres receive over 30% of their funding from local authorities. Similarly, that changes around the country, but we estimate more than that, because many law centres have already been notified of their loss. Hammersmith and Fulham, for instance, have already lost £180,000, which is the full amount of their local authority funding. We also have another 10% of funding from other Government Departments, many of which are also cutting. We get 19% of funding from charitable and philanthropic sources. We estimate that we will be left, nationwide, with a maximum of 30% of our funding. How we continue services with that is something that we are working on now. However, it must have a significant impact to lose all but 30% of your funding.

In relation to your previous question about unnecessary litigation, I think the important thing and one of the themes that ran through the Green Paper was a view of the client that uses legal aid. That may be an average client, but my understanding is that neither the LSC nor the MoJ currently collects data on the nature of client and client disadvantage. They have certain demographic data but it does not give you a complete picture. For example, you can mention one disability, but many of our clients have multiple disabilities. As you know, there is a big difference between being deaf and blind and just being deaf. These are significant absences.

My colleague from Nottingham mentioned our client profile, but again I can leave this with you. Our clients are poor; they have lower than average educational attainment; they have poor literacy and numeracy; they come from non-English speaking backgrounds; and they have a higher than average rate of disability. We have a higher than average number of legal aid clients who are under 25 because we have specialist youth services. Almost 60% are women. Importantly, 45% of our clients only have access to pay-as-you-go mobile phones. Most do not use the internet to access goods and services, and many of them have substance abuse, mental health problems and lead chaotic lives. I mention that because you are talking about unnecessary litigation. Our clients are not the people who just want a few hundred extra pounds because they tripped over the gutter. We are talking about a very different kind of person.
Julie Bishop: Law centres cover the full range of legal aid, with the exception of criminal legal aid. As you know, it was through the work of law centres that legal assistance at police stations began, but we have since passed that on. We have a couple of law centres that do family law, but in general we do mental health, community care, welfare benefit, debt, immigration, asylum, public law—all the areas that are currently funded in civil legal aid. What is the proportion? I think the proportion of our work is indicated in the amount that is lost. Our biggest area of work currently is housing, employment and immigration. Immigration and asylum is second to housing and then welfare benefits.

Paul Newdick: If there is an assumption that some body or bodies will step into the breach and fill what looks to be an enormous gaping hole that is going to be created when no social welfare law legal aid provision will be provided, and if there is an assumption that that will be by lawyers doing more pro bono work, I have to disabuse you of that, I am afraid.

Chair: We will come back to that issue a little later in our questioning, if we may, much more specifically.

Q110 Karl Turner: That, Sir Alan, was about to be my next question. You do not foresee pro bono practitioners taking up the slack, then?

Paul Newdick: They can’t. The way that pro bono works in giving assistance to individuals is based on a very close relationship with the front-line advice agencies sitting on my right. Pro bono doesn’t just happen in a vacuum. As a charity that has been trying to provide this infrastructure for the last dozen years or so, we recognise that the people who know best about where the need is and where legal help is best provided are the voluntary sector organisations. They have become increasingly dependent on legal aid funding for their survival. If they don’t survive, pro bono won’t survive. Lawyers demand a level of administration and service if they are going to give their time for free, and that is what LawWorks does. We have put that infrastructure in place, but the service is provided through the advice agencies, through clinics, which operate usually in the evenings but often at other times of the day with volunteer lawyers. If there is no clinic, the lawyers won’t do it. I do need to tell you that the sorts of lawyers who get involved in pro bono have lots of other enticing areas of pro bono activity in which they could get involved: often international, saving the world or people in other jurisdictions. This is not the most glamorous end of pro bono provision but LawWorks feels fundamentally that we need to find lawyers who are willing to provide that service. But they can only provide it if there is an infrastructure within which to deliver it.

Q111 Karl Turner: What will happen to these clients then? Does it ultimately mean that the system is likely to collapse? Where are they going to go?

Paul Newdick: There will be nowhere for them to go, in my view. If CABs close and law centres close, where else are they going to go? I think MPs surgeries are probably going to have very large queues outside them going forward, because what else is there left?

Private practice law firms, which of course are the ones that are providing the pro bono assistance, are not going to allow these people through their own doors. They do this as an adjunct to their normal daily activity, so I don’t think there will be anywhere for them to go.

Q112 Elizabeth Truss: In the last session we heard about some of the cost drivers of legal aid spending. Given that we do have the highest legal aid bill per capita in the world, I am interested to know this. You have said that the majority of people that access services tend to have chaotic lifestyles and low educational background. Do you think the main driver of legal aid expenditure here is social issues? What are the drivers within the legal system itself for what is making our legal aid bill so high? The third part of my question is, what would you do, both outside the legal budget itself and within the Ministry of Justice budget, to reduce that bill?

Gillian Guy: There are several drivers. I think to aim first and foremost at the early intervention and advice, as I have said before, is a false economy because it brings its own costs. One of the drivers, for instance, is high-cost cases. They take an inordinate amount of court time, and I think the court process really does need to be looked at, which is another part of the Ministry of Justice. There are administration savings to be had in the legal process generally, particularly criminal, where a lot of the legal aid budget goes. There is an enormous amount of bureaucracy—and any of us who have been on the receiving end of this can testify to it—around the way in which legal aid is currently administered. There is much—I think there was £350 million accounted for last year—that could be taken out. There are perverse incentives in the system to go forward to litigation. There are incentives for lawyers to take court proceedings in order to get certificated clients, and that does not help in the backlog that goes through the court process. I think there is also probably insufficient preparation of any alternative disputes provision. It is right that there are alternatives to court, but they are not necessarily available right now and therefore ought to be put in place before early intervention is looked at.

Q113 Elizabeth Truss: Do you see that happening in other countries? Are we behind the international curve on this?

Gillian Guy: I think we are different from the way other countries deal with it. It is often said to us that we are the most generous in terms of our legal aid budget. The fact that it is not cleverly administered, though, is not an excuse or should not cloak that. We should look at it for how we are and perhaps learn from other countries in the way it is administered, but certainly alternative disputes are much more successfully handled elsewhere.

Julie Bishop: In terms of the cost drivers, again my colleague from Nottingham mentioned that 42% of clients who walked through our door were the result of errors elsewhere. We need to elaborate on that a little more and say that in December 2010 the National Audit Office found that the DWP had made no improvement in their error rate since 2007. When
Q114 Elizabeth Truss: What specific suggestions would you have about how the process could be streamlined at the same time as reducing the bill? Clearly it is not delivering efficiently, is it, if you look in comparison to what is being delivered elsewhere, although I do think Britain does have a particular social issue and low educational attainment is a problem here? But I am sure there are issues within the legal system that can be addressed.

Julie Bishop: At the LSRC conference in June last year a paper was presented by someone from Holland that was very interesting. I could get you the citation. It talked about the most effective way to spend €1,000 in relation to achieving access to justice. The result of that was that €1,000 would be spent in simplifying court processes, and it was an across Europe study. Again, previously someone mentioned court processes. That is one mechanism for streamlining. One of the cost drivers for representing clients is completely out of their control. If you take immigration, the Home Office can take years upon years before they settle the case. There are inherent costs involved in keeping that matter open over that seven-year period. Once again, the cost drivers for the poor—the people we are representing—are completely out of our hands. That streamlining must be done with a view to the MoJ in its entirety.

Q115 Elizabeth Truss: The MoJ say that that is what they are working on. Do you see any signs of that, or is it not radical enough?

Julie Bishop: I think that many of the cuts within the Green Paper will actually increase MoJ costs.

Q116 Elizabeth Truss: Sorry, I was asking you specifically about the streamlining of court processes. Do you see signs that that is under way?

Julie Bishop: The current family law review could well link to a lowering of costs. Indeed, we would ask the question: why are you proposing costs before you know the solution? I would suggest that in family law there are many efficiencies and even better ways of resolving family disputes than what happens now, which is quite costly. One would assume that some of those will come out of the review of family law.

Paul Newdick: The streamlining processes are not going to help people who don’t understand how to operate the system in the first place. The idea that people will manage on their own without any assistance—

Q117 Elizabeth Truss: That is not what I am saying. I am saying that, if you were to propose alternative ways of making savings in the MoJ budget, how would you do it? If streamlining is one of those, what would that mean?

Paul Newdick: There is an area in terms of access through both telephone and electronic means which, I think, can streamline and save costs, but it does require some joint working. It requires the voluntary sector, the Government and the pro bono sector to work together to try and achieve that. So far we have not managed to do that with the Ministry of Justice and we would like to do so. There are ways of streamlining which will save costs.

Q118 Chair: I am interested, Mr Newdick, in whether you thought that courts, and particularly tribunals, could do more to make it feasible for people to represent themselves by taking a more inquisitorial approach and making it clear to the people in front of them what information it is they need to provide.

Paul Newdick: As a practitioner, because I am a practising lawyer aside from my role as Chairman of LawWorks, I think the amount of regulation and the complexity of law which faces most citizens is very, very difficult for a tribunal to suddenly make simple and easy for them. One only has to read an employment tribunal decision to see the complexity of it. I don’t think the tribunals themselves are going to help simplify issues. They could intervene in terms of trying to get earlier resolution of disputes, and certainly mediation, which is not a topic we have touched on yet. In terms of early intervention and resolution I think there is something there that could be investigated which could achieve more savings in terms of court time.

Claire Perry: Might I just focus some questions to Ms Guy? I would like to pay tribute to the work the CAB does. It is an enormous resource across the country and I am very concerned because I think there is a perception that you will be stepping up, if you
like, to use the language of Mr Newdick, to take some of this responsibility.

Chair: Could I defer you in that case, because we have a group of questions about CAB and I would rather take them all together, if I may?

Q119 Yasmin Qureshi: My question is in relation to the suggestion about whether the tribunal members could help in the resolution process. Is it fair to say that most of these welfare and disability tribunals seem to have lay people as the adjudicator?

Paul Newdick: My own personal experience is with employment tribunals, where the employment judge is legally qualified. I had understood that most tribunals have a legally qualified person on the panel; it is not just lay people.

Julie Bishop: One of the other things in terms of tribunals is that 60% of people who are represented at tribunal do reach a settlement. Those are ACAS figures. If we are talking about streamlined processes, you could argue that representation decreases costs.

The second thing to say in relation to that is an issue of equality of arms. Our people may go along, and even the employer, if they are represented, may have prepared witness statements and assisted them with working out their cross-examination, etc., but we have not had one case of an employer that is not represented by a barrister. I cannot give you a case. Prior to this I bothered to try and find out. There could be one, but nobody could present one. I think the issue here is not about lay people and how simple the system is, but does the British justice system believe in equality of arms? Does this Green Paper seek to destroy equality before the law? Is this what we are discussing here?

Gillian Guy: I can certainly give you our methodology. I referred to it slightly earlier. The first thing we took was the Legal Services Commission outcomes data that they require as part of their performance management of the contracts. We then get an understanding of where there are positive outcomes to the legal help that is given and where there are not positive outcomes, so that either disappears or goes into the court process. We then took the Legal Services Research Centre research, which looked at the adverse consequences and costs of those cases that did not reach, and would not reach, positive outcomes. We took those two and put them together through an economic model which looked at the kind of costs in terms of housing and health that ensue, and indeed court cases that ensue, as a result of that early advice not being successful, and then multiplied that up. That gave us a figure of a £1 investment bringing forth between £2 and £9 saving to the state.

Q120 Chris Evans: Ms Guy, looking at your submission here, your evidence states that for every £1 of legal aid expenditure on advice, somewhere between £2 and £9 is "potentially saved" to the state.

Gillian Guy: The figures that have been given by the MoJ vary, which is unnerving. The figure that we’ve taken is that 97% of the early advice will be hit. So 97% of that intervention will be hit, which is in organisations like those represented before you today. Obviously the cost that we see arising from that is that every £1 has gone and therefore the saving of between £2 and £9 has gone for every one of those pounds. That amounts to a large loss of saving.

Q121 Chris Evans: The Green Paper says that less costly alternatives need to be found to using lawyers and the court system. What do you envisage those alternative options would be?

Gillian Guy: The alternative options do rest on the kind of alternative dispute resolution that we have been talking about, and also mediation. We would not be advocating that the alternative is litigants in person, for the reasons that my colleagues have just expounded. We think that adds to costs in the system, because it takes longer for a case to go forward, and we do think there is inequality bound up in that. I think it would be about looking at alternative methods. I have already spoken about a way of taking costs out of the system. Just to hark back to an earlier question, one of the reasons that costs do not come out of the legal system is because it is not one system. It is a variety of systems with too many vested interests in it. What it needs is a cohesive review that brings some savings out. That is the only way to get streamlining.

Chair: Could I interrupt you again? I didn’t get your full answer to the question you were asked. It was about the kind of system that is in place. You said that equality before the law is not the issue. Is the system that we have before us a system that is not equal? Or is the system that we have before us one that is unequal?

Gillian Guy: The second thing to say in relation to that is an issue of the kind of alternative dispute resolution that we have. We think there is inequality bound up in that. I have already spoken about a way of taking costs out of the system. Just to hark back to an earlier question, one of the reasons that costs do not come out of the legal system is because it is not one system. It is a variety of systems with too many vested interests in it. What it needs is a cohesive review that brings some savings out. That is the only way to get streamlining.

Q122 Chris Evans: I am looking at your submission again. At point 9 you publish a table with categories. If you say: "What this table very clearly shows is that the proposals, as well as reducing the volume of publicly funded cases overall, will shift the balance of public funding away from early advice." How important is early advice in reducing costs, and do you think the MoJ is missing a trick here?

Gillian Guy: The figures that have been given by the MoJ vary, which is unnerving. The figure that we’ve taken is that 97% of the early advice will be hit. So 97% of that intervention will be hit, which is in organisations like those represented before you today. Obviously the cost that we see arising from that is that every £1 has gone and therefore the saving of between £2 and £9 has gone for every one of those pounds. That amounts to a large loss of saving.

Q123 Chris Evans: Have you made any estimate of the amount of cases that won’t be resolved at all if these proposals go through?

Gillian Guy: They will be those people who have nowhere else to turn. It is the point made earlier really. If the advisers are not there, there is nowhere to go. They won’t necessarily suddenly find the wherewithal to go and represent themselves in court. They won’t find the wherewithal to go and get legal advice. They may find that they are cornered into going, particularly in terms of debt, to debt management agencies, where we know that people are very often exploited as a result of that. For example, some 40% of any recovery that happens in benefits is taken away from them by those agencies. I would rather, as an organisation, not leave them to those kinds of devices but offer them advice that enables them to get the benefits to which they are entitled.

Q124 Chris Evans: I know it is outside the scope, but I am interested in financial inclusion. Do you think doorstep lenders and moneylenders are now going to thrive if these proposals go through?

Gillian Guy: The difficulty is that when people are vulnerable they can be taken advantage of. When other people have a commercial interest in doing that,
it is going to happen. What we like to do is to be able to prevent that, give that advice and make that intervention. That is what is under threat at the moment.

Q125 Claire Perry: To continue where I was going with the CAB analysis, you polled about 100 bureaux, which is a relatively small percentage of your 3,300 outlets, specifically on the 15% withdrawal of legal services funding. There was, in a way, quite a disproportionate response. 51% of the bureaux you polled said that there would be a risk to their continuation as a result of that. Do you feel that would be represented across the whole picture if you polled all of your outlets, or do you think that was perhaps disproportionate based on those who were responding?

Gillian Guy: We have to compare the right figures, first of all. It is not 100 out of 3,000 plus. It is 100 out of just under 400, so that is a quarter of our population of bureaux, because the outlets are obviously multipliers of the bureaux. That is the first thing. That is about a quarter. Those figures were about legal aid expenditure and the impact on those bureaux of that.

Q126 Claire Perry: It was 15% of the national budget.

Gillian Guy: Exactly so, and that isn’t equally spread across the bureaux so it would not be all 400 that were impacted anyway. It is 100 out of an even smaller figure than that. The next point, as I made earlier, is there is a cumulative impact on those bureaux as well. In terms of financial inclusion funding, £19 million is currently under threat to go by the end of March and over 300 workers are currently serving their redundancy notice out. They will go and that specialist advice will go. There is also the local authority funding, on average, as I say, of 10%. We have seen some of the impact of that, but it does mean that some of the general advice won’t be there as a back-up either.

Q127 Claire Perry: You referenced, I think, if I may add, that the overall picture was looking rather worryingly as if is a 40% reduction if you add up all of these various reductions. When was the last time your budget was that small? Where would that take funding back to relative to your history?

Gillian Guy: I said 45%. I don’t have a date; I can’t tell you that. If it is a point you want me to address, I will.

Q128 Claire Perry: What I am trying to understand is this. I don’t know the numbers but, for example, the financial inclusion money, which is a very good project, is a relatively recent addition to the CAB budget. I suspect, like all budgets, there has been quite a lot of inflation of these budgets over the last decade or 20 years. What I am trying to understand is, within the picture of looking back historically, what did the CAB do with what amount of money five or 10 years ago? What we are trying to understand is how resilient is this fantastic service. What is the leverage in this service for getting in volunteer caseworkers and people who can assist, so that when we make a submission we can understand what the likely outcome is as opposed to the Armageddon outcome which none of us would want? Whether or not you are able to provide numbers that look at this budget relative to your historical data, it would be extremely helpful to know relative to your historical picture what this budget cut might look like. Might you be able to supply that to the Committee?

Chair: You are most welcome to let us have that information later.

Gillian Guy: I would be very happy to provide that information. What I would like to add to that information is the increase in demand for the service that we provide. The pockets of money that you are referring to, quite rightly, such as the Financial Inclusion Fund, came out of another change in the circumstances, which was a recession and the need for 70,000 people every year through that Financial Inclusion Fund to come just to CAB for advice on their debt management, because they are getting into situations where they will be homeless, repossessed, and have to move their children from schools, and suchlike. Those specific issues have changed historically as well.

Q129 Claire Perry: I do understand that, but my understanding was that the Financial Inclusion Fund became policy prior to 2007. It was certainly on the policy mix prior to the 2007 recession. Again, one of the issues we have in the Committee is, what is it that has changed so fundamentally about Britain? Is it the complexity of benefit law? Is it the social issues to which my colleagues refer? What is it that is so unbearably complicated that we now need to be spending more money to tackle the problems? Clearly we would like to tackle the cause rather than the symptom. We would all probably prefer to do that.

Gillian Guy: I think it is all of those things. In the Citizens Advice movement, if you like, what we are trying to do is tackle the benefits system, to try to take that out of its complication.

Q130 Claire Perry: I know you support the simplification of the process.

Gillian Guy: We do indeed, and we are working with Government to try and make sure it works first time as opposed to picking up problems later. It would suit our purposes if people did not need as much advice, but the situation we are in is that they do. Until those steps are taken we can’t do is withdraw the advice.

Q131 Yasmin Qureshi: Finally, if the MoJ has its way, a number of areas which currently receive legal aid will be taken away. How do you feel? Are there current systems in place or places which could step in and do the work that other centres used to do? Are there viable alternatives at all in the system for those areas of law which are no longer going to be legally funded?

Gillian Guy: I don’t think there are free alternatives. That, in a sense, is the conundrum that we are in. The fact that something comes out of legal aid expenditure and is no longer financed means that either some other
department has to pick it up as a social issue or it doesn’t get picked up at all. The alternative for these people is not, I would submit, to go and pay for legal advice because that is what led them into the situation in the first place. They also value, I would say, independent advice. I know that the Green Paper talks about things like Jobcentre Plus being able to give advice. Apart from the fact that they are not in the business of doing so, because they give information, they are not necessarily the first place that people trust when they are looking for that advice and I have not noticed that any extra money is going into Jobcentre Plus to enable them to do that. I think the conundrum is that it is not free. Volunteers are not free. We could double our volunteer workforce by campaigning for volunteers to come forward, and we are very lucky that they haven’t all drifted away, but we have to pay to manage that, to supervise that, to make sure that they are trained and to make sure that they have the information that people can rely on. So I don’t think there is a free place to go.

**Julie Bishop:** Just to add to what Gillian has said, in the past, Government has contracted with agencies like ours because we provide more than just the £1 that you get. As Gillian said, they have done some costings. We also commissioned a savings document a couple of years back where we found that for every £1 spent at a law centre it resulted in £10 of additional benefits. The point I am trying to make is that when a client comes to a law centre or a CAB, we are dealing with their legal problem but we are part of our local community. They come to us mostly because their neighbour or someone else has said, “Come here.” They are not people who look up the internet and say, “Oh, I’ll find my law centre.” A community member or a relative has brought them to us. We are then able not just to address their legal problem but to plug them into other support mechanisms that can help them in their life. At a time when there are major changes happening across Government, across policy programme, at the heart of a lot of that is personal responsibility and self-reliance. They often need to start somewhere. They need to start at a trusted organisation.

We may be dealing with a legal problem but, in fact, we are a key part of that path to people getting back on to self-reliance and being responsible for themselves, being plugged more effectively into their local community and into other support. We would argue that, in taking away a cost saving for a legal matter, you are actually taking away a lot more. You are taking away all our connections. You are taking away all the other money we leverage. At Law Centres, for instance, clearly we are madly thinking at the moment how we survive these cuts. We are in talks with everyone, but I need to tell you—

**Paul Newdick:** Not in relation specifically to the Green Paper, but as LawWorks has lost its funding from the Ministry of Justice we have been attempting to talk to other Departments in relation to the work that we do. So far we have had no positive response at all.

Could I comment on what would be left? What we are talking about here is a dismantling of an infrastructure which has fantastic leverage. You lose all of that if the infrastructure goes. We are talking about people who do this sort of work because they are very committed to it, and they give more than their job’s worth in terms of the work that they do. Also they can leverage to obtain a massive amount of free legal advice which would not otherwise be available. Through LawWorks we deliver something like 40,000 pieces of advice a year, but we have to do it within the infrastructure because there is no other way of delivering that. That will go at a stroke. There are many other instances of where the infrastructure disappearing will mean that there is no ability to leverage other help and assistance which is free.

**Gillian Guy:** I just wanted to come back on your question, Sir Alan. We have had talks with other Departments because, as members of the Committee may know, as an organisation we wanted to do that as soon as the comprehensive spending review was thought of, to try and get some cohesion for how that would impact on people, particularly our clients. I would say that we have had open ears to talk about things. We have talked about the reform of the benefits system. I think we have been welcomed in terms of giving some input to that. The difficulty is in getting Departments to talk to one another, not necessarily to us, because there is a holistic approach required here. In terms of early intervention, to save those problems arising in the first place, we as an organisation are trying to get into prevention as well as cure and the Government would be well placed to try and do some of that as well. I can understand an argument that says, “This isn’t just the MoJ’s issue.” I have some sympathy with the argument that says, “If we are going to sort out legal aid then maybe this is a social issue that needs to be picked up somewhere else.” But that somewhere else has to be identified, and that is a Government-wide responsibility.

**Q133 Karl Turner:** Finally, would it be an outrageous, over-the-top, suggestion for me to make that, collectively, you are fearful that the system really, really will collapse if these proposals go ahead? Is that outrageous or not?

**Chair:** That could be called a leading question, but have a go.

**Paul Newdick:** It already is. There is talk about, “How is it all costing so much?”, but you have to remember that civil legal aid has gone down. The legal aid bill goes up but it is because of criminal legal aid. Civil legal aid has gone down. I have seen several law centres that have had huge difficulties as a result of the way the payment through the LSC has been made. There are many that have already closed and there are some very much on the brink of closure, even with the funding as it is now. I don’t think there is any
doubt that this will disappear as a service if these cuts take place.

Q134 Chair: Ms Bishop, you said earlier that you were looking at every possible way of surviving?

Julie Bishop: We are, indeed. I think law centres commenced 40 years ago because this service was not available. They were helping people who were working with unscrupulous landlords. Indeed, there will be this need again if these cuts come through. When I was saying we were talking everywhere, we were of course talking to law firms and to other philanthropic agencies to work out to what extent it is possible to go back 40 years. What will be left for us to do? What sort of service are we going to be looking at? I would suggest that some law centres will certainly survive, but they won’t be picking up what I would regard as the Government’s responsibility to serve the poor. We will be a stop-gap measure; we won’t have the impact that we have now.

There was a question earlier about costs as well. There is something I just wanted to add to that. An example of costs within the MoJ is that education at a cost of £1 million is seen as coming out of scope. Every young person who is excluded from school—one young person—costs £68,000 to Government. More importantly for the MoJ, 72% of prisoners have been excluded from school and only less than 10% of students are excluded from school. That saving of £1 million within the MoJ itself is going to have dramatic costs within the MoJ. There are these areas we are looking at that we are representing that we believe are a wanton waste of Government money. We don’t believe it is a way to streamline. We think it will cause greater rises in costs within the MoJ.

Q135 Chair: And CAB?

Gillian Guy: Just going back to whether a question is outrageous or not, we are not in the business of shrud waving and saying that the Citizens Advice movement is about to go completely out of existence, because we will fight tooth and nail to retain it because of its importance in the social fabric. I hope that people will join with us in doing that and have some confidence in that.

I think there are some unforeseen consequences and impacts here—I have termed them false economies—that need to be looked at, and looked at very seriously before it’s too late. The costs will come down the track. We appreciate, as a responsible organisation, that there is a deficit to be dealt with. We appreciate that there are cuts to be made, but just looking at the cumulative impact of those and the costs that they will generate seems to us to be very important indeed. Remember that the cumulative impact seems to be hitting the same group of people time and time again, so their situation will worsen. We think our demand will increase and continue to increase as a result of that.

Chair: Thank you very much to the three of you. The Committee is very appreciative of the valuable evidence we have had this morning. Many thanks.
Monday 7 February 2011

Members present:

Sir Alan Beith (Chair)
Mr Robert Buckland
Ben Gummer
Yasmin Qureshi

Examination of Witnesses

Witnesses: Rt Hon Sir Nicholas Wall, President, Family Division, Rt Hon Sir Anthony May, President, Queen’s Bench Division, and HHJ Robert Martin, President, Social Entitlement Chamber, gave evidence.

Chair: Sir Anthony, Sir Nicholas, Judge Martin, we are very glad to have you with us this afternoon to help us with the work we are doing on access to justice. We obviously recognise that you all hold very senior judicial positions which will affect the kinds of things on which you want to comment or perhaps how you want to comment on them but we will fully understand that. There are two members who might have interests to declare.

Mr Buckland: Thank you, Chairman. I have been a practising barrister for nearly 20 years, primarily in the field of criminal legal aid. I still have a practising certificate but I don’t have any new cases at the moment. I sit as a Recorder in the Crown Court.

Yasmin Qureshi: I was a barrister before becoming a Member of Parliament. I still am but I have returned my practising certificate. Before that, I received receipts from criminal legal aid as well as from some civil work that I used to do.

Chair: Thank you very much. I now turn to Mr Buckland to start the questioning.

Q136 Mr Buckland: Yes, thank you. We are focusing today, gentlemen, on access to justice and the potential impact of the proposed legal aid reforms to that. I would like to open with some general observations with which you may be able to help the Committee. It has been said, and in fact the statistics seem to bear it out, that we are spending more per head in England and Wales on legal aid than in other comparable jurisdictions, whether they be common law or jurisdictions within Europe. I would be grateful for any thoughts you may have as to why that should be, first of all.

Sir Anthony May: We are here, I hope, to speak on account of our respective major jurisdictions. I am President of the Queen’s Bench Division and I am here principally on account of the Administrative Court. Sir Nicholas Wall is here on account of the Family and Judge Martin on account of Tribunals. We obviously have experience of other parts of the business and I dare say that criminal legal aid is a contributor to the large amount of money that is spent on legal aid. I would not myself reckon to say very much about criminal legal aid today.

Mr Buckland: Very well.

Sir Anthony May: I would, however, say that I think there are diverse reasons for the expenditure of legal aid in various parts of the judicial system and they are not all the same. I am personally convinced—and this is a personal statement and not a representative statement—that one function which necessarily increases expenditure, be it legal aid or private expenditure, is the time that cases take. We have had clear experience over the past 10, 15, perhaps 20 years, where cases which, 20 years ago, would take three or four days are now taking two or three weeks. In some parts of the justice system there is also a multiplication of complexity and a multiplication of the number of parties. It is fairly obvious that if you have a very complex criminal case with six defendants, each of whom is separately represented, you are going to have six lots of legal aid on a case which, shall I say, if it were more economically prosecuted would not be so expensive and would not last so long. That is a statement outside my specific sphere but I think all of us have experienced that. When it comes to the Administrative Court, cases in that court on the whole do not last a very long time. Cases in excess of a day are relatively rare, but expenditure on legal aid where it exists in the Administrative Court occurs in large measure because there are so many cases. One case lasting a day is going to cost a day’s amount, but 5,000 cases each lasting a day are going to cost a great deal of money, particularly where some of those do not come to court. I don’t know whether the President of the Family Division would like to enlarge on that.

Sir Nicholas Wall: The only point I would add in addition is that there has been a very substantial increase in the volume of work in the Family Division in the last few years, particularly in the public law sphere and, of course, that is outwith our control.

Judge Robert Martin: It may, in part, be a function of the amount of legislation and regulation. I can give you a specific example from my own tribunal, which, two years ago, was dealing with something like 240,000 cases a year. This year we expect to reach nearly 400,000. The main driver in that increase is a Government programme, Welfare to Work, and the conversion from incapacity benefit to employment and support allowance, which has driven most of that increase.

Q137 Chair: I have been toying with the thought that the Departments which created a great deal of extra work should perhaps be a source of funds for the costs arising from it. If it had been on their budget they might start to notice.

Judge Robert Martin: In the case of the Department for Work and Pensions it does, in that the Ministry of Justice, to my understanding, cross-charges some of that; but where there might be scope for change would
be if the charge made reflected the quality of the original decisions that are coming before the tribunal.

Q138 Mr Buckland: That was a very interesting comment you made about the cross-funding. I don’t know whether, Judge Martin, you may be able to help us on where we can get hold of those figures, because on the most recent analysis of legal aid for 2008–09, for legal help with regard to welfare work, I think just over £27 million was spent by the LSC on legal help. The proportion for legal representation was dramatically smaller than that, it is fair to say, but I thought that figure was quite striking. I don’t know what your view is on that.

Judge Robert Martin: Striking for its modesty?

Q139 Mr Buckland: I thought, first of all, the difference between representation and help was striking, but what it said to me—and you may correct me if I am wrong—is that far too often the error, the mischief if you like, is further back in the system. There are errors within the DWP and the whole system itself, which then have to be ironed out by the lawyers. Would that be a fair characterisation of the situation?

Judge Robert Martin: I think so. A theme that ought to occur throughout the consultation paper is to make intervention in terms of public funding where it will have the most consequence. That might be towards the start of any dispute or case rather than further down the line, because, if it can be resolved very early on in that process, it is probably cheaper and to the benefit of all concerned.

Q140 Mr Buckland: As I say, if you do have access to those figures we would be very grateful.

Judge Robert Martin: I will endeavour to forward those to you.

Mr Buckland: I am very grateful, Judge Martin.

Q141 Chair: You might be interested to know that in previous times the Committee did look in some detail at the work of entry clearance officers, particularly because the large number of successfully challenged decisions suggested there was something wrong with the decision-making process.

Judge Robert Martin: Yes.

Q142 Mr Buckland: Following on from that particular area, I have mentioned the figures about legal aid being higher than other jurisdictions. The converse of that, as shown by a study commissioned for the Ministry of Justice by the university of York fairly recently, showed that in contrast to other countries, the costs of judicial administration and the courts were lower. Do you think that the proposed cuts to legal aid could have an impact upon costs within the court system?

Sir Anthony May: Yes. I do, and I think it is variable between the jurisdictions that we represent. If public funding of claims in court is reduced, there will be an increase in the number of unrepresented litigants. On the whole, there are some very good unrepresented litigants, who present and prepare their cases well, and who concentrate on the main issues, but there are a large number of them who do not and who therefore necessarily increase the time and, to some extent, the expenditure that the court system has to spend on them. It is, however, I think, variable between jurisdictions. Sir Nicholas Wall can tell you about what happens in the Family jurisdiction.

I am fairly clear that, if there was a reduction in public funding of classes of case that might come to the Administrative Court, yes, there would be an increase in the number of unrepresented litigants, but it would, to some extent, be balanced by a reduction in the total number of cases with which the court had to deal. It is quite clear that in some respects litigation is engendered, at least in part, by the very availability of public funding, and if public funding was not available some of these cases would not reach the court at all. That may be a good thing or it may be a bad thing. It would certainly be a bad thing if meritorious cases were unable to be brought when they should be brought, but the experience we have is that quite a large part of our statistically difficult list is occupied by cases of little merit. If some of those never arrived, there would not be much detriment to access to justice. The Family position, I think, is different.

Sir Nicholas Wall: In family law, if public funding is removed from private law applications, which is plainly on the cards, then there will be a massive increase in litigants in person. If you want maintenance or to be maintained, or you want to have contact with or look after your children, you are not going to be prevented from doing so by an absence of public funding.

We are doing our best in the private law programme to ensure that, at the first point with any child case, the District Judge and the CAFCASS officer attempt to resolve the issue, identify the issue and, if necessary, settle it. There is undoubtedly going to be a cadre of insoluble cases which are going to take much longer. They are going to be much more difficult to try and the litigants in person will proliferate. I think it is quite clear. The Green Paper does not recognise that as a problem, which undoubtedly does exist. Every day of the week, if you talk to any judge who tries family cases, you will find parents appearing in person. Sometimes, in a very difficult case, the child is represented but the case takes longer and it is much more difficult. You have to explain; you can’t take shortcuts. You have to explain, to be courteous, and cross every “t” and dot every “i”, and that takes a great deal of time. It will take more time in the family justice system.

Q143 Ben Gummer: I would like to follow up on that. I do not want to put you in a difficult position, but the Ministry of Justice has claimed to this Committee and to others that the offset, as they have suggested, in the time that you will spend on litigants in person will be effectively balanced so that the cost of the court in time and money will be equal. Everyone but the Ministry of Justice has professed some surprise at this. Do you agree with them or not?

Sir Nicholas Wall: I share the surprise.

Sir Anthony May: I share the surprise in part, because I do think that to some extent there will be a balancing
out. I think the likelihood is that if legal aid was withdrawn in Administrative Court cases one needs to identify what they would be. You would get an increase in unrepresented litigants and those individual cases would take longer and require more court, judicial and administrative time. But I do actually believe that there would be fewer cases.

Sir Nicholas Wall: One of the other difficulties of course is ancillary relief. Private law is not limited to the choices of children. It is a question of money. If married parents separate they want to sort out their finances. One of the aspects which disturbs me most is not only the proposed withdrawal of public funding from that whole sphere but also the fact that legal advice will not be available. We in the family justice area rely very strongly on the lawyers to give sensible, practical, down-to-earth advice which settles cases. Most people settle their cases. It is only a minority who fight. But, with the absence of any advice, it seems to me the likelihood is that more cases will be contested. More cases will be contested on the basis that they have no legal representation. That will take longer, be more difficult and will slow the whole process down very substantially.

Q144 Chair: I was wondering if Judge Martin thought the position of unrepresented litigants was different in the tribunals sphere, given that many were surely created on the assumption that they would not require representation.

Judge Robert Martin: The position varies across tribunals. At the moment legal aid is not available for representation in many tribunals. In the Social Security Tribunals, 72% of appellants are not represented at the moment. I think the proposal to reduce legal help will have a big change. It will not affect the number of appeals that go forward as much, but it will change the nature of them. We will see more people with cases with no prospects of success because they have not been filtered out, as they are at the moment through good advice. We suspect that many citizens with winnable cases will not reach the tribunal because, again, they are not getting the effective support at that early stage. The absence of legal help also means that cases will tend to be less well prepared for the tribunal, which will extend the amount of time we have to invest in the case to make sure that a good outcome is reached.

Q145 Mr Buckland: Can I put some questions specifically to Sir Nicholas because they relate to private family law and you have already touched on it? This Committee is particularly interested in the focus in the Green Paper upon the definition of domestic violence. It seems, on the basis of the Green Paper proposal, that that is going to be a key, if not the key, criterion for the determination of whether or not a case is in scope. It has not escaped this Committee’s notice that there seem to be several definitions of domestic violence, to say the least, between different areas of Government and in particular disciplines. I would be very grateful for your view as to where we are with the definition of domestic violence. What is your view of it and what do we need to do to create a better and clearer
criterion?

Sir Nicholas Wall: I think the Government is very ill advised to concentrate on violence in the context of domestic violence. “Domestic abuse” is the term which we currently use because much domestic abuse is not violent. It is psychological, often financial and emotional; it is not physical. There is a perverse incentive, it seems to me, in the proposals put forward in the Green Paper that people will be obliged to take out injunctive proceedings against a former spouse. They will be obliged to litigate in order to open the gateway to legal aid. As you know only too well, so much domestic abuse is hidden. It is not brought into the public domain. It is not brought forward into police action. It is not brought into prosecution. So there is a perverse incentive not only to litigate to obtain an injunction but also to make allegations of domestic violence as opposed to abuse in order to open the gateway to legal aid. I think that is very detrimental.

Equally detrimental is the fact that we won’t apparently be good enough, according to the Green Paper, to settle. Most injunctions these days are dealt with by way of undertakings. A man will frequently say, “I undertake not to assault or molest in the future, irrespective of my conduct in the past.” That undertaking is accepted by the court and the case proceeds on the basis of that undertaking. That will no longer be possible. We will be forced into litigation on injunctive issues, and if the Green Paper stands we will be forced to deal with abuse in terms of violence, but abuse is much broader. The ACPO definition of domestic abuse is much, much broader than physical violence. Indeed, common sense dictates that. We all know that domestic abuse is much broader that domestic violence. It is most unfortunate, it seems to me, that the Government has concentrated on violence in this context.

Q146 Mr Buckland: What would you make of the other issue that there seems to be a lack of clarity about whether it should be violence between adults as opposed to involving the children of the family?

Sir Nicholas Wall: Absolutely. At the moment, as I read the Green Paper, it is limited to the applicant. Of course much domestic abuse is directed at children and third parties, and it seems to me there is a lack of clarity in the proposals. I would be very reluctant to see a system which denies access to justice to the most needy people, who are in desperate need of assistance because they are the victims of abuse but they have not ticked the right boxes or gone through the right hoops.

Q147 Mr Buckland: As I read it, the criteria involve a time limit of 12 months. In the preceding 12 months there would have had to be proceedings. Conceivably, on 31 December 2009, if there had been concluded proceedings then and violence or abuse on 1 January 2011, there would be a problem in terms of scope.

Sir Nicholas Wall: I read it the same way. All deadlines produce anomalies, but at the moment one deals with a case purely on the basis of merit and judges are usually very good at assessing merit. It
troubles me that this is an artificial standard being imposed.

Q148 Mr Buckland: There has been much discussion again about mediation. I would be very grateful for your assistance here. Where in the system do you think that could come in, and can mediation operate without legal help? In other words, could it just be a direct alternative to any legal input?

Sir Nicholas Wall: Mediation works best with legal help. Most mediators will tell you that. I think. They like their clients to have good legal advice, particularly if you are dealing with all issues in mediation and you are mediating on money as well as on children. The Government is very keen on a pre-action protocol, which means that anyone who is approaching for a private law order has to go to a meeting or seek a meeting with a mediator, if it can be arranged, within so many miles and so many days of issuing the application. That may take some people out of the system. Mediation is simply one of many very good alternative dispute resolution procedures. As I have already mentioned, it is one of the mediators get their mediations because, at the first appointment, the Judge, District Judge or CAFCASS officer says, “Why don’t you try mediation to resolve this dispute? It is much better that you should do so.” Mediation is one of the factors in alternative dispute resolution, but it is by no means a panacea. To be fair to the mediators, they will say to you it is not a panacea. They will say it is very good for a particular category of case where both parties are willing to discuss the issue frankly and openly and make concessions. It is not a panacea in any sense of the term.

Q149 Ben Gummer: On that point, the Lord Chief Justice—I do not want to misquote him—has suggested that the adversarial system is not helpful in almost any circumstance in the resolution of private family law cases. How can we fill the gap, therefore, between that suggestion and the idea that mediation would solve everything, or not? Of course, that is what the Lord Chancellor has picked up on in his submissions to Parliament.

Sir Nicholas Wall: There are times when the adversarial approach is inevitably. For example, if you have to make a finding of facts, then you have to have the two cases put before you and decide between them. There is no alternative. We have long recognised that in many family law disputes, particularly relating to children, the adversarial system is unhelpful. It encourages parents to recriminate and use their children as ammunition on a battleground. As I say, all the effort is going into alternative dispute resolution. If it fails, and it will fail in a number of cases, then there will be no alternative but for the judge to decide the issue. You will be left with this cadre of very difficult family cases on which we will have to adjudicate. They will take time and they will be slow, difficult and expensive.

Q150 Chair: Is there scope to take that further? Could that be done to a greater extent and thereby reduce the requirement for a whole series of representatives: one for each parent, one for the child, and all to argue over things which the judge could surely perfectly well ask the parties?

Sir Nicholas Wall: In private law proceedings the child is very rarely represented. Only if the case is one of extreme difficulty is the child separately represented. Private law disputes tend to be parent against parent. As I say, all the effort is going into alternative dispute resolution. If it fails, and it will fail in a number of cases, then there will be no alternative but for the judge to decide the issue. You will be left with this cadre of very difficult family cases on which we will have to adjudicate. They will take time and they will be slow, difficult and expensive.

Q151 Ben Gummer: Can I press you again on that? The point is that you said it has been grafted on to the common law. Is there something that we could do that is rather more radical about the distribution of family justice than just to accept we have to have an inquisitorial system?

Sir Nicholas Wall: Of course, we are waiting for the Norgrove review. Judges in public law cases are already case managers taking a much more active inquisitorial role. There is a recognition that in private law cases ADR has a very substantial role to play. The difficulty is, what is the alternative? Is the judge to become a French inquisitorial judge, who gets off the bench, goes round and opens the fridge and has a drink with the child in the home? We are where we are. We are part of a common law system. My mind is entirely open on that, but that would be a very radical change if we were to hive ourselves off and become exclusively inquisitorial.

Q152 Yasmin Qureshi: As somebody who is very much a champion of the adversarial system, in relation to family law matters there is talk about civil legal aid, but is it not right that in the last two or three years there have been a lot more cases where children have been taken into care which has resulted perhaps in a lot of money being spent in civil legal aid funding for family law cases? I have certainly had experience of a lot of councils saying to me that they have taken a lot more children into care as a result of the Victoria Clinkiel and Baby P case. Has that not been one of the factors that has increased the amount of civil legal aid?

Sir Nicholas Wall: It has increased the amount of public funding—there is no doubt about that—but there is no proposal in the Green Paper, I am relieved to say, to interfere with that. When the State intervenes in the life of a child the parents have a right to be represented, as does the child. The child is
always separately represented in public law proceedings. The State has to justify removing the child from parental care and there are very clear criteria laid down for that. What is surprising about Baby P is that one expected a peak after Baby P, but one has not had it. There has been a peak and it has been maintained. One expected a peak and then a trough again and for things to go back to normal, but they haven’t. The work has increased exponentially throughout the period since Baby P. I don’t know whether that has been the same in other fields, but certainly it has caused enormous difficulties in public funding because, as you rightly say, a huge amount of money has had to be spent on local authority intervention and these cases are all publicly funded. Local authorities have become much less risk averse.

Q153 Yasmin Qureshi: Discussing areas of law which the Government is proposing that legal aid will not cover any more such as education, employment, housing and immigration, it has been suggested by the Legal Aid Practitioners Group that the proposal to remove funding for education would cause a lot of problems, because at the moment 92% of education cases are successful and the majority of them relate to young people with special educational needs. Would you fear that there would be a real adverse effect on certainly that particular area of the law if legal aid was taken away?

Judge Robert Martin: Yes. I agree that it will have a major impact on the Special Educational Needs Tribunal. It is a high rate of success, but what would count as success is any change in the original decision which is of benefit to the appellant. Without legal advice, because representation would not be covered, there is a risk that more polarised positions would be taken and there would be less willingness to compromise or go down the mediation route. The unadvised litigants in person would not really be in a position to evaluate an offer that had been made or compromise their intent to say, “Well, we go for the whole aim of our claim.” There will be adverse effects, not only because it may make it more antagonistic, but in my view because it would leave the unrepresented appellant feeling that the proceedings have been less than fair because of an inequality of arms. On the one side, the local authority will have access to educational experts and will have reports prepared. On the other, you are put in that defensive position of only being able to challenge or dispute someone else’s evidence. You would not be in a position to put forward alternative proposals by being able to afford your own expert evidence. So I think it will have an adverse impact.

Q154 Chair: Isn’t a 92% success rate an indication of an appalling decision-making process by the body against which the appeals are being made?

Judge Robert Martin: It may be that the local authority takes the view that the child concerned doesn’t warrant any special assistance. The parents may feel that the child should have 24 hours a week special teaching. If there is a success in gaining one hour, then it may rank as “success”. That might reflect that it has changed the original decision but only partly in favour of what the appellant would see as a fair outcome.

Q155 Yasmin Qureshi: Continuing on from that, we have the Immigration Tribunals where quite often there are quite complex issues such as nationality, asylum and others. Do you foresee that, if there wasn’t legal representation, that may lead to possibly more appeals and applications for judicial review to the Divisional Court?

Judge Robert Martin: Yes. Perhaps we could take that in two parts.

Sir Anthony May: Could I try to deal with that? It is quite complicated, and I hope you will forgive me if I give some background and expand on the question a little. The Administrative Court two years ago, in the calendar year 2009, had nearly 16,000 claims of various sorts. Of those, about 7,500 were asylum claims or similar. When I became President of the Queen’s Bench Division, the Administrative Court was in danger of being overwhelmed, administratively, by asylum-related litigation. The Government legislated by, among other matters, repealing section 103A of the Nationality, Immigration and Asylum Act 2002. That alone had been responsible for about 5,000 of the 7,500 cases before 2009 which were classed as reconsiderations. They were, in essence, last ditch—perhaps that is not a very fortunate expression—or end-of-the-road applications attempting to establish a claim for asylum where that claim for asylum had failed before the Secretary of State, had failed before the Asylum and Immigration Tribunal, as it then was, and had failed in an appeal system. The form in which those cases came until two years ago was by means of reconsideration applications under section 103A.

At the same time as the Tribunals Service was set up in its modern form, with First-tier Tribunals and Upper Tribunals, the Asylum and Immigration Tribunal went to the tribunals system and there was granted on to it the standard First-tier and Upper Tribunal appeal system. In asylum cases, that is supposed to operate, in the main, with the Secretary of State’s decision, an appeal to the First-tier Tribunal, an appeal to the Upper Tribunal if permission is granted—I am sorry to be a bit complicated but it is quite important to get to the end of this—and then, if there is a point of law which should go beyond, an appeal to the Court of Appeal. That would be an orderly progression of appeals in cases where permission is granted through the tribunals system up to the Court of Appeal, and the Administrative Court would not enter into it at all, thereby reducing this very large number of cases coming to the Administrative Court.

It was shown that the nearly 16,000 cases in 2009 reduced to 13,500 cases in 2010. But there has grown up a kind of surrogate version of the reconsideration application, the administrative burden of which we now have to shoulder, which are applications by failed asylum seekers who are on the verge of being removed by UKBA removal activity who apply, very often at the last moment within just a few hours before the plane is about to depart, to a judge of the
Administrative Court seeking a stay on their removal. Sometimes we have to deal with 20 or even more such applications every day when there is a chartered flight going out of Gatwick, Stansted or wherever it is. These, as it were, are a substitute inflow of these latter-day applications, a large number of which have no merit whatever but a few of which do have merit. Let us say that 85% of them—that is a figure I rather pluck out of the air but it is of that order—are of no merit and are in cases where an appropriate decision-making process, including an appeal and the opportunity of applying for a second appeal, has taken place.

Against that background, you have the proposal that the Government has put forward to remove legal aid in immigration cases but to retain it in asylum cases. In the main, the cases that I am talking about are asylum cases, but the critical point is that at the moment the law is that you cannot bring judicial review proceedings to the Administrative Court from a refusal of permission to appeal from the lower First-tier Tribunal to the Upper Tribunal. That applies just as much in immigration cases as it does in asylum cases.

That is the law in England and Wales, but it is not the law in Scotland. The Scottish courts have reached a different decision on this particular point. The disparity between the law of England and Wales on the one hand and Scotland on the other is coming up for decision in the Supreme Court in March. If the Supreme Court decides that Scotland is right and England is wrong, then there will be the opportunity for all these cases which used to be reconsiderations to come by way of judicial review to the Administrative Court.

I am sorry to have taken so long, but this is the point. In the legal aid context you have one fact and one prospective possible fact. The last-minute applications in the case of charter flights are brought with the benefit of public funding and would, unless a change is made, as I understand it, continue to be brought with the benefit of public funding. These are cases that have been through the system, where 85% of them are of little or no merit. I personally think that the idea of making it more difficult for the Secretary of State to refuse the question of awarding costs doesn’t arise, generally speaking, if an application for permission is granted after refusal by the single judge or not—in some cases where I have had to return home empty handed—your suggestion has a lot of merit. Do you think that could be extended to other areas? I know that, generally, there is a permission procedure when it comes to applications for judicial review, but could that principle be extended to other areas in this review?

Sir Anthony May: I am sure that the Secretary of State is deeply interested in the Cart proceedings.

Mr Buckland: As somebody who has been in the Court of Appeal in criminal cases with both scenarios, Sir Anthony, either having 5,000 or of those granted after refusal by the single judge or not—in some cases where I have had to return home empty handed—your suggestion has a lot of merit. Do you think that could be extended to other areas? I know that, generally, there is a permission procedure when it comes to applications for judicial review, but could that principle be extended to other areas in this review?

Sir Anthony May: I am sure one can think about it. All judicial review proceedings require permission. Generally speaking, if an application for permission is refused the question of awarding costs doesn’t arise, but a lot of these applications will have been publicly funded and therefore will have cost the Legal Services Commission money. I doubt, off the top of my head, if a proposal to limit public funding for all judicial review applications, irrespective of their nature and merit, would receive much backing. There is such a wide variety of these applications that one would find by a single judge on paper. The system is that public funding for the first instance proceedings for a defendant in criminal proceedings who is convicted and sentenced extends to the giving of advice in relation to an appeal and will therefore sustain the lodging of an application for leave to appeal to the Court of Appeal Criminal Division. That happens every day of the week. If that application fails on paper, the application can be renewed orally before the full CACD, but that is at risk as to public funding. The way it works generally is that the application is made without the benefit of public funding. If it succeeds, public funding will, generally speaking, be granted for the succeeding appeal, but if it fails the lawyers don’t get paid for what they have done.

I don’t see why an equivalent system couldn’t be put in place in relation to these late asylum applications. They are actually applications for a stay in an asylum case. So the proposals would result in them being publicly funded as they are at the moment, but if that particular variety of application did not qualify for legal aid, unless it was successful and the judge said so, then the amount of legal aid on those cases would be reduced by about 85% and there are 5,000 of those cases every year. It seems to me that that is a proper means of doing it.

I have to declare, as it were, that my administrative interest is to reduce the number of these cases. That has nothing to do with how they should be decided. We just have an influx of these cases that it is very difficult to deal with. In a sense, by virtue of my office, I have an interest in that, but it seems to me that that is something which should be considered. I am sorry to be so long.
it very difficult to put in place something as sweeping as that.

On the other hand, I do think that, if an economical system could be put in place where legal aid was available for meritorious claims but not available for claims which had no merit, that would be of advantage.

Q158 Ben Gummer: You have almost answered the question I was going to ask. The contention of the Lord Chancellor is that the Ministry did not want to take judicial review out of scope precisely for the reason that you have mentioned, but you have given one instance where it is perfectly possible to do so and not jeopardise the rights of citizens apropos their relationship with the State. By extension, there must be other areas within judicial review where it is possible to do that without jeopardising that relationship. Sir Anthony May: Thinking on my feet, if you have an asylum decision by the Secretary of State which then is appealed to the First-tier Tribunal and the appeal fails, and there is then an application for permission to appeal that decision, it is at least a question worth being posed whether it is possible to do that without jeopardising that relationship.

Q159 Chair: Can I turn back to tribunals for a moment? There are two things I want to say about tribunals. First of all, they have expanded with the State’s decision-making activity and its willingness to grant some kind of appeal mechanism for decisions which have a big impact on the lives of individuals or families. Generally speaking, many of them, when they were created, were meant to be user-friendly and not to generate the sort of proceedings that would be normal in a court setting in a specialist field, whereas you have some of the legal bases for the court of law. Do we no longer view tribunals in that light? Are we simply now treating them like any other court of law?

Judge Robert Martin: How times change. The complexity of the law has multiplied. When Social Security Tribunals were first set up, at that stage I was an average solicitor. I have a copy of what was encapsulated in a very slim handbook. The reference materials that we issue to our tribunals now extend to 7,500 pages spread over six volumes. The ability of tribunals to act in that simple, accessible, informed way is not assisted when the law itself becomes increasingly complex. We endeavour to live up to the original reasons to justify tribunals being informal, but that is against the formality of the court. For many of the people who appear unrepresented it is still a very daunting and stressful experience, no matter how friendly we try to be.

We still preserve the notion that tribunals should be expert bodies and therefore it is easier for a person who has not had the benefit of professional representation to set out their case, to be enabled to present their case, because the tribunal itself will adopt an enabling role. But there are limitations to what we can do. One of those limitations is that this is a criticism of the proposal in the consultation paper which says that you should look at the ability of a citizen to present his or her case. What we really need is assistance in the ability to handle the entirety of the case, because so much groundwork has to be done before someone gets to the door of the tribunal. That is where I have a concern. The removal of legal help from so many areas of activity in the tribunal will set people off handicapped on their ability to win their case.

Q160 Chair: Will it bring more people into the tribunal because they have not been advised that their case has no chance of success in the tribunal?

Judge Robert Martin: Yes, because a general public awareness of tribunals is very low. Very little is put into public education of the law and how to seek redress for grievances. There is this risk that we will see many people who have been drawn to the tribunal believing it is the most appropriate forum to solve things, whereas it may be just a mistaken conception about the tribunal. Legal help is so important in that triage function of sifting out cases which can be redressed but not through the tribunal or the court, and assisting those cases where the tribunal or the court can assist to have the case prepared in a way that maximises the chance of success.

Q161 Chair: It is not always lawyers, though, is it? It is often trade union officials or welfare rights advisers who can point the client to the aspect of the case which needs to be brought out.

Judge Robert Martin: Yes. The majority of legal help in the social security field is carried out by welfare rights advisers and citizens advice bureaux. In the employment field, obviously trade unions are to the fore. One of the beneficial changes in the legal scheme over the year has been the extension of public legal funding to cases where specialist help is not necessarily that of a solicitor or barrister but someone who has particular expertise in that field, whether it is housing, social security, welfare or education.

Q162 Chair: Can the tribunal and its office and staff do more to say to people, “What the tribunal will want to establish in your case is whether or not X” — whatever X may be — “happened and that is what you will need to concentrate on and satisfy the tribunal on if you are to win your appeal”?

Judge Robert Martin: So much of a tribunal hearing at the moment is taken up with general information and education: what is going to happen next in the tribunal and what the tribunal needs to concentrate on. For the appellant, they are there because they feel that they have not been treated fairly and a decision has been taken that they don’t think is right, but they don’t necessarily have the ability to translate that into what the law might regard as the appropriate outcome for them. We spend a lot of time in each hearing explaining exactly what the tribunal can and cannot do. We endeavour to allow people to have their full say and, in effect, clear their chest of what they believe the issues are, but then to try and steer that into what the law allows us to take into account or ignore. With the removal of legal help, we will have to spend a lot more time explaining simply what the
tribunal is about rather than getting to the heart of the matter.

Q163 Chair: It has been put to us by one witness, and probably the same view is shared by some other organisations, that there is an inequality of arms in the tribunal situation if one side, whether it be a Government Department or an employer, is legally represented and the other is not. Do you regard it as an inequality of arms—an article 8 issue, if you like—or is that something that the tribunal can satisfactorily compensate for?

Judge Robert Martin: There is inequality of arms in different ways. The amount of preparation that can be put into a case varies according to the resources. If you are coming up against a Government Department, whether it is the Department for Work and Pensions, or a local authority in special educational needs, or I could extend that to say in an Employment Tribunal where the employer in effect is able to set off the costs of representation against tax, then there is a disadvantage in that way. There is an inequality of arms to that extent. The tribunal will endeavour to rectify that by assisting a disadvantaged party to present their case effectively, but we maintain a balance between trying to even up the two parties to the appeal without at the same time being overly seen as leaning over backwards in a way that might be perceived as bias in favour of one party rather than another.

Q164 Yasmin Qureshi: When parties come before a tribunal, I understand it obviously tries to offer as much assistance as it can, but of course, one of the problems is, when somebody is preparing their case for the tribunal, they need to have advice as to how to go about gathering their evidence to prove their case. If there is no legal aid or no legal mechanism, what system exists to help them?

Judge Robert Martin: In many cases where a social security appeal turns on a person’s state of health, we see an appeal letter or correspondence from the appellant which says, “My GP knows all about my health problems. You are quite free to ring him up and he will help you.” But the tribunal really isn’t in a position to pick up the phone, interrupt a GP’s surgery and say, “We have an appeal on at the moment.” Legal help comes in where the advice worker can say, “The tribunal won’t be doing that, but I can do that for you,” and possibly even pay for a short medical report. The person then arrives at the tribunal equipped with that evidence.

Q165 Ben Gummer: The Government seems to have advanced its case for reform with three statements which were repeated. The first is that there is a deficit, and we all agree with that. The second is that reform is possible cost-wise apropos the increase in the use of mediation. That has caused some surprise, as we agreed earlier. The third is that we have a very expensive system in this country. Yet their own evidence, presented to them by the university of York two years ago, suggests that in fact that is not a conclusion one could come to with great certainty, the costs of the courts in this country are considerably lower than in other jurisdictions, and it is an unfair comparison in any case because of the relative difference in deprivation in this country compared with some other common law jurisdictions. Could you comment on that last statement?

Sir Anthony May: I am not personally very well informed about comparative costs in other jurisdictions. What strikes a chord with me when you ask the question is the underlying implication that, if the cost of publicly funded legal representation is reduced, there will be an increase in the cost of publicly funded courts. I don’t see that happening because, in circumstances where, as with so many other public services, the cost of the court administration is running in the opposite direction and where there is no prospect, as we see it at the minute, of the number of judges being increased in any jurisdiction but certainly not in those jurisdictions with which I am concerned, it is perfectly obvious that the effect, it seems to me, is not likely to be an increase in the cost of the justice system but an increase in the pressure that is put on the judicial side of it and, importantly, on the administrative side of it. There has to be a danger that a rather indeterminate spin-off consequence would be that the actual quality of the justice which is delivered will be in danger of reducing. It may be in danger of reducing because the administrative preparation that is provided to the judges is not so great. It may be in danger of reducing, God help us, because the judges are under so much greater pressure that they have to do cases in a shorter time than they ought to be given, and that kind of thing. It is terribly important that a reduction in the expenditure on the justice system, however it is effected, can only take place in the end either by reducing the number of cases, which in certain instances is a possibility but in others is a complete impossibility, or in extending the time that these cases take. The only thing that one can do with the same number of cases but a smaller resource to deal with them is to extend the waiting times.

Sir Nicholas Wall: Can I just add to that? I do think there is not an adequate appreciation of the pressure that the family justice system is under at the moment already, with a succession of cuts and very low fees for lawyers. The pressure on the Circuit Bench and the District Bench, particularly, who do the majority of this work in the County Court, is enormous. I have great anxiety not just for the quality of justice but for the health and well-being of the judges if they are put under additional pressure.

Judge Robert Martin: As you say, one of the goals in the consultation paper is to refocus the funding on the most disadvantaged and the most vulnerable. I think the strategy adopted is completely ineffectual in doing that by focusing on categories of law rather than real-life individuals. If I can illustrate this, community care will be left within scope because it is to be directed towards those who are elderly, frail and disabled, but what would be taken out of scope is attendance...
allowance, which is a benefit designed for people who are elderly, frail and disabled. One of the differences may be that the payment of attendance allowance would allow an elderly, disabled person to remain in their own home. If you remove that, it has a knock-on effect because then they may be displaced into residential care, which is much more expensive. It seems to be a failure to refocus upon those who are the most disadvantaged and a failure to bring into account the knock-on economic effects of not supporting people, quite cheaply I believe, through effective legal aid.

Q166 Chair: Bearing that in mind, can I ask one slightly exasperated question? Why is it that a decision that someone needs attendance allowance can’t be well made in the first place and then subject to a process which does not necessitate a lawyer advising the person on what method he would have to employ to challenge the decision or a lawyer appearing at a tribunal in order to advocate a different outcome? Surely that very personal and very vital decision can be made in some better way, can it not?

Q167 Chair: Thank you very much. We are very grateful to all three of you for your help this afternoon.

Sir Anthony May: Simply as a matter of information, this week, a Sub-Committee of the Judges’ Council on behalf of the Judges’ Council is about to submit a written response to the consultation paper. I think the deadline is next Monday, and that deadline will be achieved. I have seen this document in draft. It covers a very large proportion of the entire consultation paper. I am sure that it will be published and be useful.

Q168 Chair: We certainly hope to take note of that and allow it to affect our thinking at the final stages of what is going to be a very short process, but that should be in time for us to do so.

Sir Anthony May: It will come to the consultation this week.

Chair: Excellent. Thank you very much indeed.

Examination of Witnesses

Witnesses: Campbell Robb, Chief Executive, and Head of Legal Services, Shelter, gave evidence.

Simon Pugh, Head of Legal Services, Shelter, gave evidence.

Chair: Mr Robb and Mr Pugh, welcome. We are very glad to have you giving evidence. You are respectively Chief Executive and Head of Legal Services at Shelter. Mr Gummer is going to start.

Q169 Ben Gummer: I will ask a general question. Most people who appear in front of this Committee and most people whose doors I knock on at weekends accept that there have to be cuts of some description in most budgets. With that in mind, how do you view the Government’s proposals on legal aid?

Campbell Robb: Thank you. Just to start from our perspective, it is worth pointing out that the civil legal aid budget has fallen year-on-year for nearly the last seven or eight years. We are not in an area where there has been a growth in the amount of money that is spent. In fact over the years the rights and support for legal aid in the areas in which we work have been salami sliced. It is not our place to comment on other areas of law particularly. We can only really comment on the ones where we are. Certainly from our perspective, we do not believe that there is much scope for cutting further in housing because it is a hugely complicated area and the type of legal support that many people need to avoid repossession, eviction or to get decent repairs is very, very important.

Q170 Chair: Repossession stays in, does it not?

Campbell Robb: Yes. We have just had some clarification about the evidence we gave to the Committee. The original proposals of the Government had been somewhat opaque and uncertain about what would and would not stay in. In fact we met the Minister earlier today and he gave us some more clarification. Quite a lot of the housing stuff now would stay in, so we are very pleased about that. There are other areas, clearly, where maybe some work could be done but we believe that in housing there is hardly any room for further cuts.

Q171 Ben Gummer: I don’t know if my experience is universal amongst colleagues, but certainly I should think two-thirds of my constituency inquiries are about housing benefit.

Campbell Robb: Yes.

Q172 Ben Gummer: Will the introduction of the universal credit and the simplification of the benefits system have a collateral effect on what you do?

Campbell Robb: We would hope so. In principle, we are very supportive of the universal credit. Until we have seen the detail of it, we would first of all have to see how well that works and whether housing costs are within the universal credit or not. There is some discussion about whether or not that will be the case. In effect, you would not need to cut the legal aid bill in advance of that because there should be a natural reduction in the number of cases because many of the cases in that area are about clarification or administrative error due to the complexity of it. We would definitely argue that you would have to wait to get through the transition of the universal credit before double-checking that, if you see what I mean, because you would naturally have that. We are worried that in that transition period you will get a lot of people wanting to challenge and understand what their legal rights are. We would want to be in a position to be able to help them.

Ben Gummer: Yes, that is a very important point.
**Simon Pugh**: If there is going to be a substantial change in the benefits system, there are always going to be issues with that change, even if the change is ultimately successful. There is going to be a transitional period where there is going to be uncertainty about how things are applied. People are not going to be sure of their rights and they are going to require advice. In the longer term, if the universal credit does work, then the demand will drop off and it will not be necessary to cut the scope.

Q173 **Ben Gummer**: Perhaps I could ask you one final, obvious question to which I am sure you will know the answer but it would be good to have it in black and white. The Government claims that of course there are lots of other organisations that can provide help and legal support to people free of legal aid.

**Campbell Robb**: Indeed.

Q174 **Ben Gummer**: What do you judge the capacity now to deliver that, and what could be done to increase that capacity so that at least the Government’s aims, if not the reality, can be realised?

**Campbell Robb**: That is a very good question. The first thing to say is that we do not give legal aid support to anyone who is not liable to get legal aid support. It is not funding a whole series of things that are not currently in scope. We are under intense scrutiny from the Legal Services Commission and others to make sure that we provide only that which exists. We provide a wrap-around service at Shelter that supports that legally-aided work with other advice and support for ineligible clients and people like that. Generally, I am quite fearful that if the Government was to go through with all of its proposals—the combination of the things taken out of scope and the introduction of a mandatory helpline—you would see a massive reduction in small localised providers. Shelter is a reasonably big organisation. We can maybe move things around and we are very lucky to be supported by public donations. We might be able to survive, but we would not be able to give the size and scope of face-to-face front-line advice that we currently give. That would be the impact on us.

**Simon Pugh**: I think there is a couple of points that I would add to that. First, the consultation paper’s own impact assessments say that something like 77% of the funding of the not-for-profit sector—and we are very much a part of that sector—would go under these proposals. In addition to that, if the telephone gateway comes in, something like 80% of cases would be diverted to that. There would be very little left to us. We believe that a substantial proportion of our funding will go from that, and it will be very difficult for us to sustain the holistic services that we provide without the legal aid income that forms an important part of the funding of our services. The second point I would say as a solicitor is that Shelter has a number of solicitors who provide advice to the public. The advice that we give in terms of court representation we really can’t do in any other way other than under legal aid. Without legal aid, clients don’t have costs protection. Conditional fee agreements are very difficult to come by in the sort of work that we do, and with pro bono work there is no costs protection for clients. It is very difficult to advise people to take cases to court without legal aid because they are at risk of costs if they lose.

Q175 **Chair**: I understand that 1 million people seek your help in one way or another in the course of a year.

**Campbell Robb**: They do.

Q176 **Chair**: But of those only 25,000 are people you can deal with under your legal aid contract.

**Campbell Robb**: Indeed.

Q177 **Chair**: So it represents a very small part of the total value of what you do for society.

**Campbell Robb**: Indeed, but it is a massively important one for a number of reasons. I should point out that 1 million people come to us for everything just from the very basic saying, “I’m a little bit worried.” The vast majority of those people are through our website. We get hundreds of thousands of people a month who come to our website for a bit of advice on a tenancy, a landlord or deposits and a whole range of stuff like that.

Q178 **Chair**: I send people to see you.

**Campbell Robb**: Indeed, and most of your colleagues do. We are grateful for them, but some of the most vulnerable clients that we work with, who are those that are most in danger of being evicted, repossessed or made homeless, are supported by this core bit of work, which is the legally-aided work. That legally-aided work is the most expensive part of what we do, and those people who need the most help are those that walk into our service and say, “I’m just about to be made homeless,” “I’m about to be thrown out,” or, “My landlord is evicting me and I think it might be illegal.” To work through the complexity of that case and the Government support to do that is such a significant part, and we can build offices and support around that, but, if you take that out, then our ability to do anything other than telephone and web becomes much more difficult for us. That is the issue. Some people absolutely need that sustained face-to-face legal advice. If we refer some of the people who referred to us may end up getting legal aid because of the nature of their case, and we just wouldn’t be able to help them in the same way without it.

**Simon Pugh**: Year-on-year, about 60% of the people we see in our face-to-face advice services are funded by legal aid. We help a lot more through our website, through information and through our helpline, but face-to-face advice services are about 60% legal aid funding.

**Campbell Robb**: To make another point, for many of those the legal aid allows us to stop that getting to court or stop that getting worse. A bit of early legal advice which says, “You’ve actually got a very good case.” To work through the complexity of that case and the Government support to do that is such a significant part, and we can build offices and support around that, but, if you take that out, then our ability to do anything other than telephone and web becomes much more difficult for us. That is the issue. Some people absolutely need that sustained face-to-face legal advice. If we refer some of the people who referred to us may end up getting legal aid because of the nature of their case, and we just wouldn’t be able to help them in the same way without it.
relatively small number against the total number we help, they are the most vulnerable and sometimes have the most multiple needs.

Q179 Chair: Do you have areas of the country where you do not have LSC contracts?
Campbell Robb: Indeed.

Q180 Chair: But you continue to provide advice.
Campbell Robb: Not in all areas; in some areas we do. Generally speaking, certainly since the Legal Services Commission started about four or five years ago, there have been, as I am sure you are aware, contracting processes. In the recent round of contracting, we lost contracts in some areas and other people won them. Shelter definitely tries not to leave any deserts, and the LSC has tried hard to make sure there are contracts in other areas. However, not just us but a number of providers are now the sole providers in one area. For example, in Cornwall and in Kent, we are effectively the monopoly supplier of advice. The changes over a number of years have meant that other suppliers have just not been able to stay viable. If we were then to be forced out of business in those areas, you begin to create deserts and that is one of our fears about these proposals.

Q181 Chair: Presumably there will be a smaller legal aid contract for the areas that are still in scope.
Simon Pugh: But the issue there is that a small legal aid contract is very unlikely to be viable. If only a very few matters are left per area per year, then it is very difficult to see how anybody could deliver that in any kind of sustainable way.
Campbell Robb: We already underwrite our Legal Services Commission with voluntary funding to make it viable in those areas where we work. We will put in donated income to underwrite the cost of the contracts.

Q182 Chair: That is really why I am trying to establish what you do in those areas where you don’t have an LSC contract. Are you continuing to help?
Campbell Robb: Yes. We might not have an open service where you can just walk in. We might be providing some local authority funded work to do support work, but there will be other providers in that area. We work very closely with Citizens Advice and other types of providers who may have won the contract in that area. There certainly are some citizens advice bureaux. If we are not operating in an area, we will almost certainly refer them to the citizens advice service in that area. We try to make sure that we are doing that.

Q183 Ben Gummer: Can I ask one supplementary on that? You say that conditional fee agreements are difficult to find. If I can play devil’s advocate, if you were to withdraw from the scene, would there be a growing business opportunity for those organisations that could provide them?
Simon Pugh: Not in the sort of cases that we deal with, no. A lot of the cases that we deal with are not money related, and the value of the ones that are—the disrepair claims and so on—is relatively small. The difficulty of getting insurance to cover the costs risk is quite high, and the costs that would be required to fund that insurance are quite high. We don’t think there is going to be a market that develops in the kind of work that we do.

Campbell Robb: Most of our clients do not, in effect, want to end up in court. They come to us as a measure of last resort, in effect, to save their home in one way or the other. The disrepair cases are different, but, generally speaking, our clients are quite desperate when they get to us in terms of seeking legal aid.

Q184 Yasmin Qureshi: The Green Paper says that it is going to keep legal aid for housing cases if somebody is at risk of becoming homeless, but you have said in your papers that you think their definition of who is going to become homeless is very narrow. Can you explain why you think their definition is narrow and perhaps give us an example of some cases where somebody may be facing homelessness but would not be eligible for legal aid under these proposed reforms?
Simon Pugh: There are two aspects to that. The first is that, on the face of the consultation paper, in terms of homelessness advice, the Government only refers to retaining in the County Court appeal stage of homelessness advice. There was a parliamentary answer last week and we have had a meeting with the Minister today at which it has been clarified that their intention is to retain in scope all homelessness, including the application and the review stage. We are very grateful for that, but our evidence to the Committee was on the basis of what is on the face of the Paper, which is only that the County Court appeal stage would stay in.

There are other areas where we think that people who are at risk of homelessness, even if not actually homeless, would no longer get advice under these provisions. An obvious example would be people who are suffering from illegal eviction. Again, the cause of action for that, which is breach of covenant for quiet enjoyment, is expressly stated as going out in the consultation paper.
We are very keen to stress as well that a fundamental part of what we do is advice as well as court representation. We help people at the early stages. We help them resolve their housing benefit problems. We help them if they have arrears problems in dealing with debts. We stop cases getting to court. Those people are at risk of homelessness even if they are not at immediate risk of homelessness. If we can’t provide that early advice and intervention, which is legal advice but is not advice in court yet, then more cases will get through to the court stage. More people will be at immediate risk of homelessness and, in many cases, it will be too late.

Q185 Yasmin Qureshi: Can you give us some examples of where you think early intervention in housing problems could save funds in the longer term? Are you aware of any hard evidence which backs these assertions that by intervening at early stages, public savings can be made?
Simon Pugh: In terms of hard evidence, Citizens Advice produced a paper last year which said that, in
hiring and debt cases, for every £1 the state spends on legal aid it saves about £3 and it is about £9 on welfare benefit cases.

Q186 Chair: Yes; they have given us that advice. We wondered if you had a similar perspective.
Simon Pugh: Yes, I am sure they have.
Campbell Robb: We do, but we agree with Citizens Advice on that particular one.
Simon Pugh: There are a number of examples. There is the one I just gave about resolving problems with housing benefit, for example, which enables arrears to be cleared without the case having to go to court. There is negotiating with landlords. It happens relatively frequently that landlords want tenants out of the properties and they don’t necessarily know what their obligations are so they just tell them that they have to leave. Obviously that is not the proper process. If we get involved and we negotiate with the landlord at that stage and say, “This is not the way it is supposed to happen”, then we can prevent people being unlawfully evicted and having to go back to court to seek reinstatement to their property. There are a number of examples.
Campbell Robb: On occasion we also stop people going to court, in a sense. We can also advise people. People will come and say, “I want to take my landlord to court”, and we can advise them that they don’t have a good case. It is not always about taking people to end up in court: we can stop people getting there as well. It is both sides of the coin, if you see what I mean.

Q187 Yasmin Qureshi: Do you think there are any areas in the housing case scenario that could quite properly be taken out of the scope of the system?
Campbell Robb: As I said at the beginning, I am afraid that, even when pushed, there is a massive contribution in helping them. It is a variety of different things. Most of our donors accept that information about where they should go for alternative support. On occasions we have to use some of our money to help to get that done.

Q188 Chair: So is everything else, everyone tells us. Campbell Robb: Indeed. There are some that are slightly simpler but not many. The scope in housing has been reduced. We were genuinely having this as a discussion before we came here because we knew we would be asked this question in the inevitability of, “You must accept bad things are going to happen.”
On the housing front, I am afraid that, for us, the work we do in supporting people in housing need in terms of legal aid is as close as it gets to keeping people in their houses. For us as well, with the cumulative effects of everything else that is happening—there are very significant reforms from CLG on housing reform, on tenure, on dispersal of homeless people into the private rental sector, changes to housing benefit reform—all of those combined means that, if you add in a significant change to the housing rights funded through legal aid, we would be really worried that we wouldn’t be able to protect some of the most vulnerable people in this country. We absolutely understand that savings have to be made and we are happy to discuss those, but on housing in particular I am afraid we feel that, even when pushed, there is very little that could be taken out. It is a tiny percentage. It is less than 3% of the total legal aid budget; it is not a huge area in terms of total amount of spend.

Q189 Chair: How much of the legal advice that you give at Shelter to people with housing issues is provided by professional lawyers?
Simon Pugh: We employ about 40 solicitors who give advice. We have solicitors in not all but in most of our advice services around the country. We also employ advisers who are not necessarily qualified lawyers; sometimes they are. But that doesn’t mean that the quality of the advice that they provide is any the worse for that. They are all experts.
Campbell Robb: And all paid for by the legal services. They are money funded through—

Q190 Chair: Forget the large number of people who don’t come under the legal services contract. There must be quite a lot of those to whom you are giving advice which has a legal context to it. Who gives them the advice?
Campbell Robb: What we will try to do, for example, on our website and helpline is create crib sheets and advice sheets which our legal team will support and advise, so you will get what is effectively supported by the knowledge and expertise that they get on the ground from doing that. Part of Simon’s job is to help our web team, our advisers and others to put in place advice which has a legal basis, but it is not the same as getting advice from a lawyer. For all the people that come to the website, we work very closely to ensure that is right but we wouldn’t ever say that you had had good legal advice.
Simon Pugh: We have advice services that are funded substantially by legal aid, and we do supplement that funding with our charitable income. We can use that charitable income to give advice to people who are not eligible for legal aid, and we do do that.

Q191 Chair: It prompts the question, because I know a lot of people donate to Shelter, what is it that your charitable income mainly gets used for.
Campbell Robb: A variety of other things. It pays for some of our campaigning work. Many people support Shelter ultimately to campaign for better housing across the board. We do a lot of work on that. A lot of our funding also goes to some support services. The Keys to the Future campaign, which we ran a number of years ago, worked substantially with young people, children and families around the country and has been a massive contribution in helping them. It is a variety of different things. Most of our donors accept that some of the money is used, in effect, to make sure that Shelter is giving the best possible advice and support. On occasions we have to use some of our money to help to get that done.

Q192 Chair: Sometimes, presumably, it is information about where they should go for alternative resolution of their problem.
Campbell Robb: Absolutely. We have a helpline, free to use, which is almost entirely funded by voluntary funding. The Government has supported certain specialist parts of it, on mortgage support or other
support. That helpline is effectively funded by donated income as well.

Simon Pugh: And open to anybody.

Q193 Mr Buckland: At the back of the Green Paper we have the box chart with various pros and cons. I am sure you are very familiar with it. One of the arguments inserted into one of those boxes is the ability of clients, it is claimed, to be able to represent themselves in many cases or find alternative sources of support. What proportion of people who are in need of advice and representation on housing cases do you think that would cover?

Campbell Robb: I will make a broad point, but the honest answer is that it is very hard to tell. The number of people we help, i.e. the number of people that we are currently funded to do through the Legal Services Commission, are the people who are due and under the current legislation are able to get legal aid, so that is the amount that we help. In terms of self-representation, Simon will definitely have something to say on that.

Simon Pugh: Many of the people that we help are very vulnerable for one reason or another. They have physical or mental health problems. They have difficulties with various other issues. The people that we help tend to be the most vulnerable in society, and it is very difficult to see that they would be able to help themselves or represent themselves. The legal process, the court process, the tribunal process in the case of welfare benefits is extremely complex and difficult. The law is complex and difficult and has become more so over the years. So it is very difficult to see that people could navigate that and certainly in a way that enables them to present their case in the best possible way.

As Campbell says, it is very difficult to quantify what sort of numbers of people would be able to do that, but very few of the clients that we represent would be able to do that in a way that would achieve the same degree of success that we would be able to if we were representing them on their behalf.

Campbell Robb: The core of this is, what is legal and what isn’t? This is the crux of this matter, in a sense, is it not? We would argue, yes, we can continue to give advice and support. That is part of our raison d’être and our donations will continue to fund that. We will always have a website and a helpline that offers advice and support to people. No matter what income range they are and whatever their housing need, we will continue to get in touch with them and we will try and advise them.

However, we believe absolutely and utterly that there is a role for the Government to pay for legal aid to support some people, not just the most vulnerable but whoever needs it the most, to help them take housing issues when their home is threatened, when they are threatened with repossession or made homeless or to be evicted, or their home is in such a state of disrepair that they have no other recourse to get it funded than through the law. We believe that you should keep a substantial part of what already is in scope to allow organisations, not just Shelter but others, to do that. We believe that, if you don’t do that, then you will be substantially letting down, particularly over the next coming years, some of the most vulnerable people in the community at risk of really significant loss of their housing rights.

Q194 Mr Buckland: Because a person will come to you not as a legal case but as an individual.

Campbell Robb: Exactly.

Q195 Mr Buckland: Initially you may not know the nature of the problem.

Campbell Robb: No, we don’t, and they present with different problems. Quite often people come with a debt problem, but the problem is not a debt problem; it is a housing problem. Sometimes people move from our helpdesk to our face-to-face and things like that. You are absolutely right. What we try and do is to sort out all of the problems of the individual. It is not just solving that. Stopping them being evicted would be the first part of our potential work with that client, which they may transfer from a legal aid thing. Just to give an example—it is not really relevant—we do a lot of work at the court desk. Many of you will be aware that at the court desk people will turn up about to be evicted or repossessed and they have had no legal advice at all. They will turn up at the desk and it will be a Shelter solicitor who is the duty clerk. We will argue against the thing. We will stop the repossession order and the judge will give them eight or 10 weeks to come back with a plan. We will then work with that person to get them decent debt advice so they can talk to their lender and come up with something else. That is legal advice leading into better—

Q196 Ben Gummer: It sounds like making an argument for public funding rather than for legal aid funding.

Campbell Robb: That is the question about what is legal and what isn’t, in that sense. I think, yes, there is a case for legal funding because there is a case very specifically in housing and some of the other areas where you need to take legal representation, where you need to go to the court to seek justice for what is going on.

Simon Pugh: Our legal aid funding does not fund general advice, help or support. What it funds is specialist legal advice on complex legal problems. That is what we need the legal aid funding to do.

Q197 Mr Buckland: In other words, the client would come in through the door, you do your assessment, work out whether it was an advice case or something more complex and then, if it was a complex situation, the legal aid funding would kick in.

Campbell Robb: The first series of questions we would ask any client, if they are coming through, is, are they eligible for legal aid? If they are not eligible for legal aid, then we have to work out another way through other Shelter mechanisms whether we can afford to support them, whether somebody else can support them in their local area if there is another provider.
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**Q198 Mr Buckland:** That is important. You apply the same criteria as any practitioner would in the marketplace.

**Campbell Robb:** We have to, absolutely.

**Simon Pugh:** Because we are subject to exactly the same contracts and exactly the same terms in those contracts as anybody else. We are subject to exactly the same rules about the merit of cases, the scope of what can be funded and that it must be a matter of law and a legal problem and so on.

**Q199 Chair:** Isn’t some of the advice that we are talking about here advice which ought to be given—and in my experience sometimes is given—by local authorities? If somebody goes along, they go and complain to the local authority about the state of the property or the landlord, and the local authority is supposed to take appropriate action. In other cases they might go to the local authority and say, “You’ve got to house me because I’ve had this notice to quit.” The local authority says, “That notice to quit has no effect whatsoever. If the landlord wants you to leave, he is going to have to get in front of the court and secure your eviction.”

**Simon Pugh:** There is a degree to which that is true, but there is funding pressure on local authorities as well and they are unable to continue providing that service to the same degree. There is also the issue that in some cases, not all cases, what we are challenging are decisions of the local authority and people cannot get independent legal advice from the local authority in that sense.

**Campbell Robb:** Our picture is a very mixed one of different local authorities. Again, as Simon said, we would worry about what we are hearing about some of the changes in cuts that are happening in local authorities. It is bound to have an impact on their capacity to support and advise. There is a double-whammy going on as well.

**Q200 Chair:** In some cases the advice has an interest behind it. They do not want to be advised to rehouse someone tomorrow who has not gone through the legal processes that are available to them.

**Campbell Robb:** Indeed, and part of our challenge as an organisation as well is maintaining relationships with local authorities where we are constantly challenging them on some of these issues.

**Q201 Chair:** Thank you very much. We are very grateful to you for your help this afternoon, for the interesting evidence you have given us and for the written evidence.

**Campbell Robb:** We should just apologise. We will update it but our evidence was based on the presumption in the Green Paper which was suggested on housing. We will send you an addendum to that which makes it clear now that we have had that clarity.

**Chair:** And for good reason. Thank you very much indeed.
Tuesday 8 February 2011

Members present:
Sir Alan Beith (Chair)
Mr Robert Buckland
Ben Gummer
Mr Elfyn Llwyd
Claire Perry
Elizabeth Truss

Examination of Witnesses
Witnesses: Christina Blacklaws, Chair, Law Society’s Legal Affairs and Policy Board, Steve Hynes, Director, Legal Action Group (LAG), Laura Janes, Chair, Young Legal Aid Lawyers, and Paul Mendelle QC, Member of the Bar Council, gave evidence.

Chair: Good morning and welcome. We are a minute ahead of schedule but we like to try and keep on time. I have to ask colleagues to declare any relevant interests.

Mr Buckland: I have been a criminal legal aid barrister for about 20 years prior to the election receiving payments from the LSC. I am not currently conducting any live cases and I am a Recorder of the Crown Court.

Mr Llwyd: I have been a Member of the Law Society and the Family Law Bar Association and have received payments for publicly funded work. Since April of last year I have reverted to a non-practising status.

Q202 Chair: Thank you very much. We are very glad to have you with us to help us with the work that we are doing on legal aid. We have Laura Janes from Young Legal Aid Lawyers; Steve Hynes from the Legal Action Group; Christina Blacklaws from the Law Society’s Legal Affairs and Policy Board; and Paul Mendelle, who was Chairman of the Criminal Bar Association in the year that has just ended. Thank you very much for coming.

The Government’s argument is that legal aid has resulted in unnecessary litigation and the budget just has to be cut. What is your initial response to that?

Christina Blacklaws: Shall I start on behalf of the Law Society? We just don’t accept that there is any problem in relation to that, then we think that that can be addressed by a proper application of the merits tests which are currently available through the LSC to ensure that the wrong cases are taken out of scope rather than whole areas of law being taken out of scope. Litigation and access to the courts should obviously be the last resort—there is no doubt about that—and the Law Society is very much in favour of all types of alternative dispute resolution. However, it is absolutely vital, particularly in areas of law where it is the individual against the State, that the Government must not deprive citizens of access to effective remedies, particularly if that is going to be contrary to the rule of law.

The legal aid budget is in fact tiny in proportion to the totality of Government spend. That is not to say it should be ignored or it should not be assessed; of course it should. However, we believe there are many other ways to reduce legal aid spending which do not cut away at the basic rights of the most vulnerable and disempowered citizens in our society. We will come on to ways that we can do that later on.

Q203 Chair: It was put to us by a senior judge yesterday that there are a large number of judicial review cases which are, in the legal sense, without merit and that a merits test applied within the judicial review process might significantly reduce costs. Do you have a view about that?

Christina Blacklaws: Yes. Of course there should be merits tests applied to almost every type of law and certainly to any law that is going to be publicly funded. I guess there are a couple of exceptions to that, and that is perhaps when the issue is of such great importance—for example, to parents and children when there is the risk that that child might be removed from their care. We are delighted and relieved that the Government is not intending to remove that from scope because that is of such fundamental importance.

As a broader point, there will be a huge increase in unmeritorious cases coming before all manner of court, not just judicial review, without proper, timely and helpful legal advice. What we are urging upon the Government is to consider that front-loaded, relatively low-cost legal advice will save an awful lot of money downstream.

Q204 Chair: There are four of you there. On any question, if there is something you want to add, please indicate that you do want to, but, on the other hand, don’t feel obliged to say something which has already been said.

Steve Hynes: Thank you, Sir. Just to chip in, the misleading picture that the Government are painting is on a number of levels. First of all, there is the original intention of the legal aid system. Lord Rushcliffe’s report was the antecedent of the legal aid system. It was quite clear from what he said that he envisaged a system where people of small or moderate means could get help and advice in cases where a lawyer would usually be required. That was the original intention of the system. It grew in terms of the coverage from the early 1970s because of an all party recognition, particularly in social welfare law and other areas of civil law, that the population needed access to justice through being given legal aid.

The Government also try to paint a picture of a budget out of control. Indeed, there were increases in expenditure on legal aid in its recent history. But if
you look at the budget over the last three years—in fact over the last five years for criminal—there is no growth. I have the figures here. The previous Government were successful in controlling expenditure, particularly on criminal, mainly through the reintroduction of a means test in magistrates’ courts—and now, as you know, the means test is going through in the Crown Courts—and the reductions in criminal fees. There is a 12.5% reduction in Crown Court and High Court fees working through the system at the moment. Over the next two years there are going to be further reductions. On the civil side, there was some growth in last year’s budget, but that was mainly due to the fact of the Baby P case and public law children cases increasing. There were quite a number of factors there, not just Baby P. I don’t think anybody in the political or legal world is saying that that is expenditure out of control.

The other factor was the recession. The previous Government acknowledged this and put more money, as a political decision, into legal help. That is something that certainly Legal Action Group agreed with because one of the effects of the recession is that you do get a greater demand for civil legal advice across a range of the areas in scope at the moment. If you look at where the cuts are going to fall, and this is the final point I would make on the misleading picture that the Government are painting, £164 million of the budgeted £350 million in cuts is on legal help. Legal help, as I am sure you know, is the initial help that people get in the legal aid system. Legal help is very effective in heading off litigation because people can get early advice on their problem before it needs to go to litigation. It is a wholly misleading picture to say that the Government are introducing these cuts to try and prevent unnecessary litigation.

The final point I would make on that is that there are areas that are litigated under legal aid, such as clinical negligence, that are within scope at the moment and which the Government are proposing to take out of scope. This is a well trod path. The previous Government 10 years ago looked at clinical negligence and decided, “No, we won’t put it into CFAs.” They listened to the lobby at that time and it was decided that the cases that need a lot of investigation, expert reports, those sorts of cases in clinical negligence, had to stay within scope. It is only around £20 million off the funding, but it is the one area, perhaps, that the Government could have an argument to say that there is litigation paid for; but whether it is unnecessary I wouldn’t agree. I don’t think those cases will transfer into whatever emerges after the civil funding reforms. There will be people who will be denied access to justice in those types of cases. I will add to those comments later in the session.

Laura Janes: Very briefly, just to endorse what Mr Hynes says about not confusing access to justice with litigation, of course as law students what we are learning to do is to avoid litigation. If you restrict legal help or replace it just with telephone advice, there is, of course, going to be even more unnecessary litigation brought by litigants in person because they will have no other choice.

On the judicial review point, I should add that I am a solicitor at the Howard League for Penal Reform where I represent children in custody. We also have a public law contract. Sometimes the importance of judicial review as a remedy of absolute last resort cannot be underestimated. One of the concerns that we have seen from the public law projects, and they have done some excellent research on this, is that the number of fairly hopeless cases that are going through for the permission to plead to be those children where the solicitor is not a specialist in the area—and that is a quality issue—or where they are bringing it themselves. Again, that is another good case for that scenario coming within the realm of public funding where there is a strong merits test.

To endorse what Mr Hynes was saying about the rather false economy of people not having access to justice at an early stage to resolve problems, lots of the children I represent in prison have fallen through all the different hoops when they could have had legal help with not being excluded from school or getting help from social services, which has often landed them in very expensive situations in terms of being detained in custody.

Q205 Chair: Do you want to say anything at this point, Mr Mendelle?

Paul Mendelle: Yes, if I may. The concept of unnecessary litigation in crime, of course, is a slightly odd one, because people tend not to choose to be prosecuted. We would argue that the Government’s own actions are a driver in this increase in litigation and I would make these points. First, Chris Huhne’s own research shows that between 1997 and 2009 the previous Government created 4,289 new criminal offences. Not all of those would have fallen into legal aid but a considerable body of them would have. That causes an increase in litigation.

The York study that the Government refers to in its Green Paper in 2009—and its report covers the period 2000 to 2006–07—also points out in Table 7.1 that there is a much higher number of legal aid cases per 100,000 of population in England and Wales than the next highest, which was Netherlands. They trace that back to several factors. The crime rate is higher in England and Wales than in other countries, with the exception of Sweden. A higher proportion of cases in which there is a suspect are brought to court in England and Wales, and the proportion of suspects receiving legal aid was nearly twice as high as in France or the Netherlands. That period exactly coincides with the abolition of means testing in 2000, which was not reintroduced until 2006–07 in the magistrates’ court and 2010 in the Crown Court. We would say that is a factor. That is one point I make.

The other point is this. The Crown Court Efficiency Group under Lord Justice Goldring, and of which I was a member, conducted a small survey of two Crown Courts. What they found was that there was a practice of overcharging in the magistrates’ court. I am not saying this critically, but the CPS were often reluctant to accept a plea until the case got up to the Crown Court. Again, the MoJ’s own statistics show that about a third of cases collapse in the Crown Court because the prosecution offer no evidence or the case
is slung by the judge. You could argue that those cases were unnecessary litigation. Our point is that the driver, if there is, of unnecessary litigation in the Crown Court is very often the Government's own actions.

Q206 Elizabeth Truss: You have talked about the overall cost of legal aid and the proposals by the Government. You mentioned how relatively high it is to other countries. Our understanding is that it is the highest per capita in the world. You mentioned the comparison with some European countries. It is also expensive compared to some other common law systems, for example, Canada. I just wondered, Mr Mendelle, if you could just explain where you see the differential lying. Is it the increased number of criminal charges in Britain? Is it the court process itself or is it social problems in Britain and the crime rate? How would you differentiate the drivers? What is the key driver that is making legal aid so expensive?

Paul Mendelle: First, we do not have the most expensive legal aid system in the world. The only comparison that we have that the Government relied on at the MoJ Commission was a report which compared eight legal aid systems, including our own. The only common law ones were New Zealand, Australia and Canada. Of course, two of them are federal systems and the report itself found there is considerable variation across the federal systems. I have already pointed out what this report says are the drivers of the increase in legal aid. You cannot exclude the fact that for a period of six years there was no means testing at all, so everybody got legal aid. That undoubtedly increased the legal aid bill. During that time the spend on crime was very largely under control or fell. The Green Paper itself says that the spend in real terms fell by 11%. So there were more cases coming to court, more people were arrested, and more cases were given legal aid. Then you have to compare like with like. For instance, in very many civil law countries the costs of legal aid are low because a lot of the other costs—the court costs and the costs of prosecution—are dealt with in a separate budget. Again, if you don’t have the report in front of you, we can certainly send it in.

Chair: We have the report.

Paul Mendelle: I am grateful. Table 7.2 on page 27 splits the legal aid spend per capita with the spend on courts per capita and the public prosecution costs per capita. When you add those three together, because those, after all, are the costs of prosecution, then this country is not the highest. In fact, Netherlands is the highest, we come second and Sweden comes a close third, and there is not a huge gulf. France is fourth. We are talking about a variation from £50 per person up to £80 per person, and £90 for the Netherlands. It is very, very difficult to make these comparisons, and the authors of the report themselves have said that this report was not intended to be definitive but was intended to provoke argument. It is a tendentious report so far as the authors are concerned.

Christina Blacklaws: Can I make two points on behalf of civil legal aid?

Chair: I think Mr Hynes caught my eye first.

Steve Hynes: The Bowles and Perry research is very interesting. The main point that it is making about the comparison across Europe is the difference between the inquisitorial systems. If you look at the overall expenditure, Mr Mendelle is correct. They found that in Holland they actually spend more on criminal, if you take all the costs of the system into account. It wasn’t the case in civil. If you look at the figures for Germany, they spend more per head of population on its civil system than we do in the UK. That is primarily due to two factors. It has a federal system which means that there are more costs in the court system, but also it is because it is an inquisitorial system so there are more costs in terms of judicial time.

It is very difficult to come up with comparisons across the common law world. I would give the one example of Ontario in Canada. Because it is a federal system, Ontario and their civil spend is at more similar levels to the UK. In other States in Canada it is a lot less. Certainly we would argue that you don’t want a system where you have a very minimum spend on civil because of all the knock-on effects to the rest of the system. I think the evidence this morning will bring that out.

Q207 Elizabeth Truss: I can see why the inquisitorial systems in Europe are not a very good comparison because the cost exists elsewhere, but had the Canadian provinces looked at why it is much more expensive in one province than another?

Steve Hynes: Canada is an interesting country. Ontario is by far the most populous state in Canada. It is more of an urban state with large cities. Their legal aid system, particularly on the civil side, is very much analogous to our legal aid system and so the spending is similar in level. It certainly is not the same; it is about half of what we spend in this country. They have gone, particularly on the civil side, for more salaried services and less procured in the private sector. That could be a factor. I suspect that it is mainly cultural differences and the way in which their court system works that has meant there are not the same costs in the system.

Q208 Elizabeth Truss: It is interesting you mention the court system. I would be interested in Ms Blacklaws’ views as well on this. Given that we do need to reduce spending and £2 billion is a large slug of money—and it is the kind of spending we do need to reduce across Departments to make sure we can prioritise on future economic growth, etcetera, which is very important—how would you propose making those savings in the Ministry of Justice if it is not through legal aid? We have heard previous witnesses talk about more root and branch reform of the system that is needed and the fact that things like the court processes are driving the cost of legal aid. What could the Government do in the relatively short term to try and make those savings? In my view, I think in our report we need to propose where else the savings could be made if we are going to say things about the legal aid budget. I would be very interested in your ideas on that.
Christina Blacklaws: Returning to your previous point, can I just make two points in regard to civil legal aid? The first is that the fact we have perhaps the best civil legal aid system in the world is a mark of our civilisation and something we should be proud of rather than bemoan as a society. Secondly, the need for this, particularly in civil, is largely created by poor decision making and actions of public bodies, so it is a responsive requirement rather than something that is a waste of taxpayers’ money.

To come on to your second question of how we can make the cuts, the Law Society is not saying that legal aid should be immune from this. In fact, we have some ideas as to how to bring about the £350 million saving without doing two things: first, reducing access to justice in this country and, secondly, reducing the support that we give to our criminal justice system. If it has to happen, I am very happy to talk to you about those and to give you further information.

The headline is that, as far as we have done the costing so far, we think we can come up with about £470 million of savings. We are very keen to discuss these proposals with you. Part of that is on a “polluter pays” basis, which is, almost win-win, savings that can be made. If you look at the alcohol industry, so much of our criminal litigation is due to alcohol abuse. I am sure that those in the alcohol industry would not be keen on this idea but, none the less, if you put a 1% additional levy upon that, that would give you about £85 million. That could come into a pot—

Q209 Elizabeth Truss: I think what we are particularly interested in are ideas within the Ministry of Justice and the justice system that could reduce costs. There seem to be all kinds of bodies that we have discussed, such as the CPS and the Legal Services Commission. I see Ms Janes wants to come in on that point. Where can we find savings, rather than just putting up taxes? I would be interested to see where they can be found in the system.

Laura Janes: I would just draw your attention to the National Audit Office report on this, which did the comparative analysis and said, “Yes, you need £22 per capita.” It also noted that, compared to other countries, we brought more than 1 million prosecutions in that time. It is a really significant amount in terms of the amount of prosecutions that we are bringing in this country. It is not just another factor; it is a really significant factor. Maybe that brings with it a lot of additional costs, so there will be a lot of cross-departmental savings from that.

Christina Blacklaws: Could I address a couple of specific points within the proposals that the Law Society accepts will bring about significant savings?

Spiralling experts’ fees have always been a bone of contention. We have specific proposals around how to contain those experts’ fees. We believe that will bring about £11 million worth of savings; the supplementary legal aid scheme, about £10 million; litigators’ graduated fees scheme adjustments, £23 million.

Those are just a few examples, but, in total, we believe that £68 million plus of savings can come appropriately from some of the proposals in the Green Paper.

In addition to that, looking within the Ministry of Justice’s budget for legal aid, the Law Society believes that, if you had a much more robust enforcement of merits tests across the board, but particularly, for example, in family law where I think there has been some real concern about inappropriate cases being fought through the courts—whether the child should be returned at 6 pm or 6.15 pm and that sort of thing—you could stop those cases from coming anywhere near to the courts by having a proper merits test. We think £12 million could be saved by that.

Another example is funding from seized assets of defendants, so again, within the system, those could be captured and used. We have a number of very specific proposals that would be: outside system, polluter pays; inside system, appropriate savings could be made. The Law Society thinks we do need to look at whole system change. This is an opportunity for us to review it. Nobody would start where we have ended up in terms of how legal aid is procured, funded or delivered.

Laura Janes: With regard to another saving within the criminal justice system itself, we spend around £300 million on child custody per annum. That is something that has not, to my knowledge, been looked at. We have a very low age of criminal responsibility and the highest number of children in penal custody in western Europe. There are 2,400 at any single time.

Paul Mendelle: Could I add that I echo what Christina said about the use of restrained funds? One understands the political argument “Why not?”, but it is not at all uncommon in a fraud case for a defendant to be sitting on £1 million or £2 million of restrained funds, to which he does have access for other items of expenditure but not for his own defence, which seems, in our view, misguided. That would certainly relieve the pressure on the legal aid fund. There is insurance of officers—i.e. insurance against their own fraud—so that they have private representation for fraud. It is a small body of potential defendants and they could get that insurance. It is not especially expensive. These are some of the most expensive cases in the system. So VHCC cases are sucking up somewhere around £100 million per annum for a small number of cases. Those are two very specific areas within the system where you could relieve the pressure on legal aid.

Q210 Ben Gummer: I have just a quick supplementary to that, if it is possible to supplement such a comprehensive question from my colleague Ms Truss. Mr Mendelle, will yesterday’s announcement about ASBOs being moved effectively into criminal law—CRIMBOs, I think they are called now—make a difference to this burgeoning body of criminal law which you have talked about? I think you have much sympathy from many parts of this Committee about it. Do you think that will create an even greater pressure on the criminal courts?

Paul Mendelle: I think it is almost inevitably bound to, isn’t it?

Q211 Ben Gummer: So this is a trend that is going to continue?
Paul Mendelle: Yes, I know this is not a very popular message to say to politicians, but it would be very useful, certainly so far as the criminal law is concerned, if there were an extended period of benign neglect.

Q212 Ben Gummer: It is very popular amongst some of us.

Paul Mendelle: I am old enough to remember Harold Wilson. I won’t tell you what I thought of him, but a lot of people used to say to Harold Wilson, “Don’t just do something; stand there.” We sometimes feel like saying the same thing to the Government.

Q213 Claire Perry: I think it is absolutely fantastic to hear, if I might say so, such very well thought-out and creative ideas for saving money. I think many of us are concerned about the restriction of legal aid, particularly to the people who need it most. I suppose I have a frustration, which is that the Legal Services Commission has been basically a bonfire of taxpayers’ cash. There are million-pound pension pots all over the place and there is just the sense that the whole system has been completely out of control. My frustration is, why were these very good ideas not put forward five or 10 years ago? It has taken a budget crisis to force out some of the creativity in the system.

I would urge you, please, to keep bringing forward these very good proposals. We are very receptive to well-thought through and structured and well-argued ideas as to how to save taxpayers’ money. I wish we didn’t have to do it in such a crisis situation, but, if we could please work together on this rather than setting ourselves up as adversaries, I think that would be extremely helpful.

Paul Mendelle: I absolutely endorse that but I can say, for instance, that two of the ideas I have mentioned—there are others—were put forward by the Bar last year.

Q214 Claire Perry: And ignored?

Paul Mendelle: Yes, exactly, six months before the Green Paper came out. So we have been advancing these views before.

Christina Blacklaws: I must say the same on behalf of the Law Society. We had a full access to justice review which has been running for two years. Lots of the creative ideas that we have had come out of that. We have been trying to fly these kites for a very long time, but now we have the opportunity to be heard, which is the silver lining, I hope, to this rather difficult situation.

Q215 Mr Llwyd: This is a question to Mr Mendelle, I think, and probably to Ms Blacklaws as well. Has any work been done on sifting through some of the legislation which has been created in the last 10 years and areas where we think we could cut away the dross so that we don’t waste money on it? I would go back to what Mr Mendelle said about Harold Wilson. The world-famous jurist, Woody Allen, said that 80% of success is turning up.

Paul Mendelle: My clients don’t say that.

Q216 Mr Llwyd: On a serious point, has any work been done on that?

Paul Mendelle: Yes. The Criminal Bar Association, shortly after this coalition Government came into power and announced it was going to have a Reform Bill, compiled a list of those statutes which we said ought to be reviewed and modified. It was overseen by James Richardson, who is the Editor of Criminal Law Review, compiled a very long list as well. I know that was sent by the Criminal Bar Association to the Bar Council. I am sure it has gone on from there to Government.

There is no doubt that the last 10 years have seen an explosion of technical law in crime. Some of that, one could argue justifiably, could be repealed. There is no doubt, for instance, that sections 34 and 35 have introduced a great deal of technicality in the law. I think there is a strong argument that section 34 could be repealed, because with defence statements now you do have to have your case before the jury and this whole argument about what took place at the police station is a little academic.

There are arguments that say we have gone too far with hearsay and bad character. A lot of time in court is taken up with these. This is what delays trials and this is what extends them. There is a huge amount of technical law being argued in the criminal courts today that was not there 10 years ago.

Christina Blacklaws: Can I add to that? If you remove the hearsay and bad character provisions which the last Government put in place, we think you could save £6 million. We have costed that. The Law Society again has a growing list of statutes which should be appropriately repealed and some proposals.

For example, in our paper we say housing law should be simplified along the lines proposed by the Law Commission in their report Renting Homes. We think that would reduce the expenditure by about 20%. That is another £10 million saving.

In family law, if you remove fault from divorce you make it an administrative rather than a legal process. I know there are lots of issues around that, but it is a difficult process for people to do by themselves because it is a legal one. If you make it administrative, then there is no need to fund that and people will be able to support themselves in accessing their own divorces. There are political issues in this as well obviously, but there are considerable savings that can be made by looking to reform the statute.

We would say that this is really the cart before the horse. Look at what you can do with reforming the statutes; then look at funding, scope and eligibility. Don’t do it the other way round.

Q217 Ben Gummer: Mr Mendelle, I was speaking to a judge at the weekend. He is trying a murder trial at the moment with two defendants. One defendant has the benefit of a silk and a junior; the other one a senior junior and a junior. The Crown is being represented by a junior and a paralegal—a solicitor of some description. He said that this is now par for the course and, as a result, the public is not being
Q218 Ben Gummer: But were these complaints that you heard when you were fresh-faced at the Bar from your elders? Is this a perpetual complaint of any profession?
Paul Mendelle: No.
Ben Gummer: I am not trying to be—
Paul Mendelle: I absolutely understand that point. You tend not to hear that too much in the magistrates' court, which is where I spend quite a lot of time. I am conscious of the fact that my perception changes as I get older, obviously. It is not a panoply being laid out in front, with me, the static observer. From the best that I can judge, these were not complaints that were being made. For instance, I am at the Bailey a lot and I can tell you that when I first started appearing at the Bailey you were only ever prosecuted by a TC. TCs at that stage were not silks. They would always be assisted by a leading top-quality junior, and you only had silks and juniors defending. Over the years that has changed. With that change comes some diminution in the quality of justice that is being administered.

Q219 Ben Gummer: Keir Starmer, when he was giving evidence a few weeks ago, was quite frank about the variability of quality across the courts. He was spending a lot of time seeing it and was honest about it, but he seemed to be struggling with how to address that. Do you have any suggestions?
Paul Mendelle: This is going to be unpopular. You have to pay people a proper rate for the job so that they will do it. In every walk of life, generally speaking, you get what you pay for. If you pay more money, you get better quality.

Q220 Ben Gummer: Can I turn to you, Ms Janes, to extend on that? Many people are concerned about the problems facing those entering the Bar. Could you give your impression of the effect on quality and also on the choices that young lawyers are making apropos whether to go in the Criminal Bar or Commercial Bar as a result of differential pay rates?
Laura Janes: Absolutely. Young Legal Aid Lawyers represents both solicitors and barristers. A huge number of our members are students as well who are at that formative stage. What they all share in common is the commitment to legal aid. We have done quite a lot of research to find out what motivates people to become legal aid lawyers. Almost 99% do it out of a desire to participate in ensuring social justice. One of the big problems with the current state of affairs, and as they have been now for some years, is that young lawyers find it increasingly hard to qualify in either side of the profession. The Bar is becoming virtually impossible, but training contracts are extremely hard to come by as well. One of the things that the Legal Services Commission did do that was very good was to have between 100 and 150 sponsored training contracts a year for some years. That scheme was axed last year. It is almost impossible for few entrants to have any hope of qualifying. They have found that it has become absolutely essential to do a stint of unpaid work, which means that that has a big impact on the diversity and social mobility within the profession.

Q221 Ben Gummer: Have you been able to measure that specifically?
Laura Janes: We have not been able to measure it, but the research shows that typically about 50% of solicitors and barristers attended independent schools compared to 7% of the general population. I know that the Legal Services Board have done some research on gender and ethnic minorities going through the profession. It is still clear that at entry point, as you are about to come in, there is a level of parity between genders, but as you get to about 10 years’ qualification it is virtually impossible. So there is a lot of work still to be done, and that is with the situation as it is, let alone the proposed changes. We have done a report on social mobility and legal aid last year in response to the Government’s diversity papers, which found that, while lots of people were really keen to become legal aid lawyers, they just simply couldn’t afford it. Over 35% of students who would like to do legal aid have over £20,000 worth of debt. The starting salary for pupillage at the Bar is about £10,000.

Q222 Ben Gummer: What is the actual effect of that? Does that mean that the only people doing it are those with private incomes or that people are living in penury, or both?
Laura Janes: This is anecdotal rather than the basis of research. The impact seems to be that either people have to be supported by their parents and are not able to develop their own financial stability, so they are not able to buy their own homes or anything like that for years and years and years, or they are working all hours God sends and doing part-time jobs to complement. We have some members that are working weekends in the supermarket and working all hours in the week as paralegals.
Steve Hynes: Just a few points to emphasise. The bulk of what the Government are proposing, around £280 million, is coming from the scope cuts in civil. They are not particularly looking at Crown and higher court work. There are a few things to say on that. I emphasised in my opening statement that the previous Government reduced fees and they are working through the system. There are something like, I would say, 1,000 or so QCs and other barristers earning six figures from the legal aid system. These people tend to specialise in criminal and high-end civil work. It is a market that is at work here. I don’t buy into the argument that somebody is paid £20,000 a year and they do a bad job. I know plenty of paralegals and even lawyers working for that sort of money in the legal aid system. Similarly, you could have somebody on six figures that does a bad job. Quality goes beyond just what is paid for the job, but it has to be recognised that at the high end of the Bar there are 1,000 or so who are earning similar figures to consultant surgeons.

It is what you place as a worth on those skills. There are about 14,000 barristers practising in the country. There is an argument to say that perhaps there is not enough work to go around, but I believe you need to have that intake to ensure that the cream, or the fortunate, rise to the top and do the Crown Court and other cases. As I say, it is not part of the Government’s proposals but you could look again at very high cost cases. You could look again at Crown Court costs and unifying the fees, which I know is one of the Law Society’s suggestions, and it would take some money out of the system. I don’t think you would take anything near the order of 23%, which is what the Government wants, and also you would risk quality. It is a balancing act that the Government are addressing in these proposals at the moment.

Q223 Mr Llwyd: I turn to family law. As you are probably aware, the Green Paper says that “the provision of legal aid”—in private family law cases—is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases. It goes on to say that “people should take responsibility for resolving such issues themselves”. Do you think this is fair? If you can, what proportion of the cases which reach the courts should, or could, have been resolved otherwise? It is a part of the process. Of necessity, to go to, if legal aid merits tests are properly applied, the people that the Government and the public want it to go to, if legal aid merits tests are properly applied. They are there and able to be applied. We think that they are fairly loosely applied at the moment, so cases are getting into public funding that perhaps shouldn’t do.

What was the first part of your question?

Christina Blacklaws: Can I start this? Just to explain, I run a large family and housing law legal aid practice in London. I am the childcare representative on the Law Society Council. I am the chief assessor of the Children Panel, so this is squarely my practice area. I have already made the point, but it does require emphasis, because we think considerable savings could be made, and also legal aid could be going to the people that the Government and the public want it to go to, if legal aid merits tests are properly applied. They are there and able to be applied. We think that they are fairly loosely applied at the moment, so cases are getting into public funding that perhaps shouldn’t.

Christina Blacklaws: If you have a look at family legal aid at the moment in the private law sphere, over 80% of those cases—are those acts of assistance, as they are called by the Government—do not go on to litigation. You have to think about why only 20% of cases that have been given legal aid go to the court. That is because the vast majority of those clients are helped by solicitors to understand whether or not they have got a good case and to start to think, in relation to children, what is in their children’s best interests, to focus on the future rather than what has happened in the past and to be assisted to negotiate properly so that they need never go near a court but come out with outcomes that are important for them as individuals, for their children, and also for society.

I would say that a lot of the work that is done at the low level, as Mr Hynes has said, is very supportive to ensure that there is no unnecessary litigation. But you will always have, as Lady Butler-Sloss said in the House of Lords recently, that hard core of cases where you have people who have mental health problems: where you have people who have all sorts of drug and alcohol dependency; who have cognitive difficulties; who basically will not be able to be reasonable. In family law, I am afraid, to be reasonable and to come up with good solutions it does take two to tango. You can be the most reasonable person in the world, but if your ex-spouse has a mental health problem then it is most likely that you are going to end up in court. There are cases which will always need to go to court. Those tend to be the most vulnerable people. They are people who don’t have English as a first language. They are the people who have these sorts of difficulties and who are the most deprived section of our community. What we say is, do we really want those people unsupported at the early stages and ultimately unrepresented in court? That is not the mark of a civilised society. So, no, is the answer to that question.

Can more cases be resolved through mediation and through support in alternative dispute resolution? Of course, we have collaborative family law as well as a different and another type of resolving cases in family. Yes, absolutely, and the Law Society is very supportive of as many cases as possible going through mediation. We fear, rather ironically, that fewer cases may get to mediation because solicitors refer to mediation. How would individuals find mediation otherwise? It is a part of the process. Of necessity, to get legal aid, you have to go and see a mediator, first and foremost. That mediator assesses whether your case is suitable for mediation. If you don’t go through that process, you may never find out about mediation or the benefits of it.

Q225 Mr Llwyd: But, of course, it is a truism that unless both parties submit to mediation it is not going to work, is it?

Christina Blacklaws: Yes, and sometimes it fails. Even if parties are very willing to try mediation, sometimes it doesn’t work so we come back to that.
hard core of clients. We have to think about this in context of the number of people who are separating and divorcing every year. 90% of them never go near a solicitor, let alone go to a court. It is a tiny proportion of people who end up going to the family courts at the moment. If you take away legal aid, that proportion is going to increase hugely because they are not going to have that checking mechanism, that good, helpful supportive advice at the outset.

Q226 Mr Llwyd: The Government have said that they intend to retain legal aid in private law cases where physical violence is involved. Do you share the widespread concern about the Green Paper’s reference to physical violence, as there is no clear definition of what that amounts to?

Christina Blacklaws: Absolutely. I think all representative bodies are very clear that the appropriate definition is probably that of the Government, ACPO—the Association of Chief Police Officers—and the Crown Prosecution Service. I can tell you what that definition is, but it goes way beyond just physical violence.

In fact, there was a judgment of the Supreme Court two weeks ago—Tenshaw v. LB Hounslow [2011] UKSC 3—which us lawyers think drives a coach and horses through the proposed definition of domestic violence. Even taking away the legalistic arguments, very vulnerable women and children, and sometimes men, will not be protected by this. What we know is that a lot of people do not seek protection because they are so frightened of the consequences of doing that. If they have not had an order or a criminal prosecution, then they are not going to get help. I can give you many examples of current cases where, not to over-dramatise, we would be very concerned that there could be serious injury and even death in relation to current clients. Had they not had this support from their lawyers and been able to access the courts, the consequences for them and their children would have been dramatic.

Q227 Chair: If you had a broader definition, would you create a perverse incentive which you, as a lawyer, might feel obliged to draw to the attention of your client and say, “If there has been any implied threat of domestic violence, it would be a good idea to make that clear because that would make you eligible for legal aid?”

Christina Blacklaws: Of course. It would be our duty to assess, as it is at the moment, whether any client is eligible for legal aid and we would have to be clear about the eligibility criteria. Possibly you are right. There may be a perverse incentive either to allege or pursue domestic violence claims. That is why we go back to saying don’t take the type of work out of the proposed domestic violence claims. That is why we go back to saying don’t take the type of work out of the proposed definition of domestic violence. Even taking away the legalistic arguments, very vulnerable women and children, and sometimes men, will not be protected by this. What we know is that a lot of people do not seek protection because they are so frightened of the consequences of doing that. If they have not had an order or a criminal prosecution, then they are not going to get help. I can give you many examples of current cases where, not to over-dramatise, we would be very concerned that there could be serious injury and even death in relation to current clients. Had they not had this support from their lawyers and been able to access the courts, the consequences for them and their children would have been dramatic.

Q228 Mr Buckland: As a supplementary on that, what you are saying is that the domestic violence test is just too arbitrary and, fundamentally, there needs to be a more stringent merits test when it comes to private family law?

Christina Blacklaws: Yes, because that would be fairer, more appropriate and enable access to justice for this tiny minority—remember it is a tiny minority who are eligible at the moment for legal aid—to ensure that they do have proper access to the court and they would be prevented from that. I want to emphasise that I am not undermining the import of domestic violence, and that must be a criteria.

Q229 Mr Buckland: Do you think the term “domestic abuse” is a better term than “domestic violence”?

Christina Blacklaws: Yes, absolutely. That is the one that is generally used.

Q230 Mr Buckland: I want to move the arguments on scope to the other areas because it is not just family law, though I accept that that does seem to be the lion’s share of the proposed savings to be made. We are talking about other areas as well which we have touched upon, such as housing, debt, benefits and employment. This Committee is well aware of the potential detriments that can occur with a reduction in legal aid for the provision of those services. I am interested in any proposals you may have that could make savings in those areas but in your view would be a more effective way of making savings rather than just a whole-scale removal from scope. I would be interested in the views of all the panel as to that approach.

Steve Hynes: We are proposing that the Government initiate a commission to look at the funding, quality and provision of the other areas of civil law. We are particularly focused on civil and social welfare law. Our fear is that, if the scope cuts go ahead, and I will give one example, it would reduce the number of contract holders in housing down to 226. That is less than one per three parliamentary constituencies. We do not think there will be a viable national legal aid service if the scope cuts go ahead. We recognise that there are other funding streams and other providers of these services in these areas of law. There needs to be a cross-Government review of these services looking to create the best that we can from the existing providers and funding streams that we have.

The other illustration I would give is on page 4 of our submission. The legal aid scheme, particularly when you look at non-family cases, has never really been a comprehensive national service. There is the example of Surrey. The Legal Services Commission has a formula that is called “indicative spend”. It means if legal aid was spread fairly across the country there is an amount that would be spent in each area. In Surrey, it would be £2.264m. In reality, and this is three years ago, £529,271 was spent, which is about 23% of the indicative spend. That illustrates the fact that legal aid has never been evenly spread across the country.

The other example I would give here is Camden, Hackney and Tower Hamlets. They are all in London
and all spending a lot more than what would be calculated as fair. That is not to say that these areas are creating demand. What is happening is that practitioners are responding to the demand in those areas and the pattern of supply has been determined by that demand. But you do not have a service now which is fairly evenly spread and providing a service in every largeish town.

**Q231 Chair:** But wealth is not fairly evenly spread in every largeish town.

**Steve Hynes:** No, it is not.

**Q232 Claire Perry:** Isn’t that exactly what we want? I would far rather see legal aid, which is designed for the people who can least access justice and least afford it, being massively overspent in our most deprived areas and not spent at all in leafy Surrey.

**Steve Hynes:** I would agree, but—

**Q233 Claire Perry:** That is an extraordinary interpretation, if I might say, Mr Hynes, of what legal aid is meant to be. We are not trying to provide a system where everybody can access their fair part of legal aid. It should and ought to be designed for the most disadvantaged. If I might say, that is the sort of thinking that has got us into this mess. We are not focused on how to get it to the people that need it most.

**Steve Hynes:** No. The point that I am making is that the indicative spend formula allows for the fact that legal aid is a means-tested benefit, in effect, but we do not have the spread of services for the people that qualify for legal aid fairly spread across the country. Surrey is an extreme example, but yes, Surrey has pockets of deprivation and people that qualify for legal aid. I would give another example of Alnwick, in the Chairman’s constituency. If you know Alnwick, you know there is public housing there. You know that there is a need for legal aid. It is not at the same level, I would readily concede, as Camden or perhaps inner-city Manchester. There is a need there but it is not catered for, because legal aid has never been particularly good at catering for need outside the larger urban conurbations where there are pockets of need. I appreciate the MP’s argument, but I am saying that legal aid should be a system, a safety net across the country, that is equally going to serve somebody on benefits or who qualifies for legal aid in Surrey as they would in Camden, inner-city Manchester, or in fact Alnwick, for that matter.

**Q234 Mr Buckland:** I accept your point. The point you are making is about legal aid deserts, fundamentally, isn’t it?

**Steve Hynes:** Yes.

**Q235 Mr Buckland:** I understand that, but the problem is that resources are limited. Is it not desirable to have practitioners of expertise and excellence who may be serving a wide geographical area but who may be based remotely from the town or village from which the particular need arises?

**Steve Hynes:** Yes, I can agree with that. I believe with existing resources we can put together a system, for example, where Citizens Advice Bureaux and other not-for-profit agencies link in with solicitors in private practice and the Bar to provide a service. I think that is exactly right. You could have a regional provider, for example, for public law family—that would work well—and they would be taking referrals from their local Citizens Advice Bureau. The problem is that they have been hit on all sides.

There are two examples I would give. The Financial Inclusion Fund is going. We are losing something like 1,000 people employed under that to give debt advice. An example from only two weeks ago is that Birmingham City Council are cutting back £600,000 on their Citizens Advice Bureaux. Five Bureaux will close. That type of service where you can have an open-door service that you can refer on when needs be to expert practitioners is going. I believe strongly that the Government needs to look at this whole problem in the round. It is not enough just to cut one part of the system in the Ministry of Justice. You need to look at the entire system.

**Christina Blacklaws:** Obviously I would like to support Mr Hynes and what he is saying about community-based services. It is really important that they are available, although, as you rightly say, they are not available across the country at the moment. It is an opportunity for us to think much more creatively about how we can deliver the services. The Law Society is not against internet delivery or greater telephone delivery. It may well be an answer to remote rural areas. In Wales, for example, there is a tiny handful of legal aid providers already so there is not that access. We need to look creatively at how else we can provide the service, but remote service provision is not the answer for everybody. What we know about our legal aid demographic is that a lot of these people will not, for many and varied reasons, be able to access services in anything but a face-to-face way. There are those with mental health problems. I can recite the list again of the people who have the problems.

**Chair:** Mr Llwyd is probably anxious to come in on Wales.

**Q236 Mr Llwyd:** Yes. You mentioned Wales. It seems to me that one of the problems is that the Legal Services Commission presumes that if there is a large throughput of cases then the expertise is there. That is simply not true. There is a mental health practice in North Wales which almost lost its contract because it was a few cases short. These are specialists who do nothing else. By dint of the fact that they are situated in a semi-rural area they had not got the throughput. It seems to me that there has to be some discretion involved here, otherwise we are going to lose good practitioners and thereby deny people good advice.

**Steve Hynes:** The point I would make on the legal aid system, if you look at how it is spread throughout the country, is that it is highly dependent—those high street practitioners—on the 2,000 or so family law providers. This will probably cut down around 60% of those providers, so you are going to be looking at a system of less than 900 providers. I don’t think that
will mean you will have in many market towns and other population centres a legal aid service. Unfortunately, the nature of the client base of legal aid is that they will travel to open-door services within a five-mile radius, but they are not likely to travel long distances. It becomes a self-fulfilling prophecy. Housing law is another example. You would look at under 200 or so providers in housing law. If there is no provider on somebody’s doorstep, then the problem goes unsolved and all the social problems that come with that. It costs something like £50,000 to rehouse a family in public costs.

Q237 Chair: That is not a new situation, is it?
Steve Hynes: It is not a new situation.

Q238 Chair: You said earlier how many parliamentary constituencies are involved. If I take the Shelter contract in the north-east, that must cover 15 or more parliamentary constituencies and an area which is 70 miles long.
Steve Hynes: Yes, it does.
Chair: Partly because of numbers, seeking more specialised advice in a particular area—in this case housing—has depended on going to somewhere more distant but usually via the open door either of the CAB or of the MP’s surgery.

Q239 Mr Buckland: I think Ms Janes wants to come in on the question I was asking about suggestions to save money in these areas other than taking it out of scope.
Laura Janes: I am afraid it is more of a general point about scope and the importance of a holistic approach to people’s needs. At the Howard League we provide an access to justice service where people can just ring in and say, “This is my problem. This is my child’s problem,” and we do a full legal diagnosis. What is striking is how many different areas of law and how many different specialists are required. I recently represented a young person, who had been sentenced as a child to a life sentence, on his parole. About two weeks before the hearing, the UK Borders Agency said that if he got parole they would deport him. It became absolutely essential then to make representations, including to the Home Secretary, to make sure that he would not be deported if he got parole, because it would completely undermine all the work we had put into the parole, and having legal aid for one would have meant he would suddenly be deported to a country he had never heard of, and you could not even have an effective hearing, because you would have to look at risk in the new country. That would be out of scope, so it would totally undermine all the legal aid spent on the parole hearing. We were able to make sure he had help and that decision was made. He was given a decision to be released, and that was an effective use of public funds. It didn’t undermine the work that we had done. It would have been meaningless for him to go through the motions of having a parole hearing if all it meant was that he was going to be deported and had no access to justice to fight that. For the clients, it is about providing that kind of holistic service. What we find with the access to justice service we have is that we have a member of staff who spends practically all her time at the Howard League ringing up other solicitors and seeing if they can help. It is a terrible waste of time and energy. Being able to provide holistic, good-quality services would make much more economic sense.

Q240 Mr Buckland: You are making a case for legal help at the threshold, which can cover a variety of issues, because the client doesn’t come in saying, “I’m a debt problem.” It is, “I’m a whole range of different problems which need an answer.”
Laura Janes: Absolutely.

Q241 Mr Buckland: Representation obviously comes further down the line if necessary, but you are talking about the first stage, aren’t you?
Laura Janes: Hopefully, you wouldn’t need representation in those kinds of cases. At our commission of inquiry that we held jointly with the Haldane Society last week, we heard from clients giving live testimony about legal aid. There was a woman who had had care proceedings. Yes, that would still be able to be funded under the current arrangements, but what she said that was compelling was that it was the help she got with her divorce that was important because until she managed to make that separation with her husband, which she found a very difficult process to navigate, nothing was fixed in her life. She wasn’t able to take the children back and look after them carefully because it was the partner that was the problem. Without that little bit of extra help with navigating through the divorce, the money on the care proceedings was virtually wasted because things didn’t come together. That is the kind of holistic approach.

The Green Paper is very clear about not wanting to have lots of unnecessary bureaucracy and overlegalism. Trying to pare that away rather than saying, “We are only going to help this bit of you or that bit of you” would make much more sense, in our submission.

Steve Hynes: In response specifically to Mr Buckland’s question, one of the suggestions that is floated in the Green Paper, and certainly one that LAG supports, though we qualify the support, is that there should be client account interest. There are various estimates floating around of how much could be obtained from it: between £6 million and £100 million. That is what we have heard. In the common law world, it is very common for client account interest to be used in this way. Certainly LAG would argue that the money should not go to the Government but back to the individuals, to those who need it the most. There is potential, though, for creating a jointly administered fund that could pick up quite a large portion of the funding that has been lost from various areas of law, but it would meet with great hostility from the legal profession, and I think they would be particularly hostile if they thought that the money was just going to disappear into the coffers of the Treasury. Certainly, if the Government were willing to look at this problem in the round, that is something they should seriously be looking at.

Chair: There are two more topics I want to move on to.
Q242 Mr Buckland: Can I deal with one final point? It certainly won’t be relevant to crime, because as we know, matters under indictment are not traditionally reviewable. Judicial review will remain in scope and there seems to be a general exclusion of JR. Do you think there is a danger, particularly in immigration cases, that there will be a flight to JR as a means of getting legal aid when other areas have been removed from scope?

Laura Janes: There are two dangers. I think there is that danger, and we have seen that already with the huge increase in litigants in person for immigration in judicial review. I think there is also another issue, which is that the effective removal of legal help from a huge range of areas will mean that problems which could be solved by judicial review, which are judicially reviewable, go undetected. That will be a detriment to justice, because if education cases are not in scope but there is a gaping injustice in an education matter, it is never going to come anywhere near a lawyer, who is able to say, “Hang on a minute. Actually you are entitled to this and there is a remedy.”

As a solicitor working with children in custody, I often have to threaten judicial review and rarely have to bring it. There is a great benefit in that remedy of last resort, which costs virtually nothing. It is done on legal help. We frequently threaten judicial review on legal help, at which point, once the authorities are reminded of their duties they are generally happy to back down.

Q243 Mr Buckland: I will come back to you in a moment. I just want to make this point. The scenario I was looking at was, in effect, that lawyers would not be involved for example in an SEN tribunal. The tribunal would take place and then the lawyer would come in, get legal aid and say, “The procedure was wrong and we are challenging it.”

Laura Janes: Yes. That would be the only way to challenge it. Those are the two risks: increased judicial reviews or things not being spotted. Christina Blacklaws: Can I make two points in relation to that? The first is that it is not just immigration. Obviously immigration cases can end up in the High Court as well. If we are going to look more broadly across the whole of civil and family legal aid, the number of cases that will end up in the High Court and the Court of Appeal, as opposed to being resolved, with immigration, at the Home Office decision stage or a tribunal, is going to be hugely increased. It is that front-loading that we are really trying to suggest to you, where £1 spent on early intervention legal aid will save £8.80 later on. The CAB have done work on this on employment law.

Q244 Chair: Yes; we have seen the CAB figures.

Christina Blacklaws: We don’t need to go into that, but it makes logical sense as well. If you can resolve things early, then you are going to save the public purse. Secondly, in relation to tribunals, obviously there is not legal aid for representation in most tribunals at the moment but there is legal aid for the early stages. That means that bad cases are headed off so they don’t get into tribunals, and appellants are aided and assisted to properly prepare their cases, which can be very complex in terms of the documentation required, etcetera, so that their cases can be properly determined by the tribunal judges. I don’t think that we can count as a measure of success less cases going to court. That is probably representative of unmet legal need and people not having their problems resolved rather than resolving them if there is no early intervention. There will be a much higher use of all levels of court and an inappropriate use of their time. If you talk to any judges about this, they are extremely clear that they would be very worried that their already limited resources—and we are talking about the same budget of course—will be stretched to breaking point if there are more litigants in person before them.

Chair: On that very topic, Mr Llwyd is going to ask a question.

Q245 Mr Llwyd: The question has been answered before I have put it. Professor Richard Moorhead did some research in 2005. He said that, if there is to be an increase in litigants in person, he is concerned that they sometime damage their own interests and they probably will create more work for their opponents and the courts themselves. The question I would put is: how will this affect the efficiency of court proceedings, the likelihood of reaching agreed settlements and is there any danger to the fairness of those proceedings?

Christina Blacklaws: Of course, the increase of litigants in person will inevitably have a hugely negative impact on the efficiency and the fairness of the court process. The Moorhead research, which I think was misused in the Green Paper, is very clear that unrepresented litigants are more likely to make errors, and serious errors at that. They are more likely to file very flawed documents that don’t assist the court. They are less likely to even attempt to settle their cases. All of these things will impede the good workings of the court system and, importantly for those individuals, will mean that they don’t have a proper and fair hearing.

I was talking to some of the senior family judiciary who say that, even if cases were dealt with more quickly, their experience is that they have a litigant who sits there and does not say a word because they are so petrified. No matter how they try to make the process inclusive and non-intimidating, just by being in a court, especially if there is a representative litigant on the other side, it is hugely intimidating. Just because it goes through quickly does not mean that justice is served in that sense.

Q246 Mr Llwyd: You say “goes through quickly”. I remember doing a family case a couple of years ago which was listed for three days. To my horror, the other side were not represented, and it took seven.

Christina Blacklaws: That is my anecdotal experience. I represent a lot of children in private law proceedings. When the court is so concerned that neither of the parents are able to act in the child’s best interests, they appoint a lawyer to represent that child. Often I am the only lawyer in the court and it takes a very long time. That is because if people have not had
the advice at the early stages they just don’t understand what the relevant issues are. That leads to a lot of frustration and, going back to domestic violence, may lead to people taking the law into their own hands with, I am afraid, quite concerning consequences.

Q247 Ben Gummer: Might I ask a follow-up question to that? Yesterday Sir Anthony May was the first person to broadly agree with the Ministry of Justice’s view that somehow the increase of time posed by litigants in person would be offset by a decrease in cases being brought, but he is the only person so far to have agreed with the MoJ. Can I very briefly have your opinion about whether you thought the MoJ was right in its assessment or incorrect?

Christina Blacklaws: Can I give you some figures from the impact assessment in the Green Paper, which is in my area of family law? The impact assessment says that there are going to be 3,300 more publicly-funded mediations. There are currently 53,000 family cases that go to the court. If there are only 3,500 or thereabouts of those that are going to go through mediation, that is a huge number of people who will be in the courts litigating in person or likely to be litigating in person.

Q248 Ben Gummer: Do you think that that number will reduce by a similar amount to the increase in time caused by litigants in person?

Christina Blacklaws: No, because litigants in person do not have advice that steers them away from the court process. That is what good family lawyers do. Court is the measure of absolute last resort. Nobody wants to see parents and children having to go through the court process. Every other way of resolving cases is tried before that. Something that is really lost in this debate is the benign effect of involving lawyers at an early stage rather than thinking that each lawyer is trying to push their clients into litigation. The reverse is true. My worry is that if you remove that layer of support and timely and appropriate advice you will have a flood of people who have no choice but to turn up at the court.

Q249 Claire Perry: I would like to press a little further on the alternative provision of help and advice that we have touched on during the debate so far. One of the arguments the Government has made for restricting legal aid application is that there are other sources of help and advice available, and perhaps there are some new creative ways to offer help and advice. The analogy I would like to use is that, as an MP, you clearly get very complicated problems brought to you that require in-depth face-to-face analysis, but you also have lots and lots of things that come in that you can deal with in a telephone surgery or relatively quickly. Do you think that there is, or could be, appropriate support provided from the existing universe or potentially from some new models of provision?

Steve Hynes: The main problem, as I think I have said before, is that other arms of government—Birmingham City Council being an example—are cutting back on the alternative providers. If you look at the Financial Inclusion Fund in particular, as I said before, that will mean something like 1,000 debt counsellors across the country will no longer be providing a service. The other problem that I see is that there is an over-confidence in the pro bono community to take up the slack of the legal aid cuts. I sit on the London Legal Support Trust, which is a trust that has City firms sitting on it. It raises money from a sponsored walk and other activities to distribute money to law centres and other not-for-profit organisations. It is a relatively small amount of money that we raise but it is successful. Many of the firms we have links with have pro bono rotas and undertake pro bono cases in law centres, particularly in London. What they tell me is that if you don’t have the provision on the ground of law centres and Citizens Advice Bureaux, then we don’t have anybody to partner with for pro bono services.

Chair: We have taken evidence from them on that point.

Steve Hynes: I will not reiterate what has probably already been said. As I said before, though, if the Government want to look at this in the round then they should, as you say, look at other areas of funding and look at the outside potential funding arrears. I have given the example of the client account interest. It is not something that is going to be done overnight, but it is certainly something that could be done within the spending review period. My fear is that the MoJ are rushing to cut this money, around £50 million, with the non-family legal aid, at a time when the rest of the alternative provision has been decimated.

Q250 Claire Perry: Ms Janes, you have mentioned the Howard League’s phone line advice provision. Would you be able to expand on this broader theme as to whether there are alternative sources that could deal with cases that perhaps do not need to be dealt with by qualified solicitors receiving legal aid, or different ways of doing it?

Laura Janes: Yes. At the Howard League we will take all the information from the person calling and talk to them about what their problems are. Quite often, as you say, there will be certain things that can be dealt with easily by non-legal entities. We will try and refer them to those organisations.

What is also very interesting is that we often get people in quite desperate situations who have been working with very well-meaning other third-sector organisations for a very long time without great effect. That is because that organisation just may not know that there is a very simple legal solution to this and, if you were to know it, and point that out to the local authority or the relevant body, things would become a lot easier. It is about the appropriate use of resources. We are in danger of trying to push so much away from lawyers, which will eventually ping back and even come back into court, that it can become a diversion. It is about the appropriate targeting.

Certainly for young legal aid lawyers, it has become almost a given that you will be doing some sort of voluntary-type advice work if you are going to be able to make your way. The provision of additional pro bono help is a wonderful asset as an extra add-on. Whatever way we are looking at it, we are not going
to be getting more money. Any help we can get is great, but, in terms of having services as of right and to make sure that justice does not suffer, it can’t be a replacement. It is really about making the most appropriate use of resources.

Christina Blacklaws: Just a couple of points. The CABs offer excellent generalist advice, but they would say that they refer a lot of cases out to solicitors. In fact we work hand-in-glove with a number of CABs and deliver the advice from the CAB centres themselves because they don’t do family work and the higher level of housing work. There is a limit to what Citizens Advice can do.

Law Centre Federations do much more specialist work. We were told yesterday at the Westminster Policy Forum that their funding will be cut from £21 million to £7 million because of this. They are not going to be able to do what they are doing at the moment, so you are looking at a huge and devastating cut across all of the sectors that deliver this sort of advice and assistance.

The third point I want to make is about other ways of resolving problems, such as mediation. I am a family mediator and I have been for 17 years. I am still very shiny-eyed about family mediation and what it can do for individuals and for their children. It is a marvellous resource and way of resolving problems for appropriate clients. But it is not the right thing for everybody, so you do need other provisions around it. I make that general point that, yes, there are other services out there. They tend to be more at a cottage industry level, which means that they are serving a smaller and specific community. Those that are broader are having all of their funding attacked every which way.

It is not necessarily that solicitors are very well paid. If you look at the National Audit Office statistics, which I am sure you have had quoted to you, legal aid solicitors get paid on average less than sewage workers. The average legal aid solicitor’s salary is under £25,000. We are not talking about this enormously expensive resource. The Law Society doesn’t think that people should make an enormous amount of money out of the public fund. We are suggesting a cap of £250,000 for any individual to earn out of legal aid. We can see that it is important that people are not making huge sums of money out of this, but, believe me, legal aid solicitors aren’t.

Q251 Ben Gummer: Does the Bar Council agree with that cap?

Paul Mendelle: Can I make a slightly separate point which I hope is related?

Chair: Wouldn’t you like to answer Mr Gummer’s question before you make your separate point?

Paul Mendelle: The short answer is yes.

Ben Gummer: You do agree.

Paul Mendelle: Yes. Can I make a slightly separate point, which is this? So far as telephone advice is concerned, I think the last figure from the Legal Services Commission said somewhere around £175 million is spent on telephone and police station attendance advice. I am not quite sure what the split is between the two.

Q252 Claire Perry: Sorry. Telephone and what was the police station advice?

Paul Mendelle: Police station attendance advice.

Claire Perry: The use of the police station’s phone to the duty solicitor.

Paul Mendelle: Attending the police station and telephone. Working from memory, I think it is about £175 million. Policy Exchange, which is a think tank, published a report last year which suggested that, of that, about £125 million was face-to-face advice. There is an argument one could mount to say that we could cut a lot of that. We could stop people going down to the police station in certain circumstances, and it is not difficult to construct those circumstances in which you would cut back on police station attendance. You might save £40 million or £50 million that way.

Q253 Claire Perry: Who is attending? Is this solicitors attending when somebody is in the police station exercising their right to phone a solicitor?

Paul Mendelle: Yes. As matters stand at the moment, generally speaking, the solicitor has a discretion as to whether he or she goes down to the police station. It would depend on whether the defendant is going to be interviewed, but if the defendant is going to be interviewed they have to be there. You can construct circumstances in which you could cut the costs of that by limiting the circumstances in which the solicitor attended.

It varies enormously around the county, but the MoJ’s data shows that not every case where a solicitor attends results in a charge or in a representation. It is sometimes a third or a half of those cases that don’t result in a charge. Is that because the solicitor has attended? Is that because the solicitor has attended, advised the defendant to answer questions, in answering questions an explanation has been put forward and that causes the police and CPS not to charge? I don’t know the answer to that question.

Q254 Claire Perry: Forgive me. Mr Mendelle, but I think the issue is about telephone advice. It is not the existing model, but to say, look, in a world where more and more of our transactions are conducted over the phone or indeed on the internet, rather than the rigid adherence to the face-to-face model for delivering what I am calling low-quality legal advice—I don’t mean that in a derogatory sense but around some of these tricky areas of benefit advice and employment questions—could you not envisage a model where that could be delivered in a far more cost-effective way by having legal aid practitioners essentially using technology to offer advice to far more people at this sort of low level of complaint?

Paul Mendelle: I am obviously looking at it from the criminal practitioner’s point of view. A lot of defendants who are arrested do not have a lot of documents. It is a much easier ask to give telephone advice. But what I am saying to you is this. We don’t know, because there is no proper research about this, the consequences of only giving telephone advice. It
may be that the saving you make at the start of the system is lost because at the end of the system you have more cases coming into court.

Q255 Claire Perry: Yes, but you could make that case about poor legal representation. That is impossible to prove, is it not, because we just don’t have those sorts of benchmarks in the legal system currently?

Paul Mendelle: That is a very good point.

Q256 Claire Perry: You had a very helpful table in the submissions about the number of telephone help lines. It was a bit like the Howard League one that we talked about where this is provided. Again, as we are facing this crippling budget deficit, can we not have some thinking about how to deliver this high-quality advice in a lower-cost method, perhaps even using the internet? What is to stop having web-chats with legal aid lawyers, which would essentially cost nothing because it is already in your infrastructure?

Steve Hynes: I don’t think any of the expert submissions are disagreeing with the concept of delivering legal services through the telephone and internet. Certainly LAG’s position has always been that these are useful services that can act as a very good gateway and often provide diagnostic services. However, you have to think of the clients. With regard to civil legal aid clients, we did a recent opinion poll a couple of months ago and we found that only 24% of people in the D and E social group were prepared to use telephone and internet advice. They are, as a group, very much excluded from telephone-type services because of pay-as-you-go mobile phones and communication and other problems that mean they tend to prefer, as a client group, face-to-face advice. As I say, these people will often have needs around comprehension and language that means sometimes the telephone just doesn’t work for them. The classic example is the debt clients with a plastic bag full of letters from creditors, with no idea what to do. They are under stress and probably depressed. They are not going to be able to go through that sort of information over the phone. You could have a client ringing you up, getting an appropriate referral, going in with a plastic bag of letters and putting it to the Citizens Advice Bureau adviser or whoever.

Q259 Chair: Don’t worry. They come to see us with that sort of pile of letters. We are running out of time. Christina Blacklaws: Can I make a couple of quick points about the actual proposal, which is that the telephone helpline is the only gateway into accessing civil legal aid services? Supporting everything that Mr Hynes has said, the Law Society can see that telephone, internet delivery and all sorts of new media delivery of legal services—one to many delivery—is a very robust and appropriate way forward for a lot of information giving in terms of legal advice. We are supportive of that, but we are not supportive of it being the only gateway into legal aid for the reasons about the clients, which Mr Hynes has set out, but also because of the reliance upon the current system being of such excellent outcomes. We would say that there are excellent outcomes for those people who are contacting the current telephone provision because they are a self-selecting group with alternatives. There is no evidence or research in relation to whether there is any, what I would call, double-dipping. That is people phoning up, getting a bit of advice and then going to see a solicitor. It may be that a lot of the cases that go through telephone help lines at the moment are that sort of toe-in-the-water type. “Well, I’m just going to phone up and get a bit of advice and then when I want to access or do something about my legal issue I’ll go and see a lawyer.” We treat the evidence about 90% plus satisfaction with some caution, because it may be that if everybody had to go through it the satisfaction rates would bottom out.

Chair: Thank you very much indeed for giving us your time, advice and help this morning. We much appreciate it. Thank you.
Monday 14 February 2011

Members present:

Sir Alan Beith (Chair)
Mr Robert Buckland
Ben Gummer
Mr Elfyn Llwyd
Elizabeth Truss

Examination of Witness

Witness: Professor Roger Bowles, University of York, gave evidence.

Chair: A very warm welcome to you, Professor Bowles. We have read your work with great interest. In a moment we are going to ask you to expand on it, but I think we have to declare interests first.

Mr Llwyd: In the past I have undertaken publicly funded work in civil and criminal law as a solicitor and member of the Bar.

Mr Buckland: I am a barrister who has conducted legal aid work in the past. I don’t have any current cases at the moment, although I am still due some outstanding payments from legal aid work.

Q260 Chair: To return to your research report, we found it very helpful and interesting for our inquiry. Have you done any work since then which has in any way modified the conclusions in the report or caused you to think that there are some points you might need to go back to more systematically?

Professor Bowles: No. I haven’t. I have not had a history of doing a lot of work in the legal aid sphere. This piece of work was commissioned by the Ministry of Justice in 2008, but I haven’t done anything of substance since I wrote this report.

Q261 Chair: Just to give you an opportunity to speak more generally about it, how would you sum up the reasons for us having a legal aid system which, in the words of the Lord Chancellor, is “one of the most expensive in the world”—a fact which seemed to be sustained by your work?

Professor Bowles: One of the main points I would like to make is that there are a lot of reasons why we are spending so much more than other countries. It is to do partly with the history of legal aid, what it was set up to do and how it has grown subsequently. It is to do with the way in which people have become accustomed to resolving disputes, the high crime rate in England and Wales and the comparatively high proportion of criminal cases which come before the courts. There is a long list of reasons which perhaps we will go into in greater detail later on. I don’t think there is any single reason that says we are being particularly profligate. It is not quite a perfect storm kind of argument, but on almost all of the components of the expenditure we find ourselves in a position where we are spending more.

Q262 Chair: We have also had the Council of Europe document, which I think you share some basic data with. Don’t you?

Professor Bowles: Yes.

Q263 Chair: We seem to come out top of the table there most of the time, don’t we?

Professor Bowles: Yes, we do.

Q264 Elizabeth Truss: One of the points you made about the drivers is that there are a variety of different drivers. One thing I notice, looking at the statistics, is that we have a very high cost per case. Even if the crime rate is higher and more people are eligible, there still seems to be an issue with the basic cost per case. How would you compare that particularly to the other common law countries that you looked at in your study?

Professor Bowles: I think the high cost per case depends on a lot of things. It is to do with the amount of legal services which are used in cases and the way in which the expenditure on services is managed. It is to do with some procedural issues which seem to make the volume of cases going before the courts, especially criminal cases, particularly high. In terms of why the cost per case is higher, primarily that has to do with what the legal inputs into a typical criminal case entail.

Q265 Elizabeth Truss: Are you suggesting that, compared, let’s say, to Canada, legal services are more expensive here, or the court process is more elongated so that people need more legal services during their case, and what could potentially be done about that?

Professor Bowles: It is very difficult to make direct comparisons of what the lawyers in the cases are actually doing, which is one of the things one would like to try and get at. It is that and the cost per hour, or the cost per step, that one is trying to control. In terms of comparisons with other countries, it is very difficult to pin down why it is costing so much here. What has evolved is a system for rewarding people who are doing criminal legal work. They are working in a set of procedural and substantive rules which, as it were, constrain what steps have to be followed in a case. Those things just seem to be taking longer in the UK than they would elsewhere.

Q266 Elizabeth Truss: Can I try and separate out the way the Ministry of Justice is implementing the body of law, and the extent of the body of law in Britain, and the way that laws are drawn up? What is the division between those? Could you also comment on the costs per hour between Britain and other countries and whether that is a factor?

Professor Bowles: There is a distinction between the substantive law and the procedural issues. I should say that I am an economist and not a lawyer.
Elizabeth Truss: So am I. 

Professor Bowles: So there are a lot of parts of this which I find quite difficult to answer authoritatively. There are all sorts of issues that tend to come up. For example, at the magistrates' court, when cases are being heard that potentially could go to the Crown court or could be resolved at the magistrates' court, that is a point at which costs often seem to run out of control because of the structure and incentives for a lawyer to terminate cases at particular stages, to decide whether to go to the Crown court or whether, at the stage of a Crown court hearing having been set down, they then make a plea late in the day and everybody wastes time. The resources are not just the legal aid time. Of course there is court time as well, which is very frequently wasted in these kinds of cases.

One of the things which emerges from the comparisons with other countries—and again it is difficult to pin down very precisely—is that the way in which courts work, the way they hear cases, and the role that is assigned to the person who is making the decisions relative to what matters have to be discussed by legal representatives tend to be somewhat different. One of the reasons why spending is very high here seems to be that an awful lot of criminal cases end up with lawyers appearing in court. That is something which has been controlled to some degree in other countries.

Q267 Chair: Even in some Commonwealth jurisdictions?

Professor Bowles: Yes.

Q268 Elizabeth Truss: How do they do that? Why is England and Wales taking a different path from Canada or New Zealand in that respect?

Professor Bowles: I can't give you a straightforward answer to that. I have looked at the expenditure figures and those sorts of things, but I don’t know enough about the differences between the details of legal procedure in criminal cases to give you a good answer to that.

Q269 Elizabeth Truss: Can I ask you again about the hourly charge or the hourly rates?

Professor Bowles: Yes. The hourly charge, again, is a difficult one. The hourly charge does depend on the complexity of the issue, what kinds of level of the court is involved, what kinds of lawyers are being used, whether there are counsel involved and those sorts of things. What one would say is that the ways of trying to control that spending per case is something which is under review at the moment. People are looking at alternative ways of setting hourly rates. I guess that is something they will be interested to look at more closely.

Q270 Elizabeth Truss: Is there an average hourly rate figure, even if there are going to be differences according to the complexity of the cases? Do other jurisdictions pay lawyers in different ways? Are there more flat rates, for example, than hourly rates?

Professor Bowles: I think even here quite a lot of the work through magistrates' courts is dealt with on a flat-rate basis, which is clearly the best way of controlling the possibility that lawyers might try to use longer on cases than, strictly speaking, they merit. I can't give you a straightforward answer on the hourly rates, I am afraid.

Q271 Chair: On family work, you said that over the period you studied, even though there had been a slight decline in volume, the share of family work on non-criminal spending had increased sharply as costs had more than compensated for a small fall in volume.

Professor Bowles: Yes.

Q272 Chair: Did you identify where those costs were?

Professor Bowles: No. That is the point at which it is difficult to get much further behind the sorts of figures that we were looking at. This was a relatively small-scale study that we did, I should say. We did not go into great depth. There are a lot of countries and a lot of different areas of law to try and digest. The sorts of things that people would probably argue is that third-party interests, for example, in family law cases became more prominent over that time interval. The interests of children and the interests of people beyond perhaps the husband and partner were being taken more seriously. That clearly requires a greater degree of legal representation for those wider interests.

Q273 Mr Buckland: I want to come back and ask you about the point that was made about hourly rates. Did you find that, frankly, an impossible exercise? Hourly rates are only charged in certain areas of legal aid: for example, very high cost cases in crime. The bulk of criminal work is in fact per case under a graduated fee scheme.

Professor Bowles: Yes. Whether one is looking at England and Wales or at other countries, pinning down a price per hour of service is a difficult exercise to do. It depends on how you treat preparation time and things of that kind, and what you do about lawyers who are left waiting in corridors for a length of time, and so on. I know that these things can be dealt with by line by line, and you can have different rates attaching to different types of input into a case, but it is very difficult to produce a single figure that one can comfortably point to and say—

Q274 Mr Buckland: Yes, because a lot of these rates will be per day, as opposed to any particular delineation. In fact, the system has been changed quite radically in the last 20 years or so, hasn’t it?

Professor Bowles: Yes.

Q275 Mr Buckland: Does it come to this, though? The difference between England and Wales and other jurisdictions is sheer volume. We seem to do a lot more in court, whether it is family or crime, than other jurisdictions.

Professor Bowles: Yes, I think that is a large element of it. In almost all the cases we looked at, the volumes and the cost per case were higher. There has been some good news in the sense that, for example, in areas like personal injuries people have found ways of reducing legal spending. The sorts of changes that are
needed to bring about those kinds of savings are really quite dramatic. One of the points I would make about the comparison with other countries is that you can find countries where income ceilings for being eligible for legal aid are very much lower, or where the ways that criminal cases are handled are very different. The problem that England and Wales has is this particularly unusual combination of these high volumes and high costs per case. That is what makes the total spending per capita look so high here relative to others.

Q276 Mr Buckland: Could one of the drivers for high costs in criminal cases be the growth in the complexity of criminal procedure, requiring more work by lawyers on procedural matters than used to be the case?

Professor Bowles: Yes. I heard somebody on the radio this morning make the point that an area of law for which the textbook was one volume a few years ago has rapidly ballooned into five volumes. From a non-legal point of view, there is good news and bad news about those sorts of things. The expansion of the case law should, at some level, mean that things are more predictable and that you know how cases ought to be resolved. The growth in the case law should, at one level, be making it cheaper to resolve disputes. But what seems to happen is that that very expansion of things opens up new possibilities, new avenues that might be explored and new issues that might be taken forward.

Q277 Mr Buckland: Yes, and more complex submissions to be made. The debate we are having here is whether or not there should be wholesale reductions in scope in legal aid or whether a different or tighter merits test could be applied. In some of the other jurisdictions that you looked at, did you notice any appreciable difference? You have mentioned one about means of payment, but was there any difference in the merits tests that were applied for legal aid purposes?

Professor Bowles: The merits tests tend to be comparatively standard. People try to get at the notion of whether a private individual with moderate means would spend their own money on the matter. That kind of test is pretty widely used. The differences come in how the advice is delivered and the degree to which representation is needed in cases. Those are the areas where the differences seem to be most appreciable. In some of the continental countries, for example, cases seem to be resolved before they come to a court hearing. There are elements of that, of course, in developments in England and Wales. There are things like fixed penalty notices, where there might be the right of appeal if you are not happy with things. There are devices that have been used to try to contain the degree to which cases have to be heard by magistrates, the Crown court or the higher courts.

Q278 Chair: They, of course, are bearing on the least expensive part of the system, aren't they? They are bearing on the magistrates’ court area.

Professor Bowles: Yes.

Q279 Chair: As you yourself point out further in the report, one of the things that makes our judicial system cheaper—not our legal aid system—is the very small number of professional judges and the large number of unpaid lay magistrates. They are being saved from parking tickets and things like that by other mechanisms.

Professor Bowles: Yes.

Q280 Elizabeth Truss: You said earlier that, because of the complexity of the system in England and Wales, it would need a radical restructure to bring down the costs. Mr Buckland talked about the scope. What sort of radical restructure are you talking about? Would you have any specific proposals, in line with something like the way the Canadian or New Zealand system worked on a common law basis, for how the court system or the Ministry of Justice could work differently?

Professor Bowles: There is a range of possibilities one can look at. If one were looking for encouragement, something like the developments in the contingency fee arrangements in personal injury cases might be a place to look. In a sense, what has happened there is that people have tried to internalise the legal service transactions within the activity itself. In other words, it is the health service and the injured parties who, between themselves, have to sort out the bills for the legal costs of both sides, whereas previously it would have been the taxpayer supporting the injured parties more directly.

From an economic point of view there are two points. One is that there are ways of internalising the disputes to a particular sector. The other is that there may be other ways of funding the legal costs. The sort of example one might think about would be if you take, say, landlord and tenant disputes. At the moment a tenant who is not very well off can get legal aid to bring certain sorts of claims. What you could imagine happening there would be somebody saying, “That’s really a housing problem, and what we need to do is to internalise the legal resources we need to use on resolving those housing issues within the housing sector itself.” You might, for example, imagine a scheme where, when people enter contracts for the provision of housing, both sides have to indemnify themselves against the possibility that there will be a dispute and that legal costs would be entailed.

In countries such as Germany, for example, there is very heavy reliance on legal expenses insurance, which is designed to try to anticipate the sorts of legal problems that citizens might find themselves running into, and to make sure they have alternatives to a reliance on a publicly funded legal service. That would be an example of a rather radical way of going about things. From an economic point of view, as I say, that doesn’t necessarily resolve the issue, because those costs may still be falling on the public sector, and it is still the health authority that is paying the lawyers and the costs of the damages. Although you may get a reduction in the legal aid budget, you would not necessarily get a saving on the amount of resources going into resolving those disputes.
Q281 Chair: Isn’t it potentially beneficial, from the standpoint of reducing cost, if an authority or a public body has some of the budgetary responsibility for the legal costs that arise from careless or bad decision making?

Professor Bowles: Yes, you can certainly make that argument. The incentive effects of those kinds of developments can be quite complex to track. For example, if the cost of settling cases goes up, then the legal defence costs of the doctors are going to go up, which may be paid by health authorities or the doctors. There are various models you can have of how the insurance arrangements work. It does depend very much on the pool of people you can rely on to meet the costs at the end of the day. The disputes have to be resolved. Legal aid as a public resource to settle disputes is a costly option, but there is then also the issue of what the cost would be of not having those arrangements in place. Those can be considerable for people as well.

One of the implications I would like to draw attention to is that the countries with which comparisons have been made have developed these institutions over quite long periods of time. The legal aid arrangements are embedded in wider structures of things. To just go in and say, “Okay, we are going to take that category of work out of legal aid” may be attractive from a public expenditure control perspective in the short term, but it does become an issue about how those disputes are going to be resolved, because in the end somebody is going to have to devote time to it.

Q282 Ben Gummer: Professor Bowles, I know you said it is difficult to compare the hourly rates of lawyers across jurisdictions, but do you have any idea—even if it is a broadly anecdotal one—about the comparability of lawyers’ incomes?

Professor Bowles: That is an interesting one. I didn’t think of looking at that. I suppose the reason for doing that is that the legal professions tend to be very heterogeneous so that you have distinctions between solicitors and barristers. A lot of legal aid work will be done by firms which are doing a mix of work. It is quite difficult to get a sense of the degree to which people are getting richer or poorer as a result of legal aid decisions being made, for example, about the use of high-cost counsel in criminal defences, there would normally be a test that said, if the Crown Prosecution Service are going to need a QC, then at some level or other you are going to have to say that the defence is entitled to one as well. It is maintaining that balance which is important, in circumstances where the Crown Prosecution Service may not themselves be thinking primarily about the cost control implications of what they are doing. There are important interactions between the provision of legal services and the human rights legislation. There are other constraints on how criminal cases are dealt with.

Ben Gummer: It does seem—and I know this is a matter of public policy—given the fact that we are questioning the salaries of chief executives of local authorities and comparing them to the salary of the Prime Minister, there is one area of publicly funded work which is conspicuous by its absence from that comparison. I know it applies to a small number, but none the less it is a factor.

Q283 Ben Gummer: I recognise there are only a very small number of barristers and solicitors to whom this applies, but in pure market terms, what would be the effect if you provided a cap at the top end of the pay scale—if you limited income for lawyers? The Law Society has suggested a £250,000 cap, for instance. If you were to do that also for barristers, what effect would that have through the entire fee-making engine?

Professor Bowles: That is a complicated question.

Q284 Ben Gummer: That is why I asked you. I am not trying to catch you out, but you are the professor in this field.

Professor Bowles: One of the sorts of things one has to take into account is that, when legal aid decisions are being made, for example, about the use of high-cost counsel in criminal defences, there would normally be a test that said, if the Crown Prosecution Service are going to need a QC, then at some level or other you are going to have to say that the defence is entitled to one as well. It is maintaining that balance which is important, in circumstances where the Crown Prosecution Service may not themselves be thinking primarily about the cost control implications of what they are doing. There are important interactions between the provision of legal services and the human rights legislation. There are other constraints on how criminal cases are dealt with.

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Q285 Elizabeth Truss: Is it affected by the large market for legal services? The UK is a leader in the international legal services market and has some very highly paid lawyers who work in all sorts of jobs, whether it is for major corporates or the City. Does that have an effect on bidding up all of the legal work in Britain?
Q286 **Professor Bowles:** I would guess that it must do at some level. Certainly, if you are looking for highly specialist, very experienced lawyers, then I am sure that that does drive salary levels higher than they might otherwise be. As to what the implications of capping those expenditure levels would be, there is a comparatively small number of people involved. The question for me would be how elastic the supply in the market for legal services would be. I don’t know what the answer to that would be. I think it is an interesting question to ask, and a rather important question to ask, because it is clear that those high cost cases are consuming a significant proportion of the budget and trying to keep costs down in those cases is an important priority. The counter would be that prosecutions, especially in major fraud cases, large money laundering cases and things of that sort, are becoming very, very complex and there is a lot of evidence and you need good people to be able to sort them out.

Q287 **Mr Llwyd:** Can I take you back to something which you said to Sir Alan earlier on about family cases? Did you find during the study period, which I believe was 2001 to 2006-07, that there was a substantial increase in the instruction of guardians ad litem?

**Professor Bowles:** That is a very technical question. I do not have the answer to that at my fingertips, I am afraid.

Q288 **Mr Llwyd:** Could you write to the Committee with the answer, please?

**Professor Bowles:** Yes.

Q289 **Mr Llwyd:** With regard to your research in particular, can I remind you of what Lord Bach said? He described the findings as “tentative” to our previous Committee. Two issues were identified in particular. He said: “First, particularly in the federal systems such as Australia and Canada, there was sufficient variation even within single countries, at provincial level, to preclude [comparison] from being feasible within the time and space limits. Secondly, as regards”—European Union—“countries surveyed, the sources of comparative data were regarded as insufficiently robust to support much in the way of inferences.” What are the key limitations of your research? Are the findings, indeed, to be interpreted as “tentative”, to our predecessor Committee?

**Professor Bowles:** I would distinguish between “tentative” and “definitive”. These findings are certainly not definitive because we did not go into anything like the depth of detail that one would need to do to produce clear-cut answers to these sorts of issues. I regarded this as an exploratory piece of work. It is not “tentative” in the sense of saying, “If you were writing it again, would you do it differently?” No, I would do it the same. I would say the same things.

In relation to federal systems, there are some quite substantial differences that do make it difficult to generalise. Let us say we have five pages to write about Australia. There are a lot of states there and they differ quite substantially. In those circumstances, given the sort of space and time limitations we had, we were not able to drill down into those differences. I am not tentative in saying that those differences exist; they certainly exist. As to the robustness of the EU data, that is true. In the sort of exercise that the Commission did in producing their comparative statistics, they did get a lot of criticism from people for the sorts of assumptions that they made. If you are going to make any comparisons of case volumes, costs per case and those kinds of things, you have to make heroic assumptions and produce rather broad-brush findings. I would certainly be the first to say, yes, this is broad-brush kind of stuff. If somebody said, “We’ve got to produce a paper on the reform to the legal aid system. Could you use what is in my report as a reliable guide?” I would say, no, it is a starting point, but there is nothing in that which would lead you to do anything other than be quite nervous about taking on the kind of range of reforms that are in prospect.

Q287 **Mr Llwyd:** To be fair, you have said yourself that additional analysis of data collection methodology might have revealed other explanations.

**Professor Bowles:** Yes.

Q290 **Mr Llwyd:** The Ministry of Justice specified the comparator countries that you studied.

**Professor Bowles:** They did.

Q291 **Mr Llwyd:** By what criteria were they determined?

**Professor Bowles:** My understanding is that the two things they wanted to do were, first of all, to compare mainland Europe with some of the Commonwealth countries with common law jurisdictions, because there was a worry that there was something about the continental countries which meant that legal procedure was an important component in the cost of providing public provision for legal services. I think those were the two principal criteria.

Q292 **Mr Llwyd:** Would you have found it more useful to do a worldwide comparison? It would have been a big piece of research. I am sure, but do you think that would have concluded that the system in England and Wales would be the most expensive?

**Professor Bowles:** In so far as we were concentrating primarily on middle and higher income countries, we included quite a large range of those and certainly most of the major European countries. We didn’t cover the United States, which would be a very large and messy piece of work to do because of the state level jurisdiction. The other country would be perhaps Japan, which has such a different legal system that I am not sure there would have been a great deal to be learned. I am not sure about that; I would be hesitant about that.

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Q294 **Mr Llwyd:** Could you tell the Committee what impact the reintroduction of means testing in criminal cases has on your findings?

**Professor Bowles:** It is quite difficult to produce a quick and easy answer to that. I have not looked at
the business case that the MoJ will have had for making that change. It is certainly the case that in other countries there is means testing in criminal cases, and in some countries it goes even further than that and you don’t get anything if you are convicted for certain sorts of offences. There is no entitlement at all, whatever your level of income. The answer would be that one would need to look to see what kinds of cases were being turned down, and what the proportion of cases would be where contributions were being sought from defendants. I could not give you a figure off the top of my head, I am afraid.

Q295 Ben Gummer: I have two very quick questions. The first is, if I may ask a personal question, how much would this cost? You have mentioned additional research to be able to come to more definitive conclusions. What would the cost of such a study be? I wouldn’t want to put a price tag on it. I will ask the second question after that.

Professor Bowles: It would depend very much on what one wanted to do. It seems to me that there are, in a sense, two issues here. What we did in this report was pretty much to document the way in which arrangements work in other countries, some of the key features of them, and demonstrating that there are some countries that do things very, very differently. There can be very big cost differences that one can attribute more or less directly to those kinds of differences.

What seems to me to be the more testing question is how you could learn from those experiences and transplant them into England and Wales. If you take something like the ceiling income entitlement and suppose you were to reduce that by two-thirds, that would be an enormous change to make. Being able to track through what the consequences of that might be is of a different order from doing a more descriptive study that looks at the way that different countries operate their legal systems at the moment. There are different things one could do. One would be to go further with the kind of study that we have done here and to look in greater detail at particular areas of law, for example, and make comparisons across those countries.

The other kind of exercise is more like the kind of work that I thought I was going to find in the impact assessment for the consultation paper on legal aid, which is to say, “If we do this, what kind of world are we going to be looking at in three or four years’ time?” I did not find much indication of that in the impact assessment. That would be an interesting piece of work to do, but it would be somewhat different from a more thorough, encyclopaedic piece of work.

Q296 Ben Gummer: I have a quick question on the intriguing suggestion you have put here about non-voluntary pro bono work by lawyers. Without going into too much detail, did that have an appreciable impact upon the legal costs in the places where that was effected?

Professor Bowles: The context for making that remark was that, in certain parts of the US, there are, for example, law firms which do quite large amounts of pro bono work as a kind of quid pro quo. They know they are well off and it is their way of putting something back—let’s put it that way. In a sense, that is one of those areas where you could reduce legal aid spending by inducing people to supply services at zero user cost or at low user cost. But the question is: who then pays? Is it the clients of those law firms who are paying for other kinds of legal work to be done? Without being unduly cynical, it is probably not the lawyers themselves thinking, “Corporate law is such a doddl, I have a lot of spare time and I would like to put something back into the community by doing some pro bono cases.”

Chair: We are running short of time.

Q297 Mr Buckland: On a point that you have mentioned, you may not be aware of the substantial pro bono work that already goes on at the Bar and with solicitors—for example, the Bar Pro Bono Unit—which can be of help to Members of Parliament with their casework. I want to draw something out of you about the timing of your research. The control period of your research ends in 2007, does it not?

Professor Bowles: Yes.

Q298 Mr Buckland: The Council of Europe figures demonstrate a nearly 23% decline in spending on legal aid in England and Wales in the period since then.

Professor Bowles: Yes.

Q299 Mr Buckland: Does that have any impact upon the conclusions that you come to as of today?

Professor Bowles: That is an interesting question, and I have asked myself that over the last few days. Not having kept up to date with this field since I did this piece of work, I am not absolutely certain. There are two things I would say. The first exercise to do would be to look more closely at the MoJ figures for how things have evolved in England and Wales. There are also things like changes in exchange rates which mean that some of the relativities would be somewhat different now. There is also the fact that there have been changes in the pattern of work that is being done under legal aid. One would need more time to reflect on what the consequences of that might be.

Q300 Mr Buckland: A final question, if I may, Sir Alan. The Council of Europe report shows that, when you look at courts, public prosecution and legal aid together, England and Wales is at the average when it comes to the percentage of GDP per capita spent on legal services.

Professor Bowles: Yes. That is an interesting observation. That is why I think more needs to be done about trying to track through what the implications of some of the proposals might be for the volumes of work that might be anticipated under the new proposals.

Q301 Chair: In the report you speculate that the cost difference on the court side may be primarily because of the use of lay magistrates here and very small numbers of professional judges.

Professor Bowles: Yes.
Q302 Chair: Do you still hold the view that that is the likely reason?

Professor Bowles: Yes. One needs to be a little careful with that argument. It is not just that the time of those people is paid for in a different kind of way. It is that, if you have a professional judge sitting in a court, then the way that the case is presented, the issues that are looked at and the part that the defendant and the prosecutor play is somewhat different. There seem clearly to be possibilities for substitution here, that is to say, you could have the court do more inquisitorial work itself. The consequence of that might be that you would need less by way of representation. That really goes to the point I was making about legal aid not operating in a vacuum. It is derived demand in a market for legal services, which is itself propelled by all sorts of substantive and procedural things to do with the way that the legislation operates and the way that the courts work.

Q303 Chair: Thank you very much indeed. We are very grateful to you. There was something you promised to let us have a note about, wasn’t there?

Professor Bowles: Yes, a note on guardians ad litem.

Chair: Yes, thank you.

Examination of Witnesses

Witnesses: Sarah Albon, Director for Civil, Family and Legal Aid Policy, Ministry of Justice, and Carolyn Downs, Chief Executive, Legal Services Commission, gave evidence.

Chair: We are very glad to have Carolyn Downs and Sarah Albon, representing the Legal Services Commission and the Ministry of Justice, to help us with our inquiry into legal aid. In the earlier session this afternoon we were looking at the comparative figures and trying to draw some experience and lessons from that on the basis of the study which the Ministry of Justice commissioned. I will ask Elizabeth Truss to open the questioning.

Q304 Elizabeth Truss: Could I start off by asking what the cost drivers of legal aid are, in the Ministry of Justice’s assessment, and how you are planning to address that through the proposed reforms?

Sarah Albon: The principal cost drivers of legal aid are simply the numbers of cases that come through. If we look at criminal legal aid, it is about the number of people who were interviewed by the police and then the numbers who go on to be charged and, crucially, which venue they appear in, whether it is the magistrates’ courts or the Crown court. Obviously in the areas around debt, social welfare, housing and that kind of thing we have seen an impact from the recession, with increasing numbers of people eligible for legal aid. In public family law, dealing with children at risk of serious harm, we have seen a significant increase in the volumes, particularly following the Baby Peter case.

Q305 Elizabeth Truss: Can I ask about the cost per case, though, because on the international comparisons, that does appear to be higher than other countries and it appears to be higher than other common law countries? What would you say is the driver of that cost per case?

Sarah Albon: We only have limited evidence on what drives the individual cost per case. Clearly, it breaks down to a mixture of lawyers’ fees and experts’ fees. An individual case will cost us more typically in crime if it takes longer at trial. We have also seen, in crime, a significant increase in the number of pages of evidence which are served and that drives through into higher fees.

Q306 Elizabeth Truss: What is driving that increase in the pages of evidence? Is it the complexity of the case or the complexity of the law?

Sarah Albon: I don’t think we know.

Q307 Elizabeth Truss: Could I ask the same question of the Legal Services Commission?

Carolyn Downs: I completely agree with Sarah in terms of the various costs. I do think expert fees are a driver, particularly in relation to family law and child protection cases. That is an issue that drives costs. Something else which can drive costs as well is prosecution. I don’t think you should just think about defence but also prosecution in looking at how the cost of cases comes about. I do agree with Sarah that I don’t think there is any definite evidence.

Q308 Elizabeth Truss: What work has the Ministry of Justice looked at in terms of reforming the whole system to make the process through the courts more efficient?

Sarah Albon: We have looked at a number of things. Currently, under Lord Justice Goldring there is a piece of work going on looking at the Crown court efficiency. Prior to that, led by the predecessor to the new presiding judge, a piece of work was done to significantly increase the efficiency of work going through magistrates’ courts. The CPS, Home Office and others are under the same sort of spending pressures obviously that the Ministry is. They are all internally looking at what savings and efficiencies they can drive. The Family Justice Review is looking at whole system reform and will publish an interim report at the end of March, again looking to drive significant efficiencies through the system. We are also planning to publish a paper on civil justice in the spring that should look at driving further efficiencies in the civil justice arena.

There are a number of proposals on guilty pleas and sentencing we have published that we hope, again, will drive more efficient behaviour. Finally, in the legal aid proposals themselves, we hope some of the proposals on reconfiguring some of the criminal fees will reduce late guilty pleas and, again, have an impact on a more efficient disposal of business.
Sarah Albon: Has consideration been given to a “polluter pays” principle, where that cost would effectively be their costs. Has consideration been given to a “polluter pays” principle, where that cost would effectively be their costs. Under the new system, with electronic case management system where we will be able to interact with providers electronically so you stop the passing around of documentation. We would hope to introduce that by October of next year. That is work that we are undertaking at present with both. Finally, on civil representation, which we would see as being a cost driver for us—it is the most heavily work-intensive part of our business—we are aiming to bring in a new automated and electronic case management system where we will be able to interact with providers electronically so you stop the passing around of documentation. We would hope to introduce that by October of next year. That is work in place as well. So it is those two particular issues.

Q310 Elizabeth Truss: A number of witnesses have suggested that one of the drivers of costs has been other Government agencies effectively externalising their costs. Has consideration been given to a “polluter pays” principle, where that cost would effectively be internalised either within other sectors or within other public service areas?

Sarah Albon: We do look at those sorts of issues. In 2009–10, some £170 million was recovered on behalf of the legal aid fund from costs and damages awarded against non-legally aided parties. Of course in criminal cases, on conviction under the old system, people convicted of crime could be asked to pay towards their costs. Under the new system, with means testing, people who can afford to pay towards their defence are asked to do so. In terms of other Government Departments’ policies on legal aid, we do conduct a justice impact test as new policies come up. Over the past few years about £20 million has been transferred from other Government Departments to the Ministry of Justice. The other thing we would need to look at is that, at the moment, the legal aid fund has fairly complete cost protection against itself being on the losing side. If we had a “polluter pays” scheme, then it would be reasonable to expect that, when the legally aided party is on the losing side, costs might be recoverable against the legal aid fund. If we move to that, it would probably leave us even worse off in net terms than we currently are.

Q311 Chair: Can I just check something there? When you said £20 million has come from other Departments, was that part of the process of the Courts Service acquiring responsibilities for the tribunals system, or was it actually you somehow knocking on the door of the Departments and saying, “Look, you are costing us a lot of money and I think you should contribute”? Sarah Albon: Yes, it was that, Mr Chairman. It was part of the inter-departmental clearing of new policies where we would have identified that, if a particular Department introduces a particular policy, there would be knock-on costs to the Legal Services Commission, and money was therefore transferred from those other Departments to the Legal Services Commission through the Ministry.

Q312 Chair: Can you just clarify what this process is? You mean you say to the Department, “This policy will generate a larger number of appeals and legal procedures than previously”?

Sarah Albon: Yes.

Carolyn Downs: Yes.

Q313 Chair: But the one thing you can’t get at with that, presumably, is bad decision making?

Sarah Albon: No, that is right. It doesn’t get at bad decision making. It is new policy that will create new criminal cases or a new class of criminal case. For bad decision making, what we are trying to do is to work very closely with other Government Departments—for example, the DWP—sharing knowledge from tribunal judges about typical mistakes which are made by first instance decision makers and trying to embed a culture of making decisions right first time.

Q314 Ben Gummer: It is not really holding their feet in the fire, is it? Much as it is nice for the DWP to have that advice, it is not really imposing a penalty for bad decision making?

Sarah Albon: I accept it is not a penalty, no, but there is an issue of what would cost the Government more. There is a danger in setting up a bureaucratic chasing round of who has made a bad decision, because you haven’t necessarily made a bad decision every time you have made a wrong decision.

Q315 Chair: No, but if you get a persistent 90% appeals success rate for example—and we have an example of exactly that in special educational needs—then there must be some bad decisions or something wrong somewhere in the Department that is responsible, mustn’t there?

Sarah Albon: It seems most likely that that must be the case, yes.

Chair: Perhaps there ought to be some mechanism for pursuing that.

Q316 Elizabeth Truss: I would like to follow up on two things. A number of other witnesses have also talked about issues within the Courts Service and inefficiencies such as documents not turning up and so on, prolonging cases. What is being done by the Ministry of Justice to address that? Likewise, for the Legal Services Commission, there have been a lot of complaints about inefficiency and over-bureaucracy. You have already talked about your electronic scheme, but there is always a risk with IT systems that sometimes they can create inefficiencies that weren’t there in the first place.

Chair: Any offers?
Sarah Albon: I am not aware of problems being reported to us in the past about documents being lost directly by the Courts Service, although I am aware of cases where, in particular in the magistrates’ court, prosecutions cannot go ahead because, say, the CPS have not served documents in a timely way. If it is direct losses by HMCS, I am not personally aware of that, although obviously I would be very happy to look into anything that you have heard and write to the Committee.

Carolyn Downs: On inefficiency and over-bureaucracy, there are a few issues there. People do write to me about the overhead costs of the Legal Services Commission as well, but the overhead costs of the Legal Services Commission are about 4% of the take on the fund. If you look at that as the overheads for running an organisation, I don’t think 4% is overly excessive.

On the other issues around being overly bureaucratic, I have to say I would agree in certain instances in relation to a lot of the checking and re-checking that we undertake. It is worth bearing in mind that we have had our accounts qualified now for two years in a row. A lot of the checking that we are required to do is specifically around the qualification of accounts. I will give you an example because I was with my staff in Chester last Friday, where we have been looking at the cost both to us and to providers of the checking that we now have to do around eligibility and chasing people’s bank statements. That is specifically a requirement about the overpayments that have been made in the past. We will be looking at that very clearly to see whether the level of money that we are recovering justifies the level of cost both to ourselves and indeed to providers. Then we will have to go back and have a conversation with the National Audit Office if we feel that that cost to both ourselves and providers is greater than the recovery of moneys to us. It is an issue with which I would have some sympathy.

Q317 Mr Buckland: But it is an estimate that is not based upon any analysis of impact upon other Departments?

Sarah Albon: The impact assessment attempted to look at the possible impact on HMCS, recognising on the one hand that there would probably be some increase in litigants in person, which would be difficult to make some cases take longer, but on the other hand the best analytical assumptions that we could bring to it also suggested that there would probably be some reduction in the overall number of cases. We accept that this kind of prediction of behavioural change is extremely difficult. I don’t think we would try to suggest that there is any arithmetical certainty behind what are simply best estimates.

We have not made any analysis of the potential impact of the legal aid changes on other Government Departments. There was some analysis of the impact of the Jackson proposals on the NHS litigation authority, where we think that the combination of the two proposals together would probably save the NHS litigation authority in the region of £50 million a year. Although they will continue to defend cases, they won’t be paying the same level of uplift and after-the-event insurances.

Sarah Albon: I don’t think it is a speculative figure, but what I am saying is that it is necessarily a best estimate.

Q321 Mr Buckland: So the figure of £350 million that is suggested as the saving is really a speculative figure?

Sarah Albon: I don’t have that on me. What I famous? It will have an upward cost on fees and costs.

Carolyn Downs: On inefficiency and over-bureaucracy, there are a few issues there. People do write to me about the overhead costs of the Legal Services Commission as well, but the overhead costs of the Legal Services Commission are about 4% of the take on the fund. If you look at that as the overheads for running an organisation, I don’t think 4% is overly excessive.

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Q317 Mr Buckland: One thing that has always struck me, having done legal aid work over the years, is that VAT is charged on the fees. I collect it and then I pay it to the Treasury. Why do they do this? It is one arm of Government collecting money to be paid out to another. What is the point? I don’t know whether you can help us with that.

Carolyn Downs: I think that is a question for the Treasury.

Chair: We will ask them that the next time we see them.

Carolyn Downs: I have to pay VAT to the MoJ.

Q318 Mr Buckland: There is one final point, and again I just need to deal with it. I am all in favour of databases and the use of computers, but are we not entitled to be a little sceptical when the LSC, now having taken on the role of payment of fees for counsel, are already showing quite significant delays with the new system? There is a great concern out there as to the delays that are being caused as a result of the transfer from the Courts Service to the LSC.

Carolyn Downs: I would accept that, absolutely. The truth of the matter is that that delay relates to inadequate IT infrastructure in both organisations, and the map across. With the Advocates Graduated Fees Scheme transfer, we have been very clear that we are not prepared to have that transferred from the Courts Service to ourselves until it is at a point at which we can effectively administer that process, precisely because of the issues that you raise. Yet again, we would have been in a position—if it had transferred last October—of bringing it across and not being able to administer it at all. So it is better to leave it where it is until we have an adequate and appropriate solution.

Q319 Ben Gummer: On the back of that, do you have an estimate of the increase in costs that might have been incurred by the extraordinary delays in payments to counsel for which the LSC is now famous? It will have an upward cost on fees and costs.

Carolyn Downs: I don’t have that on me. What I would say, however, is that, if you look at our payment targets and our payment rates against our targets, we are over 90% within our target levels. I can go away, have a look at that and get back to you on it, no question.

Ben Gummer: It was an ancillary point.
Sarah Albon: No. It is £350 million net saving to the legal aid fund rather than net of wider Government impacts.

Q323 Mr Buckland: The truth is that we really don’t know what impact it will have upon overall Government spending on legal issues. Shall I use that phrase rather than legal services? We just don’t know, do we?
Sarah Albon: I think that is true; we don’t.

Q324 Mr Buckland: Reference has been made to education law and SEN. The Chairman has already asked a question about that. Has there been any assessment of the impact the removal of legal aid from education? What do you think the impact is going to be if and when legal aid is removed from that area entirely?
Sarah Albon: We estimated that approximately 2,000 cases a year would no longer be helped as a result of this change if it was implemented, at an estimated saving of £1 million. It is important to qualify that it is not a complete removal, because the assumption is still that, where the issue is one of discrimination, as with other areas of discrimination, those cases will remain in scope to the extent that they currently are.

Q325 Chair: Would it be the case that within that area you have some cases which raise quite important legal questions and set precedents for others, but you also have decisions which are being appealed against, in which legal representation might be considered unnecessary or at least a bit of a luxury, when what the process needs to do is to test the facts about that particular case?
Sarah Albon: I think that is exactly right. With regard to the very difficult cases that you describe, where you are talking about an extremely difficult point of law where maybe people’s article 6 rights are engaged and the right to a fair trial as you get further through the appeal process, we do recognise that various cases, although out of scope, will still need to be funded through the exceptional funding mechanism, looking at individual cases which were otherwise out of scope of legal aid under the new proposals.

Q326 Mr Buckland: How much work has been done with the Department for Education, who you know are about to undergo a Green Paper of their own on SEN, to understand potential alternative means of dispute resolution within the SEN framework?
Sarah Albon: The Department for Education agreed the proposals before we went to consultation.

Q327 Mr Buckland: Is it proposed to link up with their Green Paper work? Obviously it will be slightly behind the work of the MoJ on its legal aid proposals. Will there be a formalised or concrete liaison with the DfE during its revision process to understand the implications of their proposals and to work up some impact assessments or costings for the MoJ?
Sarah Albon: Certainly, and we work closely with the DfE. I meet my opposite number director, I would think, on average, weekly and the teams work very closely together. They work jointly on some areas such as the Family Justice Review. We will absolutely continue working very closely together.

Q328 Mr Buckland: That brings me on to the question of family justice. A great deal is made of mediation. Has there been any estimate made of the cost benefits of mediation in family law cases? Bearing in mind the fact that the majority of cases settle out of court anyway, I am not saying there could be an increase but that is a possibility. Have you done any cost-benefit analysis of that?
Sarah Albon: Yes. The NAO did a value-for-money report which was published back in 2007. The LSC figures continue to support the broad differences, which suggest that the average cost of a legally aided, non-mediated case was around £1,682 whereas a case was mediated the cost was around £752.

Q329 Mr Buckland: Forgive me, legally aided and non-mediated: is that a case that went to a full fight?
Sarah Albon: No; the majority of those won’t have done. As you say, they mostly don’t. The NAO considered that if, say, a further 14% of cases were diverted away—which is not an increasing small number—they thought that the resulting savings would be some £10 million a year.

Q330 Mr Buckland: Moving on to the criterion of housing scope and imminent homelessness, the proposal is to reduce the scope of legal aid funding on these cases. What analysis has been made of the impact of reduction of scope in that area?
Sarah Albon: We have made an analysis. If you will bear with me, I will look the figures up for you. I am sorry. Would it be easier if I wrote to you? I could get something to you before you meet again on Wednesday.

Q331 Mr Buckland: I am sure that will be all right. There is a supplementary I want to ask about that area. A lot of us on the Committee and elsewhere will have had input from Citizens Advice Bureaux, and law centres in particular were very, very concerned about the reduction in scope here, but say that the work will not go away. Has there been any discussion with other Government Departments—perhaps the Cabinet Office, for example—as to ways of still meeting what is sometimes a quasi-legal demand? Some of these issues can be resolved by negotiation with the local authority, for example. Has there been any discussion with the Cabinet Office as to how we can retain some of these local services in order to stop them from escalating into something far more serious and therefore costing the Legal Services Commission even more?
Sarah Albon: There have been discussions in Government, and it may be that the Minister is better placed to answer some of that when he appears on Wednesday. The key issue is that, although with central government funds and these different forms of providing help we can take a holistic look across and make sure that decisions are made jointly about what streams of funding continue, we are left with little more than the ability to exhort and encourage where the main funders are local authorities. Ministers have
Sarah Albon: That is always the case in a hard core will be many in family law—that will simply not be much better than it is currently.

Q332 Mr Llwyd: The 2009 study by the University of York found, among other things, that, compared to other countries, to some extent high legal aid costs were offset by lower costs elsewhere in the system. By spending less on legal aid are we going to reverse the situation and have, effectively, more expensive courts?

Sarah Albon: In a sense, that comes back to the point I was making about litigants in person. We do accept that, where people convert from being represented to becoming litigants in person, there may be some increased cost as cases may take longer. But we also consider that, partly through the provision of alternative methods of dispute resolution and mediation in family, we hope to reduce overall the number of cases that come to court, so that even if the unit cost increases the overall cost won’t.

Q333 Mr Llwyd: But mediation is already available, isn’t it?

Sarah Albon: It is already available but not perhaps widely known about and not pushed or sold as much as it could be. We think that the take-up could be much better than it is currently.

Q334 Mr Llwyd: But there will be those—and there will be many in family law—that will simply not be fit for mediation, because one or two of the parties will flately refuse to enter a room with the other party.

Sarah Albon: That is always the case in a hard core of cases. We accept that. The issue is whether or not sufficient cases can be diverted away from otherwise coming to court in order that the increased cost of some cases is offset.

Q335 Mr Llwyd: Litigants in person do take up a huge amount of court time.

Sarah Albon: They do, and we accept that, although there is some evidence that, where there are two represented parties and two non-represented parties, it is the two non-represented parties whose overall costs are less because they spend, frankly, less time back in court arguing again.

Q336 Mr Llwyd: Really? That is interesting. Could I ask you one question about family again? I put it to Professor Bowles earlier on. Is there any evidence of a substantial increase in the instructing of guardians ad litem over the past five or six years?

Sarah Albon: I don’t know the answer to that question.

Q337 Mr Llwyd: I don’t mean to trick you. If you are able to send a note to the Committee it might be helpful.

Sarah Albon: Sure, yes.

Q338 Mr Llwyd: Thank you. The Ministry of Justice specified the comparative countries which were to be included in the international study to which I have referred. By what criteria were these countries determined?

Sarah Albon: When we say we specified them, we discussed it with the university. I think it was a list that was reached jointly. Effectively, we were looking to get countries that had a mix, where possible, of common law background, and not just looking to the civil law European countries. We wanted as much of a mix of cases as we could get. We were not trying to compile a complete list, obviously, of all the jurisdictions there are. It was inevitably a limited study, but we were just trying to get as much of a mix as we possibly could.

Q339 Mr Llwyd: Has the Ministry of Justice reviewed practice in any other jurisdictions to inform its proposals on legal aid?

Sarah Albon: Yes, we have. We have spoken at some length to quite a few other countries, both thinking about legal aid but also trying to learn lessons about how court procedures can work in other jurisdictions, particularly in the realm of family law in the context of the Family Justice Review.

Q340 Mr Llwyd: Could you specify further on that?

Sarah Albon: We have been quite interested to look at other jurisdictions where mediation is used more, thinking of some of the American states and also Australia. We have looked at the different way that the family justice system works in Scotland, where they have a quite different set-up from the set-up that we have down here. We have talked obviously to our counterparts in Scotland and Northern Ireland as part of the overall UK jurisdiction about how they manage to do things differently and what is different about their systems. We have spoken to people like the Canadian Ministry of Justice and also various states in the US, as I say, about what they fund and what makes them fund.

Even if eventually Ministers conclude that they are going with the full range of scope cuts that have been proposed and consulted on, it is true that there are still quite a lot of other jurisdictions that simply do not fund the range of advice that we choose to do. For many other jurisdictions, they are limiting themselves much more closely to criminal representation and some of the child protection work, although often the child protection systems are very different from our own. It has been difficult to find some other area, look at it and think they are providing a much better and cheaper service than us. Mostly, when they are spending a lot less, it is because they are buying a lot less.

Q341 Ben Gummer: On that note about research, I have to say that this is a feature of government which, as a newcomer, I am finding increasingly interesting. If a private enterprise was spending £2.1 billion investment per annum, the depth and richness of data on which they would expect to base their decisions would be very much greater. Is it a cultural thing that the Ministry of Justice has not gone beyond the excellent research already provided by Professor Bowles, or is it just a budgetary thing? Why can there...
not be a better evidence base for making these decisions rather than what seems to be, if you will forgive me for saying so, a largely anecdotal exploration of comparative costs?

Sarah Albon: Are you talking about knowledge about our own system or knowledge about other jurisdictions?

Ben Gummer: Both.

Sarah Albon: It may be a criticism of governments in general that the amount of data collected in straightforwardly comparatively ways is very poor. We are often left in a position where we need to go back to original court files or at the Commission to their original files to do quite in-depth research into the kind of information that we might perhaps have wished predecessors routinely collected but frankly didn’t. I guess there is the balance for Government and for the Legal Services Commission. There is an awful lot more information that we would like to routinely collect, but there is a cost to collecting it both in terms of data and IT systems, and, more fundamentally, in the human cost to solicitors, barristers and then the Commission in having to collate and provide information.

For example, the Commission has moved over the years to a system of much more fixed and graduated fees. That means that however much work, up to a certain point, a solicitor or barrister does on a particular case they are only going to get a particular fixed fee. It might be very nice for us to know, behind that, exactly how much work they have done, when and where they did it and what type of work it was. But if we tried to collect all of that and require providers to tell us, I think they would very reasonably be saying to us, “Look, none of that is going to make any difference to the fee that you pay me and it would be expensive for us to collect and report it to you. Unless, frankly, you are going to pay us more, we can’t and won’t be able to provide that to you.” In those terms, if you then said, “Nevertheless, you must tell us”; you would end up with very poor quality data because, not unreasonably, firms and individuals would probably just write down what they thought the Commission wouldn’t query, and on we go.

Chair: That sounds like the voice of bitter experience.

Sarah Albon: Yes.

Q342 Ben Gummer: I take your point on that, but, on the further issue of the impact studies that you have done, you are probably well aware that the President of the Family Division expressed his surprise at the MoJ’s assumptions. It seems that no one believes, frankly, what you are saying is going to happen as a result of this. What is your answer to that?

Sarah Albon: I think we had perhaps one supporter in Sir Anthony May.

Ben Gummer: Yes, I am glad you grasped that.

Mr Buckland: That was on judicial review.

Sarah Albon: When we have spoken to practitioners in other contexts, and when you look at the number of people who are not legally aided but who are not either perhaps in a position to fund their own litigation without worrying about the price, there are not very many people of modest means just above legal aid who spend a lot of time as litigants in person fighting through the courts. We do accept that we need to look at the procedures that people need to go through around relationship breakdown, making applications for contact and those kinds of things to facilitate people using our courts more straightforwardly without expert professional help in every case. We do think that, if we continue to provide better information, mediation services and to ensure that the procedures are as simple and straightforward to access as possible, then sufficient numbers of people will be enabled to sort out their own relationship breakdown issues without needing to bring everything to court, although we do of course accept that there is a hard core of cases which will, and should, appropriately come to court in order to be decided by a judge.

Q343 Ben Gummer: Finally, there has been a lot of comment and evidence from the FLBA, the Bar Council and the Law Society, and Stephen Cobb was on the radio this morning. They have all provided their comments on your proposals, most of them largely negatively. We’ve heard in this Committee, I have been trying to find positive suggestions from them. Have you received many positive suggestions and how useful have they been?

Sarah Albon: I saw today the FLBA’s response to our consultation. It is 300 pages long. I am hoping that there are indeed some positive suggestions in there, but honestly could not tell you that I have read it yet.

Q344 Chair: To what extent have you already looked at and dismissed alternatives? Among those, was the idea of a stricter merits test for judicial review an issue that was looked at, or is that something to come on to another stage?

Sarah Albon: No. We have continued to look at that. We are very mindful that it is important to maintain the ability of the individual to challenge the State. We see judicial review as a very important mechanism by which those sorts of serious cases can be brought. Effectively, the staff at the Legal Services Commission rely on indications of prospects of success from independent counsel, usually employed by potential litigants. It is quite difficult for staff at the Legal Services Commission to second-guess that kind of thing, but we are certainly open to suggestions about how things like the merits test could be tightened up. It is fair to say that we have not dismissed any alternative at the moment of funding suggestions that may be put to us.

Q345 Chair: In the case of judicial review, which is fairly topical because we had one Minister answering today on the outcome of a judicial review, you have a problem that people take the decision to go to judicial review because they are very upset about a decision and wish to change a decision. But they tend to win procedural victories rather than substantive victories, which means that a consultation then takes place, which should have happened in the first place.

Sarah Albon: Yes.

Q346 Chair: Is there any way we can address that problem, either by penalising Departments which
keep getting themselves into this situation or by simplifying the process by which merely procedural failings are identified and dealt with by the court?

Sarah Albon: I think that is a very interesting suggestion. It is not one I have had put to me before. You make a very valid point that the end result of many judicial reviews which are successful is that the public authority can go away and still do what it was always going to do, but it takes it longer to get there. The other thing, though, to bear in mind on judicial review is that the biggest area of burden on the courts around judicial review is in the area of immigration and asylum. There, large numbers of cases do fail at permission stage, but most of the ones which are being legally aided go through. It tends to be people who are funding it through other mechanisms that, overwhelmingly, are dropping out at permission stage. We see a really significant difference between cases which have been through the Legal Services Commission’s merits test and cases which are funded through other mechanisms. Obviously we don’t know how, whether it be pro bono, through friends and families or through charities, but the Commission’s merits test there is making a significant difference to the quality of cases that are taken through.

Q347 Mr Buckland: Finally, the prisoners’ voting scenario had its genesis as a legally aided case. I have heard what you say about the merits test. Is there not also merit in looking at another conjunctive test, which would be the public interest? It is a little like the test that is applied by the Crown Prosecution Service, for example, in its decision to prosecute. Could that not be looked at as another criterion by which judicial review applications are judged fit for legal aid or otherwise?

Sarah Albon: Certainly, on the exceptional funding cases that the Commission looks at now, it does use the significant wider public interest test as one of the main planks under which it decides whether or not a case should be funded. We would be wary of usurping the function of the court through employees of, in the end, an NDPB of a Government Department to stop judicial reviews that might seem inconvenient.

Q348 Mr Buckland: You are not stopping them, though, are you? You are not funding them.

Sarah Albon: No; we are just stopping our funding.

Q349 Mr Buckland: There is a difference, isn’t there?

Sarah Albon: Yes.

Chair: Thank you very much indeed. We will see you again, Ms Albon, on Wednesday. Ms Downes, we will see you on other occasions. Thank you both very much indeed.
Wednesday 16 February 2011

Members present:

Sir Alan Beith (Chair)

Mr Robert Buckland
Chris Evans
Mrs Helen Grant
Ben Gummer
Mr Elfyn Llwyd
Claire Perry
Yasmin Qureshi
Elizabeth Truss
Karl Turner

Examination of Witnesses

Witnesses: Mr Jonathan Djanogly MP, Parliamentary Under-Secretary of State, and Sarah Albon, Director for Civil, Family and Legal Aid Policy, Ministry of Justice, gave evidence.

Chair: Welcome, Minister and welcome back, Ms Albon; we saw you on Monday. We are getting towards the closing stages of our work on the Government’s legal aid proposals. We will have one final evidence session on the Monday that we return after the week’s break to discuss with your ministerial colleague, Nick Hurd, what the rest of Government is going to do about those things which might not fall within scope if you go ahead on the basis that you are currently doing. Before we start questioning, Members with interests may need to declare them.

Mr Buckland: I have been a criminal legal aid practitioner at the Bar for 20 years in receipt of civil legal aid and criminal legal aid. I do not have any live cases at the moment.

Mrs Grant: I continue to be in receipt of legal aid funds. I continue to be a partner in a legal aid practice, so I will not be asking any questions this morning.

Mr Llwyd: I have undertaken legal aid work both as a solicitor and a member of the Bar. Since April of last year I have been non-practising.

Karl Turner: I am a member of the criminal Bar. I practise from my local chambers in Hull. I have not undertaken any publicly funded work since the general election, but I have done private paying work in the last couple of months.

Yasmin Qureshi: I am a barrister and I have received civil legal aid and criminal legal aid in the past, but since the election I have not done any legal work at all.

Chair: The rest of us are not lawyers.

Q350 Ben Gummer: Minister, the need for cuts aside, what is your assessment of the legal aid system as it stands?

Mr Djanogly: What has obviously dominated proceedings in some ways has been the need for cuts, but I think your question is a very important one because, despite the need for cuts, we do fundamentally believe that the legal aid system needs reform. We believe that there are significant inefficiencies in its delivery. We believe that it needs to be directed more towards helping the most vulnerable. We also believe that in many circumstances there are non-lawyer and non-judge alternatives that should be better exploited. I thank you for bringing the issue up because in some ways we do feel, looking for instance at the media, that too much time is being spent on looking at the proposals and not quite enough time looking at the inefficiencies within the existing system. We have to look at what exists to move on to where we want to go.

Q351 Ben Gummer: Among some of our witnesses there has been a ready acceptance that there are inefficiencies. The Lord Chancellor predicted a tirade of complaint from many parts of the legal profession, which has predictably materialised. On the numbers given by the Ministry of Justice—£350 million savings—it was put to Ms Albon on Monday that this was a speculative figure. While she didn’t concede, if you don’t mind me saying that, she did not entirely demur. How fixed do you feel that figure might be and on what evidential basis has it been arrived at?

Mr Djanogly: The impact assessments provide the basis of the assessments. However, it is a middle figure and it is not just a middle figure for the whole lot. For each element of savings there is an upper figure and a lower figure. The £350 million is a middle figure of all the middle figures, if you like. It would very much depend on how things transpired. I should also point out that there is a timing issue. That is predominantly because, even if we wanted to, we could not bring in all of the savings immediately because a lot of them require primary legislation. When we say £350 million, we always say £350 million by 2014–15. A lot of the savings are back-ended because we need to bring in the legislation. I would also say one other thing here which makes consideration of the figures very difficult. It is important to realise that we are not just talking about cuts here. We have as a policy objective a behavioural change. We do believe that the system at the moment is too lawyer-based and too court-based. We want to look for alternatives. The implications of that are very difficult to measure.

I will give you two examples. The first was when I went to a legal advice centre in the East End two weeks ago. We were talking about the difference between legal help and general help. We may come back to that later on because it is becoming quite an important issue. When I was discussing it with them, they said, “Do you see just across the road there is the benefits office? Very large numbers of our clients go to the benefits office and the benefits office tell them to come here, to the law centre, to be told what benefits they can and can’t get.” That is absolutely bizarre, because you are using legal aid to provide a
Q352 Ben Gummer: Can I pick you up on that anecdote?

Mr Djanogly: Can I just finish that anecdote before I go on to my second anecdote? I will let you in, but let me just finish this anecdote. When they go to that benefits office, they should be getting proper advice on the benefits to which they are entitled. We need behavioural change within Government. That is why the MoJ has been taking this issue up, very seriously I can tell you, with Work and Pensions, to make sure that we get those changes.

I am going to give another example, but do you want to come back on that?

Q353 Ben Gummer: I do, because on that anecdote you lead me to ask about a point which is being brought up increasingly. The on-costs of that behavioural change shift to other Departments and to other areas of public expenditure have not been calculated or factored in with the Ministry’s savings. In fact, these savings might not materialise in terms of net Government expenditure because of shift to other areas—for instance, to the benefits office opposite the road from the legal aid centre. How do you answer that charge?

Mr Djanogly: The key is to encourage early intervention. In the example I gave you, I am talking about the position before we talk about general help, let alone legal advice, let alone representation. I am saying that at an earlier stage we should be doing more with the money that is already being spent with no extra cost involved. That is the earliest intervention, if you like, and that is often being overlooked, but it is not one that we are overlooking, I can assure you. We have a significant project with the Department for Work and Pensions on that very issue.

Can I mention one other good example of this, and that is the idea of early intervention and the cost implications of that, to answer your question? That would be in relation to family law. Here, we are looking for £178 million savings. Predominantly, we are doing that by looking to take out private family law from legal aid. We have a policy decision there that we don’t think the taxpayer should be paying for run-of-the-mill divorces and—

Q354 Chair: We are going to come back to private family law later, so you will have an opportunity to talk about that.

Mr Djanogly: Okay.

Chair: But before you leave your earlier example, surely the Department, which causes through so many bad decisions so much legal advice to be sought, ought to face some consequence from that. The lack of any budgetary impact on the Department of the budgetary impact on legal aid of what you are doing is the fundamental weakness in the system, isn’t it?

Mr Djanogly: They do contribute to the cost of the tribunals.

Q355 Chair: But not in proportion to how many bad decisions they send them.

Mr Djanogly: Of course, Chairman, we are talking here about robbing Peter to pay Paul to some extent, one Department of Government paying another. So far as the taxpayers are concerned—

Q356 Chair: We are talking about achieving behavioural change.

Mr Djanogly: As far as incentivising Work and Pensions, yes, because we do charge them more if there are more cases coming from them. If I can just say, from the family law point of view, on the one hand we are getting savings, but on the other hand, we are spending more, because we are going to be investing more in mediation, but not as much as we are getting in savings. Then people say, “Ah yes, but you will have more litigants in person.” From our calculations, the number of cases that we will decrease will not be increased by very much through litigants in person. There will still be a significant net saving. But I do agree that all these things knock on against each other. It is complicated.

Q357 Ben Gummer: I am sure we will come on to that, but right at the beginning we hit on one of the big problems that this Committee has had. It is not the fault of this Government. It is a systemic fault. It is the complete lack of evidence and research into any of these issues that we are looking at. We are dealing sometimes with huge decisions being based on one research paper from which conclusions are being drawn to justify very big decisions. How does the Government think that it can base so much on very limited amounts of research, and what is it going to do in the future to ensure that the evidence base has improved, so that action and decision making can be improved as well?

Mr Djanogly: We are looking to improve the evidence base. I can say that the area where this has been most felt has been the not-for-profit area, where Government knowledge was very limited. Even when you speak to some of the not-for-profit organisations, the centres often have very limited knowledge of what is happening on the ground in their own organisations. Getting information has been difficult. We saw this early on. For instance, I brought this exact issue up with the CAB at a very early stage. They did say they would provide us with evidence. Of course, the consultation closed two days ago and I don’t know what has come in yet. We have had about 5,000 responses, by the way, which we are going to be looking at very carefully. I hope that a lot of evidence will have come in on these sorts of areas, yes.

Q358 Chair: Going back to something I was asking you a moment ago, the point I was putting to you was a sort of “polluter pays” principle. If, as an organisation, you generate a large amount of legal aid or legal help cost, you should feel the impact of that on your budget in order to create some degree of behavioural change. That is the whole basis on which
the “polluter pays” principle works. Is there scope for that within the Government system or is it too radical to cope with?

Mr Djanogly: There are elements of “polluter pays” within the system as exists. For instance, court costs are technically “polluter pays”. If you lose, you pay the other side’s costs. We do have charging systems between Departments. For instance, if DWP are giving us more tribunal cases then they will pay for that, so they have an incentive not to do so. That does exist within Government. The problem as far as the taxpayer is concerned, though, is that there is not necessarily an overall net saving to the taxpayer. Indeed, if you have “polluter pays” outside of Government, then it is possible that the taxpayer could pay more if it is Government that has been doing the polluting. You can’t necessarily say that the “polluter pays” principle is going to have a better result for the taxpayer.

There have been alternative proposals. By the way, I can’t discuss what has come in on the consultations, but I remember about three months ago the Law Society was talking about the “polluter pays” principle in terms of having some kind of levy on alcohol that would go towards lawyers. I think, Mr Chairman, you saw what the tabloid press made of that one: “a penny for lawyers”. Of course, these things are seen as a tax.

Q359 Chair: I hope you are not wholly influenced by the tabloid press when you reach conclusions on these kinds of decision.

Mr Djanogly: Not at all, but I would say they can be seen by the taxpayer as a tax rather than a levy.

Q360 Chair: We had another example given to us in evidence in the area of special needs education, where over 90% of appeals were successful. If that is happening, there is clearly something wrong with the decision-making process. Money which might have been better spent on looking after the children in the first place is being spent on legal processes to overturn nearly every decision.

Mr Djanogly: The key here is early intervention. This is very much a policy objective of the current Government. In DWP, we want better decisions to be taken at an earlier stage so that fewer appeals come through. In relation to employment tribunals, I have just put out a consultation document, together with Ed Davey in BIS, where one of the proposals we are looking at is that all cases should go to ACAS before the employment tribunal to try and sort out the issue before lawyers are even needed. In relation to education, we are looking at the possibility of mediation pre-tribunal. In many of these areas we are now switching to looking at early intervention, which is the key.

Q361 Elizabeth Truss: Minister, I wanted to address the point on “polluter pays”. You are essentially saying that there will be a zero sum game if it just transfers from one Department to the other. Is it not the case that, if DWP sorted out their system and reformed it so that it worked effectively, it would save money in the long term and paying high legal bills in the short term might incentivise them to do that? We are comparing the cost of lawyers to the cost of personnel within the DWP getting it right first time. Certainly, as an MP, I experience a lot of the DWP getting it wrong the first time. The greater pressure that can be put on in the short term will result in a long-term saving.

Mr Djanogly: I absolutely agree that we have to get DWP to do more right earlier on. We are working on that. In the short term I have to say that from the Ministry of Justice’s point of view we have to provide a service. The service is making sure that people who want to have their benefits decided have them decided within a reasonable period of time. Because the benefits system is rapidly changing at the moment we are getting an increase in appeals. That will take a year or two to calm down until we get into the new system. We are seeing a spike in appeals and that has meant, I am afraid, that in the short term we have had to respond to that as a Department to make sure that people get their benefits within a reasonable period of time when they are entitled to them. We have, I can tell you, increased the number of medical advisers on the tribunals by 170 in the last few months. We have also increased the number of judges by 20. We did have a backlog on this. We are now in a position where I can fairly confidently predict that we will get back to normality by the end of the year. We are on top of it. We do have to deal with these issues as they come up, and we are dealing with it.

Q362 Elizabeth Truss: Would it not be cheaper for the DWP to have dealt with those issues rather than it going to another Department and having all these additional costs and experts involved? If it was just a systemic failure of DWP to get it right in the first place, it strikes me that we have experienced a ballooning in cost because the process isn’t being done. Will DWP be charged for those extra people that you have just been discussing?

Mr Djanogly: The tribunal costs, yes.

Q363 Elizabeth Truss: But will they be charged for the extra advisers?

Mr Djanogly: It forms part of the tribunal costs, and so the answer is yes. I think there are two issues here. First, there are historical systemic problems that you are talking about that we are addressing. Secondly, there is the fact that we are significantly changing the benefits system. That would have had a lot more people appealing, whatever the systemic issues are. So there are two issues there. But, ultimately, that is a good question to put to the DWP as much as me.

Q364 Chair: Can I raise a slightly different point but a related one, which is that in civil legal aid the cost of funding representation is more than double the amount that is spent on legal aid? It is at least possible that, if the balance was different and help was provided in more cases, then some of the need for representation might be avoided. Some of the help that is needed is not necessarily even qualified lawyer help but specialist advice, if one takes areas like housing, for example. If that specialist advice is not available, then it pushes up the amount of representation that
takes place because more cases go to court. It is the balance between representation and help.

Mr Djanogly: Yes, that is a very important issue. Of course, Chairman, you made the distinction between civil presumably as opposed to criminal.

Chair: Yes.

Mr Djanogly: But within civil the positions are very different. For instance, if you take welfare law, most of the money goes on help. If you take family law, most of the money goes on representation. Within those areas you probably have differences as well, so you can’t look at it quite like that.

Going to the highest level, we do believe that we have had to relook at the system—given that we have to put in place cuts and we want to make an efficient system—to decide where the help most needs to go to help the most vulnerable based on our criteria. If someone’s liberty, security or their home is at immediate risk of repossession, then they are priority issues. Less priority issues are where people are looking for damages or to increment their income. It is not that those are not important issues for those people, but I am afraid Government do have to look for savings and that means we have to make priorities.

I would like to take this opportunity—

Karl Turner: Chairman, I wonder—

Mr Djanogly: If I could just finish, because there has been a lot of confusion on this area of representation. I would like to take this opportunity, if I may, just to clear this up. There has been a lot of press comment and articles. I am looking here at an article by the shadow Justice Minister. I have to say that Mrs Grant wrote a letter in The Guardian which made the same point. The misconception in all of these is that, in benefits legal aid, legal aid currently pays for representation. This is a common mistake, and I am seeing it again and again and again. It is getting a life of its own. Let me make it quite clear. At the moment people do not get legal aid for representation for benefits in either the lower tribunal or the upper tribunal. By the way, the cost, we reckon, of providing that would be about £500 million.

I am very prepared to have a rational debate about any of this, but in some areas the debate is getting out of the bounds of reality. I just think we need to pull it back a bit and I am pleased to have that opportunity.

Chair: Mr Turner had a supplementary question.

Chair: I am sorry. I think that is anticipating a question that I was going to come to with Mr Evans after Ms Qureshi has dealt with family law. Could we just leave that until we come to that section?

Karl Turner: Okay, Chairman, thank you.

Chair: Yasmin Qureshi?

Mr Djanogly: Can I just—

Chair: I am going to give you an opportunity to talk about all of that. I just want you to do it in the order of questions.

Q367 Yasmin Qureshi: Minister, you started off by saying that you visited a law centre in which you were told that people were advising people as to what benefits they can have. Are you suggesting that perhaps most of the law centres and Citizens Advice Bureaux are giving people advice on benefits they can have? Are you seriously saying that is the case? I can assure you, as one who has done a lot of work for the Free Representation Unit and for law centres, that at no time in my 20 years have I ever advised anyone on what benefits they can have. It has been about when they have been refused something and they have been advised on it.

Mr Djanogly: Let me start by saying that I, and indeed the Government, very highly values not-for-profits. I agree that they provide very frequently a fantastic service to vulnerable people. That is not the issue. At the same time, the reality is that people who should be receiving general advice are getting it paid for by legal aid and, in a state of affairs where we have to very carefully ration and look at where we are spending our money, that is not the right way to go. In effect legal aid has often become a sticking plaster for the problems that came into the system.

What do I mean by that? About 10 or 11 years ago, when the last Government decided to allow not-for-profits to use legal aid—because before then they weren’t allowed to—at that point there should have been a review of the entire sector, but there wasn’t. The result is that money is being inefficiently spent. There is huge duplication of services across the sector, and there are significant inefficiencies. I am afraid that, now the money is not there any more and we have to look very carefully at how we spend the money, all of these inefficiencies are suddenly coming out of the woodwork. Are we going on to not-for-profits later?

Chair: Yes, we are.

Mr Djanogly: So we can discuss that in more detail.

Chair: We are trying to turn to family law at the moment.

Mr Djanogly: I would just make the general point to answer Ms Qureshi’s question.

Q368 Yasmin Qureshi: In relation to the provision of legal aid, the Green Paper states that “the provision of legal aid in”—private family law—“is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases.” Can I ask the Minister what the evidential basis is for that assertion?

Mr Djanogly: This is in family, is it?

Yasmin Qureshi: It is in family.

Chair: Yes, private family law.

Mr Djanogly: It is unnecessary litigation. Let us first realise that in family law 90% of cases do not go to court. In 90% of cases, people agree how they are going to divide their money and they can do that without going to court.
going to proceed as far as their divorce, their family assets and contact with their children are concerned without a court. They will sit down and agree. The question is, what happens to those 10% of cases? At the moment we are providing a very significant amount of legal aid for people to go into courts to decide whether, for instance, a child should be picked up on a Wednesday by one parent or whether they should spend one holiday or another holiday with one parent. We fundamentally think that that is not a priority for legal aid. Again, I am not saying it is not important for the family concerned, but we are saying that for the most part, from a policy directive, those people should be deciding how they run their own lives. We, as Government, are prepared to help them, which is why we are going to significantly increase the amount of spending on mediation, which is proven to be quicker, cheaper, less contentious, less adversarial and actually where the parties buy in to the results rather than having a judge telling them what to do. That is why in those cases, where people haven’t decided, we want them to certainly look to see whether mediation is appropriate in the first instance.

Q369 Yasmin Qureshi: Resolution has told us in a Committee hearing that, without targeted funding for early advice on all non-court options, parenting information or solicitor negotiation, the courts could in fact become too easily the first port of call rather than the last.

Mr Djanogly: That is simply wrong in 90% of cases and I can’t see how that is going to change. We are talking about that 10%, so I think that is a huge exaggeration to start with. But there will be cases where people do not agree. I think, when they are on an equal playing field in terms of not getting legal aid, they will perhaps be more interested in taking the mediation alternative. That is something we would certainly encourage. Some of them will end up in court as litigants in person. They do now. This is an important point, Mr Chairman. People often take the existing system as a fair one, but we need to appreciate—and I am not just talking here about Fathers 4 Justice—that many thousands, perhaps tens of thousands, of people who are going through the court system at the moment are feeling prejudiced and unhappy with the system. This is not coming out. This e-mail came in to me on the 4th, and I have another one here that came in on the 8th. I think it would be of interest to the Committee, Sir Alan.

Chair: It depends rather on how long it is, because we have a lot of questions to ask you.

Mr Djanogly: It is not very long.

Chair: I will be the judge of that.

Mr Djanogly: Let me just read it to you. “I want to draw your attention to the actions of my ex-husband who has been in receipt of legal aid since April 2009. He has a dispute with me over contact with our two children. Because of his serious mental health problems and his abusiveness towards me, I have obtained a Controlled Contact Order. Despite having contact every 7 to 8 weeks for a whole day he takes little notice of court orders and continues to bring new hearings at the Family Court and harasses me. This is of course extremely detrimental to my family’s peace of mind. So far there have been five hearings. He is supported by at least two solicitors and once a barrister.”

Chair: I think we have got the message.

Mr Djanogly: Just the end of the story, Sir Alan—

Q370 Chair: Order, order. Most of us have received a wide range of very similar e-mails in the course of our Committee work. I take it you are making the point that a legally aided litigant in such cases can place someone who is not legally aided at a disadvantage.

Mr Djanogly: I am making the point, Sir Alan, that this case has cost her parents £30,000 because she can’t afford it herself. She is not entitled to legal aid. I am also making the point that these are coming in to me at a very rapid rate. The idea that the current system is fair is hotly disputed by many thousands of people. I don’t think that is coming out.

Q371 Yasmin Qureshi: Minister, has any research been carried out on the impact of removing legal aid funding from private family law cases on the number of cases reaching court? It is one thing for you to give your opinion about it, but has any research been carried out by the Department?

Mr Djanogly: Yes. HMCS management information shows that in 2009–10, so this is very current, divorce cases where both parties were represented took over 50% longer on average than those where neither were represented. We can have a debate as to whether it is fairer or not but legal representation is certainly slower, which by the way runs totally contrary to a lot of the anecdote that we have been receiving that if you don’t have legal representation cases are going to take longer. Our evidence is showing that it takes 50% shorter.

Q372 Yasmin Qureshi: But have you looked at the impact of removing this legal aid funding from people? What would the effect be on people if you took the legal aid away from them?

Mr Djanogly: On the basis that they are not represented, I certainly don’t think that we have any evidence to show that cases are going to take longer.

Q373 Yasmin Qureshi: No, but what I am trying to say is that you are taking away somebody’s legal aid on these family law matters, but it seems that no one from the Department has looked at the impact that would have on the people when you take the money away. Has any research been carried out on that?

Mr Djanogly: I think it is hard to research what would happen when it hasn’t happened yet.

Chair: Can I get one further point out which we do need to have cleared up. Do you want to deal with it or shall I?

Q374 Yasmin Qureshi: According to the proposals, individuals who have experienced non-physical domestic abuse do not qualify for legal aid at the moment. Can you clarify for us how you define domestic violence?

Mr Djanogly: The proposal that we have for the definition of domestic violence is stated in the
consultation document. I can tell you that in the consultation meetings I have been having this has come up as an issue very frequently. We can see it is an important issue and it is one that we will be studying very carefully in our responses to the consultation.

Q375 Chair: So you have yet to come to a conclusion on that?
Mr Djanogly: Absolutely.

Q376 Chris Evans: You said in the House on 3 February “our aim is to direct our scarce resources towards the most vulnerable.” Who do you define as the most vulnerable people in society?
Mr Djanogly: We have eligibility criteria. In criminal terms, those were set by the last Labour Government and we are not proposing to change those until we see how they work. In civil terms, we have put a set of proposals into the consultation paper and we are changing the eligibility criteria. In certain situations at the moment I believe someone with £300,000 of assets can get civil legal aid, which we think is unfair. So the criteria as to who is eligible exist—

Q377 Chris Evans: Do you think these people are going to need help with debt, housing, immigration and welfare cases?
Mr Djanogly: As a guiding principle, as I said before, Mr Chairman, if someone’s life, liberty or their home is at immediate risk, then they will be eligible.

Q378 Chris Evans: How are you going to direct these resources if you have taken them out of the scope?
Mr Djanogly: Sorry?
Chris Evans: How are you going to direct the resources if you have taken them out of the scope of legal aid for things like debt and housing?
Mr Djanogly: To those who remain within scope.

Q379 Chris Evans: What about those ones who are outside scope? Where do they go now?
Mr Djanogly: You can’t generalise, Mr Evans, because in some circumstances it will be more suitable for general help. In other circumstances we would be saying that it would be more suitable for non-court alternatives such as mediation.

Q380 Chris Evans: Could you give me an example? You have been very anecdotal today with stories. Could you give me some sort of example of the type of person who is outside the scope and what help will be available to them?
Claire Perry: It is a general question.
Mr Djanogly: I don’t really know where to start. If you want to give me a particular area, then I can perhaps address a particular area.

Q381 Chris Evans: If we looked at someone whose house wasn’t at risk but they needed help with housing, what about them?
Mr Djanogly: The consultation document in that situation says that if the repairs that were required were very serious because of a safety problem, coming back to the principle of their safety being at risk, then they would still receive legal aid. I have to say in relation to a point made by Mr Turner earlier, who I think said that we were taking housing out of scope, we are not. We are reducing the scope. If someone’s home is at risk or if there is a serious security issue—for instance, gas is creating a security problem—there will still be legal aid—£38 million on legal aid will still be spent afterwards on housing. We are not taking it out of scope.

Q382 Chris Evans: With the concerns about Citizens Advice Bureaux, what about debt?
Mr Djanogly: Debt is generally a matter for general help rather than legal assistance. It is a complicated area in relation to how it is bound up. It is not mainly Justice of course who funds it, let alone legal aid. It is mainly Financial Inclusion and that is a Treasury-led one. That comes to the end in March. I would say that dealing with debt from a general help point of view is an important issue. If we are coming on to not-for-profits later we can discuss it then, but it is certainly an issue that should be included in the discussions with the OCS.

Q383 Chris Evans: I want to move on a little now. Do you agree with the Legal Action Group’s belief that “legal aid will cease to be viable as a nationwide public service” in future should these proposals go through? What are your thoughts on that?
Mr Djanogly: Absolutely, absolutely. We are proposing to cut legal aid—

Q384 Chair: Do you mean “absolutely not”? Mr Djanogly: Absolutely not; sorry. I don’t agree with their supposition.
Chair: I just wanted to clarify.
Mr Llwyd: I rest my case.
Mr Djanogly: Thank you, Sir Alan. We are proposing to cut legal aid by £350 million, but that is off a £2.2 billion budget. In certain areas we are not looking to touch the scope at all. In criminal law we are not looking to touch the scope at all, for instance. We are just redirecting resources to where we think they should be redirected.

Q385 Chris Evans: What will you do to prevent legal aid deserts, should they occur?
Mr Djanogly: That is an important issue and it is one that comes out of this consultation. It is going to be dealt with, as we have said in the consultation document, on a stand-alone look as to how we take forward competitive contracting, which will be done first in relation to criminal law. Yes, there is most certainly an issue when we view how the contracts should be formed as to geographical area and as to how many firms practise in these areas. I can assure you that one of the main aims will be to avoid advice deserts.

One other important issue in this consultation paper is our belief in the need for an effective telephone advisory service. This came out quite significantly in oral questions yesterday. We do see an effective telephone advisory service as a way of helping those who are in remote rural areas, those who are disabled
and those who can’t afford transport. You can call up this advisory service and they will call you back. You don’t even have to pay for the phone call. We see this as another way of directing our resources to where they are most important and getting the best advice to people. We think there is a lot we can do through the use of the telephone.

Chair: Elizabeth Truss has a supplementary point before I come to Mr Turner.

Q386 Elizabeth Truss: I am very interested in how you balanced the scope issues compared to the cost per case issues. It seems to me that, when you look internationally, England and Wales has a problem on both fronts. How have you compared internationally to other common law countries in terms of the scope of legal aid provided? Also, could you talk a bit more about cost per case? Over the witnesses we have seen quite a lot of people complaining about the inefficiencies within the CPS and Legal Services Commission. How is the MoJ bearing down on its internal functioning to make sure that these things are dealt with much more efficiently? Do you see cost per case or scope as being more important in terms of reducing the overall cost burden of legal aid?

Mr Djanogly: They are both important issues. The CPS currently has a review going on. They are very keen to improve the CPS service. They are looking at various areas. It is clear to us that on any measure, taking Northern Ireland out of the equation for this purpose, that we are spending more than any other country in the world on legal aid and we will still be doing so after our proposed savings. The Council of Europe data that we have suggests that our expenditure per head on the court system and public prosecutions is in line with comparable western European jurisdictions. There is a further issue that is often brought up, and that is that the nature of our system—that is an adversarial rather than an inquisitorial system—means the actual format of representation is more complicated because you spend a longer time arguing.

Q387 Elizabeth Truss: The Committee has looked at other common law countries and they have much lower legal aid costs.

Mr Djanogly: Much lower.

Q388 Elizabeth Truss: Have you looked at countries like Canada, for example, and what lessons would you draw from those countries? Where is your ideal model?

Mr Djanogly: We have had an international report. It mentioned many, many things. That is something that I would like to write to the Committee on separately.

Chair: It may be a document we already have.

Mr Djanogly: We will check that, but there are many aspects to that. It is an important one.

Q389 Karl Turner: In relation to tribunals, Minister, we have heard from His Honour Judge Martin, the President of the Social Entitlement Chamber. I think it is fair to say that he has some concerns. He has told us that, regardless of presenting their case, applicants at tribunals need help in preparing for them and that without such help cases would take longer. What estimates has the Department made of the implications of the cost on tribunals by not allowing individuals that assistance?

Mr Djanogly: We don’t think there is going to be a fundamental cost implication. Don’t forget, as I said before, that there is no legal aid for representation. It is for legal help. There is an issue, of course, as to when legal help is required and when it is a question of general help. A lot of benefits or debt advice requires general help rather than legal help. Very often, the issues are very basic rather than of legal complexity.

Q390 Karl Turner: I do not know what your vision of a tribunal is, Minister, but mine I suspect is very different from yours. It is a terribly complex, procedurally difficult arena. The law is extremely difficult for even lawyers to get an understanding of. Have you considered those points?

Mr Djanogly: We have. What I am looking for is a statistic—I can’t find it now so perhaps we can send it on later—which basically shows that in the vast majority of cases the issues that come up in a tribunal are of a general nature rather than a legal nature. Don’t forget, tribunals are not designed for representation. They are designed for people to go there and talk in normal, non-lawyer speak and they are aimed at people being able to represent themselves.

Q391 Karl Turner: I wonder when you were last in an employment tribunal scenario, or in fact any tribunal situation, Minister. I suspect your version of what happens there is very different to many hon. Members on this Committee who have had experience in those situations.

Mr Djanogly: Can I just make the point that people do not get legal aid for representation in employment tribunals now?

Karl Turner: Yes, I understand that.

Mr Djanogly: They may have union support. They may sometimes have pro bono support, but they don’t get legal aid.

Q392 Karl Turner: I understand that, Minister, but there is a suggestion that assistance for preparing cases prior to going to a tribunal will stop. Do you not accept that there will be implications on cost? Do you not accept that by allowing someone to go to a tribunal unrepresented, who has not had any experience of dealing with this area, who has not had any help in preparing the case, which is very complex, very difficult stuff, is likely, in my view, to slow the system down dramatically? Would you accept that?

Mr Djanogly: It depends on the circumstances. In the most complicated scenarios I do accept it. Don’t forget, in many of these complex scenarios we are keeping legal aid for them or where there is the most risk. This also misses another point. I pull us back to the need for early intervention. If we can take the example of employment tribunals, as I have said, we have looked very carefully at this and we see a need for early intervention, before people go to tribunal, which is why we are saying that all cases should go to ACAS for early mediation review. We think that
Mr Djanogly: Do you not worry that more people will go to tribunal. It gives lawyers an opportunity to consider things. It gives people an opportunity to advise and potentially avoid going to tribunal. Do you not worry that more people will go to tribunal without having been advised against doing so?

Mr Djanogly: I hear what the judge says but I have to say that we are moving to a different position, and this is a policy decision.

Karl Turner: I can see that, Minister.

Mr Djanogly: I think that the triaging, where it can, should happen before you get to judges, before you get to lawyers. In too many situations cases—

Q394 Karl Turner: How do you propose that is going to happen, Minister, in real terms?

Mr Djanogly: I have just told you: through ACAS, in the example you gave, and in family through mediation.

Q395 Karl Turner: What about the inequality? People are often represented at tribunals. For example, in an employment tribunal scenario I would guess—I am not an employment lawyer—that the vast majority of employers will be represented. What about the inequality of people not represented, who are applying—

Mr Djanogly: Is the implication of what you are saying that people should receive legal aid for representation in tribunals? I have already told you, Mr Turner, that in Work and Pensions alone—

Karl Turner: The implication—

Claire Perry: Let the Minister finish.

Karl Turner: The Chairman is in his chair. I would be grateful if the Chairman directs the proceedings. The implication, Minister, is that I think the process will be slowed down. It will be more costly in the long run. It will provide inequalities in the system. People will not be assisted with legal advice in what are very complex scenarios. In my view, that is not fair and it does not protect, as you say, the most vulnerable.

Mr Djanogly: Mr Turner, you have switched between legal help and legal representation. The implication of what you said earlier, I think, is that people should receive legal aid for representation. You may suggest that, but you must realise that that does not exist at the moment and it has very serious cost implications. I don’t know what they would be in employment tribunals, but we reckon that in Work and Pension tribunals it would be about £500 million. It is very easy to talk about spending money, but if you come up with the commensurate savings—

Karl Turner: Minister, I have not suggested that at all.

Chair: Mr Gummer has a supplementary point.

Karl Turner: I have read his evidence.

Ben Gummer: We were here and we heard what the judge majored on, which was the problem and the extent of the legal guidance he had to deal with in tribunals. He said it has gone from a small handbook when he started to 7,500 pages over six volumes. This is a systemic problem that originates in the Work and Pensions system, doesn’t it?

Mr Djanogly: I am very pleased to be able to say that on employment tribunals, in particular, we have a consultation paper out just on reforming tribunals. They are too bureaucratic. People are increasingly thinking of them as unfair. We do want to see earlier intervention before people get bogged down in all the procedure that Mr Gummer is talking about.

Q396 Ben Gummer: Can I first of all ask Ms Albon about the letter which she wrote to the Chairman on 15 February? On Monday I asked you whether there was any evidence to show that there has been a substantial increase in instructing guardians ad litem in family matters. The response is, you say, that the Commission does not indicate whether a guardian was appointed in a matter and as such is unable to provide the information. I find that rather surprising because it is clearly a cost driver, is it not?

Sarah Albon: Yes. We are seeking this information from you from Cafcass so that we can still provide it to the Committee, but the way the Commission keeps its data means they know what they are paying solicitors and barristers, and then they know what they are paying in disbursements. They don’t keep data in any centralised way that allows them to break out what those disbursements were, so they can’t separate the cost of a guardian from other disbursements in a case.

Q397 Mr Llwyd: Do you think that is sensible?

Sarah Albon: It probably comes down to issues around the cost of different data systems and new data systems. The Commission would be the first to accept that they are not always able to provide us with all of the management information that either they or we would like them to be able to do.

Chair: I am not sure you have convinced yourself by your answer, but that may be a little unfair on you.

Q398 Mr Llwyd: Do you think that is sensible?

Sarah Albon: It probably comes down to issues around the cost of different data systems and new data systems. The Commission would be the first to accept that they are not always able to provide us with all of the management information that either they or we would like them to be able to do.

Chair: I am not sure you have convinced yourself by your answer, but that may be a little unfair on you.

Q399 Mr Llwyd: I am somewhat underwhelmed by the passion of your argument. Can I refer the Minister to what Sir Nicholas Wall, the President of the Family Division, told us? He expected a “massive increase” in litigants in person. He thought that cases will take longer and there will be more difficult experiences in court. He thought the Green Paper did not recognise this problem adequately. Furthermore, Sir Anthony May, President of the Queen’s Bench, said that some presented their cases well but large numbers did not and therefore increased the length and expense of court cases.

You said earlier on that it was purely anecdotal that there would be some difficulties in court. Are these two gentlemen labouring under some problems of believing anecdotes, or do you think they are relying on their own experience?
Mr Djanogly: We do think that there will be an increase in the number of litigants in person, but there will be a significant fall in the number of cases going to court. As to how far that goes, it depends on the extent of the behavioural change which we are promoting, not least the move towards mediation. It is hard to go firm on figures, I would say, from any point of view. However, we are sure that the rise in litigants in person will be much smaller than the decrease in cases. Does that make sense? But I would also say that it is important in this that we realise litigants in person have problems now and we have identified this as an issue. We have a report being commissioned at the moment on litigants in person. We also appreciate that they need to be given better advice on how to demystify the court process. We are looking at that. One particular aspect of that we are looking at is to use IT, and particularly a walk-through IT system that you can look at that takes you through the court process. I have looked at a pilot and I can tell you that it is a very interesting development. I think it will do much to help litigants in person find their way round the system.

The other point I would make is that, if you take family law, which is what we are talking about, it is a much more inquisitorial process on the whole than other parts of the legal system. I have sat in on cases and very often, when people are not represented now or even when they are represented, the judge will take quite an inquisitorial approach to the case and guide people through. If you add all that together, I think it is an interesting question and one we will have to look carefully out for, but I don’t have concerns.

Q400 Mr Llwyd: It is not exclusively family, because the President of the Queen’s Bench has also expressed a similar view, hasn’t he? Have you any estimate of the cost of the impact of an increased number of litigants in person, which is recognised in your Green Paper?
Mr Djanogly: It is built into the impact assessment.

Q401 Mr Llwyd: Do you have any concerns about the ability of people with mental health problems, disabilities, drug dependency or alcohol addictions to represent themselves?
Mr Djanogly: We do. We are interested to see how people respond to the consultation on these particular issues.

Q402 Mr Llwyd: Have you made any pre-assessment of this particular area?
Mr Djanogly: You can’t generalise. For instance, if you take mental health, we are proposing to keep that within the scope of legal aid in the Green Paper. You have to look at it on a case-by-case basis.

Q403 Mr Llwyd: Presumably you will have an impact assessment after you have considered all the responses; is that right?
Mr Djanogly: It will be reassessed, yes.

Q404 Mr Llwyd: We were also told that it would not be possible to fund, for example, drug tests or psychiatric assessments where these might be needed in a situation where there is no legal aid available in family matters. It is to determine whether a child’s safety, for example, is at risk. Is this correct?
Mr Djanogly: It is about child safety, there is a so-called rule 9.5 issue which has been mentioned to us by many family practitioners in the consultation meetings that I have had. It is something that we believe does need to be looked at carefully.

Q405 Mr Llwyd: In other words, if a litigant in person requires that test to be undertaken, applying rule 9.5, there will be public funding for that to happen.
Mr Djanogly: It would relate to the child being represented.

Q406 Mr Llwyd: Sorry, the point I am trying to make is that you have a litigant in person in a family matter to do with child welfare and that parent wants a psychiatric assessment of the other parent in the interests of the child’s safety but is not publicly funded. Will there be an application of rule 9.5 to cover that public funding?
Mr Djanogly: I don’t want to get too specific.
Mr Llwyd: I would like you to be specific actually.
Mr Djanogly: My understanding from the facts that you gave is that there would be legal aid funding in that scenario.

Q407 Mr Llwyd: So as not to be unfair to you, Minister, would you care to write to confirm whether that is correct, in due course, because it is a very important point?
Mr Djanogly: Yes, it is. I appreciate that.

Q408 Chair: While we are on family law, you have laid quite a lot of emphasis on a shift to mediation, a wide use of mediation, among that 10% which currently goes to court. Who is going to do it and how is it going to be paid for?
Mr Djanogly: There are mediation organisations. Our view is that the initial demand can be met from those organisations. The practice of mediation will be developed rapidly once mediators realise that they are going to be in demand. I should also point out, Sir Alan, that there appear to be very large numbers of mediators out there—so-called “sleepers”—who are waiting for the call and who, when they realise that there is a demand for mediation, will be able to come on tap quite quickly. There are issues surrounding mediation in such areas as the training that mediators should have. These issues are being debated within the profession itself.

Q409 Chair: But the cost?
Mr Djanogly: We do see that there will be an additional cost through mediators. Our initial assessment is in the region of £5 million, but those who are eligible for legal aid now will be eligible for mediation.

Q410 Claire Perry: Many of us think mediation is a good solution but I don’t think it is good enough to just say lots of it is out there and people will find it. What could you do to signpost or divert people to
mediation? What active steps are you going to take to do that?

Mr Djanogly: Mrs Perry makes a very good point. I can assure the Committee that this is an issue of particular concern to me. Since I have been a Minister I have made some half a dozen speeches on the issue. We are publicising it. We are providing a new website which will be on the Directgov website. People will have easy access to mediators. In the last few months the number of mediators across the country and also the number of mediation outlets has increased dramatically. We do not have those figures to hand, but we can provide them.

Chair: Add to them to the letter you are already sending to us.

Q411 Mr Buckland: We have concentrated on areas where scope is to be reduced. I just want to ask you a question about judicial review, where there are no proposals to reduce scope. Sir Anthony May gave us evidence a week or so ago about his concerns about a potential rise in judicial review cases around asylum. It arises from a particular Supreme Court judgment. It is the Cowen case. I am not sure they have determined that. He was concerned that if the judgment went a certain way there could be an explosion in judicial reviews under that particular head, which of course would have a big impact on the legal aid budget. I use that as an example, but I simply ask the more general question: is there more that we can do to look at dealing with the merits tests for applications for legal aid for judicial review and, for example, a wider public interest test when it comes to granting legal aid applications for these cases?

Mr Djanogly: I have to say that the starting point in our consultation paper is that we are not proposing to make any changes to the scope of judicial review at all, it being the citizen’s right for redress against the State. Having said that, I note the points you make. I will look forward to receiving the consultation response from the judge you mentioned and we will certainly take that on board and consider it.

Q412 Chair: In your Green Paper you refer to a number of groups such as Child Poverty Action Group, Disability Alliance, Free Representation Unit, Age UK and others you have talked about such as Citizens Advice Bureaux, Shelter and Neighbourhood Law Centres. Almost all of these groups have queried their ability to plug the gap which they think will arise. So those upon whom you are relying, and many of us rely on as Members of Parliament, to assist in cases of this kind are all worried about whether they will have the critical mass to maintain the kind of advice which you envisage people will go to them for in the future. What do you say about that?

Mr Djanogly: First, Sir Alan, although we did mention these groups in the consultation document, we did that out of respect knowing that they were players rather than because we wanted to take their names in vain, if you like. Indeed we have had very significant consultation and ongoing meetings with nearly all, if not all, of them. I would like to make it very clear that this is an area we take very seriously. We do see it as an important issue. We do see it as an issue where the existing circumstances and the existing provisions are not coherent enough given the fact that there is going to be less money in the system so that reform is required.

If you take CAB, for instance, the Ministry of Justice funds CAB to about 15%. Most of CAB’s money locally comes from local government, although an average CAB may have a dozen or more funding streams. There is a great lack of knowledge, as we discussed earlier, as to where these funding streams come from and how they tie in nationally. Most of the national money on CAB, for instance, comes from the Department for Business. There is a great need to have a cross-governmental review of how we support our not-for-profits and how we don’t duplicate services. In certain areas, particularly debt, there is huge duplication around the country. This is something to which certainly the Ministry of Justice is very committed.

I have already had a meeting with the Office for Civil Society, part of Cabinet Office, and Nick Hurd, who I am very pleased to see you are going to be meeting with shortly. We have been in constant correspondence with him at ministerial level and officials are in constant discussion. Of course, it involves most of the Departments of State, not just Justice, but this is an area that the Government takes seriously and that we are going to be looking at on a cross-governmental basis.

Chair: Finally, Mr Turner is going to ask about the consultation itself.

Q413 Karl Turner: Thank you, Chairman, yes. We are very lucky to have you here, Minister, just a couple of days after the consultation period closed. Thank you for that. I do have some questions around the consultation. I do not know if time will permit, but perhaps you might want to put your answers to us in writing. First, I think you have said 5,000 people responded to the Department. What type of organisations—

Mr Djanogly: I can’t tell you that.

Q414 Karl Turner: Okay. My concern is around the staff. How many members of staff has the Department held over for considering the consultation? Is there a timeline for the responses from the Department?

Mr Djanogly: I think just about anyone with an interest has responded. A lot of the 5,000 responses are standard form letters, it has to be said. They are not all individual responses. Some are several hundred pages long and some are one-page standard letters. I cannot give you a breakdown of that two days after the consultation has finished, but it is about 5,000 of them and they will all be considered and looked at. We are hoping to come back before Easter.

Q415 Chair: We will report, of course, before then. We will expect you to take account of what we say. Clearly, it is going to take quite a lot of staff to absorb all that material and make sure that you have a full and accurate summary.

Mr Djanogly: This whole exercise has been a very major exercise for the Ministry. Right from the
formulation of the consultation paper we have had a very significant team on it.

Q416 Mr Buckland: Minister, I think you have said this before but the Committee would welcome reassurance. This is going to be the last such consultation for a considerable period of time, bearing in mind we had 30 between 2006 and 2010.

Mr Djanogly: Absolutely. I have made a point of that myself. The idea behind this consultation is that we have a composite look at legal aid across the board. Indeed we put out the Jackson proposals on the same day so that people could look at funding not only from the State-funded sector but also in the privately-funded sector. I have to say, though, there is always an exception and that is, as is mentioned in the consultation paper, that we will have a separate consultation on the competitive contracting which will be for criminal, as I mentioned earlier on today.

Q417 Chair: If you don’t carry out a proper consultation, you may find yourself in court subject to legally aided judicial review.

Mr Djanogly: Indeed, Chairman.

Chair: A final question from Yasmin Qureshi.

Q418 Yasmin Qureshi: Minister, sometime ago you said that if Citizens Advice Bureaux and other places close down people can always go to their Members of Parliament to seek assistance.

Mr Djanogly: I said that?

Chair: It was very unwise of you.

Mr Djanogly: Did I say that?

Q419 Yasmin Qureshi: I have mentioned it in the House previously and I think it was reported in a newspaper that you suggested that they should be able to go to their Members of Parliament. My Citizens Advice Bureau in Bolton saw 14,000 people. Are you really expecting me to be able to deal with all those 14,000 people?

Mr Djanogly: First, I don’t recall saying that every CAB case should go to their Member of Parliament. Secondly, I would hope that the Committee would have understood, from what I have said earlier, that I am fully supportive of CABs, I am fully supportive of not-for-profits and I am certainly supportive of general advice being provided by these organisations. What I have said on the floor of the House—I said it in the legal aid debate two weeks ago and I said it in answer to a question yesterday in Justice oral questions—is that I do hope that Councils across the country look carefully before they decide to stop support for their local not-for-profit general advice provision. I repeat that again today.

Chair: Thank you very much indeed. We will report to you in due course.
Wednesday 2 March 2011

Members present:

Sir Alan Beith (Chair)
Mr Robert Buckland
Chris Evans
Ben Gummer
Mr Elwyn Llwyd
Claire Perry
Elizabeth Truss
Karl Turner

Examination of Witness


Chair: Mr Hurd, welcome. Members of the Committee may need to declare interests before we start. I shall start with Mr Buckland.

Mr Buckland: For nearly 20 years I was a barrister practising legal aid, chiefly criminal legal aid. I still have a practising certificate, but I have not taken on any new cases since the election. I sit as a recorder at the Crown court.

Mr Llwyd: I was a solicitor for 16 years. I have been a member of the Bar for 13. I have practised in publicly funded work, both in crime and family, but not currently.

Karl Turner: I am a member of my local chambers in Hull. I have not been paid public money, but I have practised in the past three months.

Q420 Chair: The reason why we have asked you to come along, Minister—we are grateful to you for doing so—arises from our work on changes to legal aid. We have had a number of evidence sessions. We will shortly publish a report, which we are just about to prepare. It became clear to us in the course of our work that assumptions are being made about the capacity of the voluntary sector to deal with some of the things that have been dealt with hitherto by legal aid, often through support to those same voluntary bodies like citizens advice bureaux and neighbourhood law centres. Do you recognise that you already have a task in looking at the ability of the voluntary sector to pick up the slack, which the Government think that it can pick up?

Mr Hurd: In the specific context of advice to our constituents, yes we do. That is why the Cabinet Office has got involved at this juncture. As MPs, we all know the value of our local citizens advice bureaux. We also know that demand on them is increasing. We also know that their funding streams are often complicated and diverse. In certain points of the system of the network, there is extreme vulnerability at the moment, often depending on the attitude of the relevant local authority. As members of the Committee, you will know, for a lot of citizens advice bureaux the really important funding in the short term is the funding from the local authority, which is the core funding they expect to leverage in different ways. Yes, there clearly is a problem, not least with the potential triple whammy of local authority cuts, reform of legal aid and, until recently, uncertainty about the short-term future of the financial inclusion funding, which is why the Cabinet Office was recently invited to do three things, which I shall explain briefly to clarify our role. We have been asked to pull together some hard information about what is happening on the ground, because it is not mapped in a very robust way. Secondly, we have been asked to pull together stakeholders—to use the jargon—to consider two things: first, what can be done in the short term to mitigate the damage where there is greatest risk and, secondly, what can be done to build a more sustainable future for this incredibly important network? That will include recommendations on what the Government can do, and also recommendations to the sector itself in terms of adjustments. That process is recent and is under way. There was a meeting last week of about 60 key stakeholders. Recommendations have come out of that meeting. They are being framed very urgently to a group of Ministers, which is being convened on 9 March to consider the matter. There is an urgency in the system to review this. I am sorry to go on at length, but my final point is that we did to some degree anticipate this, because the Cabinet Office fought very hard in the comprehensive spending review to get £100 million of taxpayers’ money set aside. The transition fund made that explicitly open to providers of advice. I am advised that some 93 citizens advice bureaux applied to that fund. That is generally the context in which the Cabinet Office is operating.

Q421 Chair: Thank you. We are going to look at each of the specific measures like the transition fund, the big society bank and continuing with the financial inclusion fund, in the course of our questioning, but let us stay for the moment with the general issue. You recognise in your reply that the organisations feel a cumulative impact from a whole series of measures. The financial inclusion fund was one of them, but others, as you say, include levels of local authority funding. When the CAB gave evidence to us, they gave careful evidence in which they avoided assertions that all local authority funding was about to be withdrawn, but, unavoidably, they had an unclear picture, because it varies in different areas. You have to recognise that part of the context is that they relied on local authority funding simply to maintain the infrastructure, to which they added work funded, for example, by the Legal Services Commission, if they had specific legal aid contracts. The Cabinet Office recognises that even where local authorities have
maintained a good level of funding and have only limited cuts, there is a cumulative impact that is proving difficult for them.

Mr Hurd: Yes. A number of Departments are involved in this process. That is why it was considered sensible that the Cabinet Office should step up in its co-ordinating function to knock some heads together. On local authorities, I acknowledge the picture that you framed, about the importance of that core funding from the local authority and the opportunity to leverage that. I have written to every MP, inviting them to bring in their voluntary and community sector. Many have done so, and there is almost always someone from the CAB on that visit. This message has come through loud and clear: they are most concerned about the core funding from the local authority and the threat to it. Not everywhere, because, as you have acknowledged, it is an uneven picture across the country, but in the short term, that is what the concern seems to be, and we can discuss the Government’s response to that, if it is appropriate.

Q422 Mr Llwyd: I would like to ask you generally about the ability of the not-for-profit sector to provide assistance in the absence of legal aid funding, due to the impending cuts. I will give you some context. Age UK said: "Our concern is that while it is true that both Age UK nationally and our partners in local Age UKs and Age Concerns do provide some help and advice with welfare benefits it is most often not at a level comparative to that provided through legal aid." Furthermore, the Free Representation Unit said, "we thoroughly disagree with the Department’s position that the consultation document gives a misleading impression of FRU...It points out correctly that FRU represents clients in tribunals. It then illogically uses FRU’s representation work in tribunals as part of the justification for withdrawing Legal Help for initial advice work in welfare benefits cases."

Given these rather obvious and deep funding difficulties, which will be and are being faced by not-for-profit organisations, how realistic do you think it is for them to plug any gaps left by the cuts?

Mr Hurd: Is that a question about the short term or long term?

Q423 Mr Llwyd: You can address both. Whichever you prefer, although both if you can.

Mr Hurd: In the short term, we are focused on two things. I am speaking purely through the prism of the Cabinet Office. The first is the working of the transition fund, which was deliberately set up to provide relief and a lifeline for organisations that were particularly vulnerable. We wanted to set it up in a way that was quick and as unbureaucratic as possible, because we recognised the need to get money out there as quickly as possible. You will know that although £100 million is an extremely significant commitment, it was always likely to be less than demand. If we had had more money, we would have offered it, but there just isn’t the money around. We had to set some quite strict eligibility criteria for that, but we left it explicitly open for providers of advice. As I said, something like 93 have applied, and one on the Isle of Wight has already been told that it has been successful.

The second short-term response is about local authorities. As we have already discussed, they are the problem in the short term. This is politically difficult because in the age of localism the ability of central Government to direct and control what local authorities do is rightly limited. Several months ago the Prime Minister sent an extremely clear steer to local authorities: "Look to make your own efficiencies and savings in-house before taking what might seem like an easy option to cut outside.”

In response to that, as most Members will know, the picture is extremely mixed across the country. County councils such as Wiltshire, as Claire knows, have kept their investment in the voluntary sector; Reading has increased it, and my local authority is continuing to take efficiencies out of the back office, having received the worst financial settlement in 10 years. However, it is not an even picture across the country. There are other places where this process is not being handled in the way that we would like. We are monitoring the situation carefully, because hard information is important. There has not been good enough mapping on this, and we are determined to get a better picture of what is actually going on.

We have also moved quite recently. The Committee may not be aware that yesterday the Secretary of State for Communities and Local Government made it clear that we are prepared to set what he calls tests of reasonableness for the behaviour of local authorities—in the proportionality of cuts, the notice given for cuts and the time given to people on the wrong end of decisions to adjust what they are doing. He stated those tests of reasonableness, and also said that he is prepared to consider putting them on a statutory basis. That is quite a significant move in response to our very genuine concern about what is happening out there as a result of decisions by local authorities. They are faced with tough choices, but this is the context in the short term. I am sorry, but this has been a very long answer.

In the long term, the other problem is what happens after 2012 in terms of the funding coming from Departments, which we at the Cabinet Office are actively reviewing in terms of the effort to bring people together and to look at what recommendations we can make to Departments, but also recommendations that we can make to the sector itself in terms of positive changes that it can make; for example, to create more sustainable and diverse funding streams. That was a long answer.

Q424 Mr Llwyd: I for one never criticise Ministers who give full answers. I appreciate it.

On the question of CABs, you will appreciate that there is a great deal of concern in that sector about the immediate future. Would I be right in thinking—you will tell me if I am wrong—that the transitional fund will apply to them, for them to be able to continue giving advice? In other words, could they apply for funding if they fell short? As you well appreciate, much of the money that they receive comes from local government, who themselves are having to cut their cloth. Could you help me on that?
Mr Hurd: I shall set out a little bit of detail on the transition fund. It is £100 million. As I said, our whole instinct was to set something up quickly that could get money out quickly and in as unbureaucratic a way as possible, as far as the Government can. We are grateful to the Big Lottery Fund for stepping in very quickly to set it up. The idea was to try to make £10 million available in the current financial year and £90 million in the next, and run it as one process. It was announced in October, applications closed on 21 January and we have already started the process of announcing 18 successful applicants, including a law centre on the Isle of Wight.

We deliberately made it open to providers of advice, because we anticipated a problem. As I said, 93 advice providers of different sorts have applied. I have no means of knowing how many will be successful in that process—BIG are running this at arm’s length—but it is there, and that is what it is set up to do.

I think you will appreciate the reasons why, given the potential, we had to set some quite clear eligibility criteria. There are three metrics that are important to register. The first was a threshold of turnover income, which was £50,000 a year. We took advice on that, which was that if this exercise was trying to direct resources to those who are most vulnerable it was above that income threshold that vulnerability was likely to be most concentrated. We set the threshold of vulnerability measured in terms of proportion of income from the state at around 60%. The other vulnerability metric was in terms of an anticipated cut of around 30%. This was an exercise really focused on those organisations who are most vulnerable and want to continue delivering a public service.

The last critical criteria is that it is not funding for business as usual; it is funding for change, funding for transition, and funding to organisations who have the beginning of a plan to get out of the situation they were in, not least in terms of trying to develop sustainable and diverse income streams. That caused some frustration in the system, but we had to set some eligibility criteria that were robust. We had to send a signal that this was about trying to help organisations build a more sustainable future.

Chair: Because we have come to the transition fund as a result of that question, I want to slightly change the order in which we are going to do things and deal with the transition fund now, so I will bring in Mr Buckland.

Q425 Mr Buckland: I am really drilling down as to time scales, Minister. As a Committee we are focusing on the legal aid Green Paper. First, I would like to know how much input you had in the preparatory stages of that paper.

Mr Hurd: Not a great deal, although I wouldn’t expect to, Robert. I was made aware quite quickly in the Cabinet Office of the risk that it would result in lower levels of funding legal aid, and therefore the potential consequences of that for the voluntary network that we are discussing. It was in that context, not least, that we did the preparatory work for setting up the transition fund, so that is the degree to which I was advised.

Q426 Mr Buckland: Secondly, the process that the Green Paper has initiated is going to be quite lengthy. We do not expect legislation to be published until later in the year, and therefore not passed by both Houses of Parliament until perhaps next year. Law centres, such as the Wiltshire law centre in my constituency, have had substantial funding from the Legal Services Commission for years up to this financial year. Assuming that the Green Paper isn’t altered much and becomes the basis of legislation that is passed, we then come to 2012–13. It is really that period that concerns a lot of practitioners and service providers. Are you able to sketch out for us your view of what the situation would be then, with regard to potential sources of funding for these sorts of organisation?

Mr Hurd: Not in a huge amount of detail. Obviously the transition fund is not relevant at that stage; it is a very short-term measure to help people who have been placed in a hole, need some help, and have a plan to get out of it themselves. That is there, it is important, and it is a big commitment, but it doesn’t answer your question.

The work that we are now doing very urgently at the Cabinet Office is pulling people together, including Government Departments—cross-departmental work—and other stakeholders, including foundations and trusts who have a big interest in this area, such as Barings who are sitting in on this session. We are asking this kind of question. Given the risk in that funding period, what recommendations do we make, in terms of what they can do to help, to Government Departments, principally MOJ and BIS who are the big funding streams in this? Also, critically, what recommendations can we make to the sector—if I can call it that—in terms of how they help themselves?

I do not underestimate the difficulty of that. I have listened to enough people in CABs saying, “Look, the problem is we’re not donkey sanctuaries; it’s very hard for us to raise money from the public. Don’t rely on that as a funding stream.” This will place a great deal of pressure on the system to be more entrepreneurial—if I can use that expression—in looking at ways to diversify. The Isle of Wight law centre, which has already received a grant from the transition fund, is trying to develop what it calls an independent personalisation brokerage, and on that basis it has been given a grant to try and develop that. It is a huge challenge and this is extremely difficult, but I think it is entirely right that we were asked to intervene at this stage to try and bring some strategic coherence. Joining up Government is extremely hard, but that is the role of the Cabinet Office.

Q427 Mr Buckland: One of the problems we have progressively identified is that very often law centres and legal aid providers are clearing up the mess left by other Departments and their decisions. For example, DWP in 08–09 spent £27.4 million on legal help relating to tribunal welfare cases. A large part of that is the result of errors made by another Department.

Chair: We are going to come back to that issue later.

Mr Hurd: I suspected you might.
Q428 Chair: If I could just reserve that, because I wanted—to use Mr Buckland’s expression—to drill down a little into the issue of the transition fund. I was very interested, and you reflected it in what you said, to hear that applicants have been told that in some circumstances they may be able to spend on current services but that is very restricted. I am quoting here from what I assume is a Cabinet Office statement: “the changes your organisation needs to make to meet the programme outcomes”—which is what they are supposed to be spending on. “In some cases it may be appropriate for you to spend a small amount of your grant on continuing to deliver services but you will need to explain why this will help you achieve the programme outcome.” In other words, if the organisation continues to use the money to fund the provision of legal advice to people, that can only happen on the basis that it is transitioning to a scheme in which that is funded from some other source. Can you give us an example?

Mr Hurd: The programme outcome, to place this on record, is that “civil society organisations, which deliver high-quality public services”—I am sorry to read this out—“are more resilient, agile and able to take opportunities presented by a changing funding environment.” I come back to the fact that we had to set strict eligibility criteria for this. If we had simply said, “This is a big pile of taxpayers’ money available to keep organisations going on just doing what they were doing before, because they have got themselves into a situation where they are so dependent on the state and taxpayers’ money,” there would have been a bit of an uproar from across the rest of the sector. Many organisations would have come to us and said, “Well, we actually diversified our income streams, and we did not let ourselves become so dependent on the state. Why are they being rewarded rather than us?”

The message we wanted to send, therefore, is that this is not just to fund business as usual; it is a lifeline to help you get out of the hole, as long as you have a plan yourself, or you are committed to a plan. I do not underestimate the difficulty of trying to develop more diverse income streams or more entrepreneurial models that suggest that you may have a more sustainable future, or put yourself in a more robust position in order to benefit from the future opportunities in terms of delivering public services that we are absolutely committed to opening out. I am afraid we had to send a clear message, and that caused some frustration. I do not underestimate that, but I am afraid with the limited resources we had and given the scale of the anxiety that is out there we had to be very clear about what we were trying to achieve.

Q429 Chair: What is the time scale for the remaining £90 million?

Mr Hurd: There has been some frustration about this, but in the context of wanting to get something set up quickly that was unbureaucratic and could give people some certainty as quickly as possible, we decided to run one process and leave it open for organisations that perhaps did not have hard confirmation that their grant or contract was going to be cut but had very good grounds for believing that. We ran one process. It closed on 21 January. That has caused some frustration because some organisations were perhaps slow to pick up on the opportunity. Again, we felt that we needed to run a very clear—

Chair: What is the time scale?

Mr Hurd: The fund is closed.

Q430 Chair: The second £90 million?

Mr Hurd: Yes. There was one process. Applications closed on 21 January, and they are now being sifted by BIG, our independent partner in this. It has already announced 18 applications that have been processed and approved quickly—about £1.7 million. There will be another round of approvals in March and successively through to June. That is it.

Q431 Chair: So anybody who has not applied by now has missed the boat?

Mr Hurd: Yes, they have. We are scrabbling round trying to find some opportunities to top it up, but most members of the Committee will recognise that there is not a magic money tree; there isn’t a great deal of money around. We recognise that there is a lot of demand for the money, and are doing what we can to pull together resources to try to top it up.

Q432 Claire Perry: Can I touch on the issue of innovation that you mentioned, Minister? That seems to have been a fundamental criterion in the way that many of these organisations receive grants. Many of us felt, from the submissions we took, that it was difficult for charities to look at what other organisations were doing, because they are so busy fighting fires and giving out good advice. What are you doing to help organisations see the effective law centre in the Isle of Wight, or the CAB that is tendering for contracts, so that they can make themselves a little more resilient?

Mr Hurd: That is a hugely important point, because there is a quite understandable tendency, particularly when you are grappling with the issues that those bodies are grappling with, to sit in your circle. One explicit thing that we are looking at as a result of the meeting last week, which I mentioned, is the scope to work with partners, to do exactly what you are saying, Claire, which is to help throw a spotlight on innovative practice across the network and make better connections between organisations, so that they can learn from each other effectively. That is potentially an extremely valuable initiative for which we can be a catalyst. That was certainly one of the things discussed at the meeting. I imagine that will be tabled to Ministers at the meeting on 9 March. That seems a very sensible approach to take.

Q433 Ben Gummer: On the issue of scrabbling around for pots of cash, an interesting idea in the Green Paper—

Mr Hurd: Which Green Paper? Ours or theirs?

Q434 Ben Gummer: The one that we are discussing here. The idea is to use the interest on client accounts up to the £25 limit, and to skim that off and put it towards law centres or other legal aid areas. Have you been able to find out how much money can be
Mr Hurd: I have a slightly different sensibility. I can’t give you a direct response to that. I would expect that to be picked up in the urgent review that we are doing, looking at all the options available.

Q435 Ben Gummer: That could be a fruitful source of funding.
Mr Hurd: That is a useful contribution, and I am sure it will go into the mix.
Chair: Somewhere else for you to scuttle.

Q436 Chris Evans: Would you set out your vision for the big society bank? Can you think of any examples of how it could help people access legal aid more efficiently and effectively?
Mr Hurd: Given that the Committee has an interest in the bank, one of the things I can certainly do is immediately send the Committee a copy of a document we published two weeks ago on our social investment strategy. It sets out our plans to do what we can to grow this market called social investment and set the big society bank firmly in that context.
Chair: I think we have it.
Mr Hurd: Do you? In which case, that is done. Perhaps I can say a few words on the strategic mission of the bank. I will keep it quite brief, if you have had the document. Members can come back to me, and then, Chris, you could perhaps just direct your specific interest. The bank will exist, when it is capitalised, to grow the social investment market. What is that market? It is the pool of capital that is prepared to consider a blend of financial return and social impact. Without wanting to sound too naive and idealistic about it, the ultimate goal is to make a much better connection between the social sector and the trillions of pounds of assets sitting in mainstream financial institutions being managed on our behalf as savers. There is really no connection between those two worlds at the moment. Social investment is the bridge. This will not happen overnight; it is not a short-term panacea for the challenges we have just talked about.
Over time, there is an opportunity to shape what we think will be a third pillar of funding for the sector, which will be social investment making it much easier for social entrepreneurs to access capital—not revenue, but capital. There is clearly a need. The bank will operate in that space, as a wholesaler, working through intermediaries, and we can explore why. Its mission will be to invest on the basis that it would envisage them getting a return?
Mr Hurd: It depends on whether they can offer something that can be financed in terms of physical assets or contracts that generate revenue from which working capital can be financed. The context is a new world in which the public service markets will be thrown open to a wider range of providers, so there will be more opportunities in this area. It depends on the ability to present something that can be financed and contains within it the prospect of some return.
In terms of how demanding the capital will be, that will be effectively negotiated with the banks. I am delighted that Sir Ronald Cohen, who is enormously experienced in this field, is advising us in terms of locking in the social mission of the organisation. That is hugely important. I am clear, and the document is very clear, that if the bank is to help grow the market, it must be in a position to take differentiated risk and to offer genuine long-term patient capital. It must not be in a situation where it is simply competing with what the private sector can already deliver. That adds no value to the system at all, so we are very clear on that, and that is the attitude that we will be taking into discussions with the bank around its social mission, the investment, and critically, the bank’s risk strategy.

Q437 Chris Evans: I accept what you have said, and I think that the dormant bank accounts idea, especially, is good. My major concern is when you say that it has to be self-sufficient and earn a financial return. How would a law centre, for example, earn a return? They would probably look to something such as the big society bank for money. How would you envisage them getting a return?
Mr Hurd: It depends on whether they can offer something that can be financed in terms of physical assets or contracts that generate revenue from which working capital can be financed. The context is a new world in which the public service markets will be thrown open to a wider range of providers, so there will be more opportunities in this area. It depends on the ability to present something that can be financed and contains within it the prospect of some return.
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Q438 Chris Evans: I’m glad it’s not a short-term thing, because it is important that this type of project is seen in the long term. In terms of timing, when do you think front-line providers will see some benefit from the bank, if you can give a time?
Mr Hurd: Okay. You have allowed me to talk about the intricacies of setting up a social investment bank, which people have been talking about for 10 years but it hasn’t materialised, because it is a fantastically complicated thing to do. Now that you have opened the door, I can answer that—and it depends on a lot of variables that we don’t control.
This is what we are expecting to happen. We have a commitment from the largest banks to put up £200 million of capital, and we are actively now working on how we approach the negotiations with them around governance structures, social mission and all the things that you would expect. In parallel, we have to process the dormant bank accounts, which have to go through quite a complicated fund. Our objective is to take £200 million of private sector capital and inject the dormant bank accounts in a secondary stage, once they’ve cleared the various hoops. The hoops are as follows: they are required by legislation to pass through an institution called a reclaim fund, and the Co-op has stood up to perform that function. This mechanism is necessary to protect the interests of the people whose money it is, — the people who have allowed that money to sit in bank accounts for more than 15 years. As I’m sure you’re aware, we have to be very careful with this money. The Co-op is the steward of that, and I am sure that it will take an extremely conservative view about how much money needs to be held back to meet potential claims. So, that’s variable number one.

We are talking about the total scale of the opportunity — and we have been informed about this by the British Bankers Association — will be around £400 million. We expect, by the end of quarter 2 of this year, that the reclaim fund will have released somewhere between £60 million and £100 million of dormant bank accounts to the Big Lottery Fund, which again, is the funnel required by the dormant bank accounts Act. What we are going to do is set up an interim shadow bank or investment committee. As soon as the money is available, they will be free to start making investment decisions and to start deploying investments, very much anticipating the kind of work that the big society bank will be independent. It will respond to the society bank lead to investment in the types of things that might be able to supplement or replace services that are currently not being provided.

Q439 Chris Evans: I’ll end with a specific question, while we are talking about legal aid. Will the big society bank lead to investment in the types of services that might be able to supplement or replace those that are historically funded by legal aid?

Mr Hurd: I come back to my first point, which is that the bank will be independent. It will respond to the market. It has been asked to respect an overarching high-level priority of opportunities for youth, because that was the clear priority set by the previous Administration. However, it will be independent to make its own investment decisions based on the quality of the investment proposals that are put to it. So, there is clearly a possibility, but it depends on the quality of the investment proposal put to it. There won’t be an explicit steer from the Government on that.

Q440 Chair: I can see how it might work for a charity that had revenue-earning activity or investment—for example, a charity looking after a historic building that is a tourist attraction and has a revenue stream, which needed to borrow some money, although it could of course do that in other ways—but I cannot quite see how it would work in the area we are concerned about. By definition, the people who come in for legal advice are not people who will provide you with a revenue stream, because they are the people that cannot afford to buy legal advice.

Mr Hurd: I expect it to be difficult, and this will be a test of the entrepreneurial innovation we talked about before. In my view and to put it simplistically, two things can be financed—though there are probably variations—and they are contracts and assets.

Although patchy across the network, there are physical assets which, in theory, could be financed if the trustees and leaders of these organisations felt comfortable with it. As I said, there are at the moment examples of debt finance in the system, around property development. As part of the big society agenda, we also want to encourage, through things like the right to buy, much more community activity in taking over assets and property, and setting up ventures. I very much hope that the big society bank would be in a position to deliver some capital towards that stream of activity.

However, how this will all play out, I am afraid, will depend on the market and the ability of intermediaries and organisations to structure high-quality investment proposals that people are prepared to back.

Chair: One possibility that occurs to me, and it relates slightly to something we will discuss later, would be if an organisation or public body with a need for advice itself contracted a voluntary body to ensure that that advice was available. There is a revenue stream in that form. In which case, however, you might not need the intermediary of the bank to have money up front in order to do that. But we will return later to the issue of people who cause appeals and processes to be necessary.

I want to turn to the financial inclusion fund. Mr Turner.

Q441 Karl Turner: Minister, all Members, on both sides of the House, would welcome the Government decision to extend the financial inclusion fund for a further year, but the Committee wonders why the Government decided to do so for a further year but not for future years.

Mr Hurd: That is a question for BIS, because that is its funding stream. All I would say, coming back to the process I described and Robert Buckland’s earlier question, is that clearly one of the big challenges for the sector is what happens towards the end, with the
money. What happens further down the track? That is part of the conversation we are now facilitating, as I understand it. Although BIS has made no explicit commitments, there is a process of review.

Q442 Karl Turner: Is it accepted, therefore, Minister, that there is clearly a need for such funding?

Mr Hurd: Again, it is not my specialised area.

Q443 Chair: You must have had some access to the reasoning behind this decision.

Mr Hurd: To be honest, Chair, and again coming back to my description of the process going on in Government at the moment, the Cabinet Office has been brought in really quite recently to pull this together. This is all very recent. These are conversations that are ongoing between officials and will be ongoing between Ministers in this meeting that I am talking about, but this is all quite recent. The issue is clearly under review within BIS, which has made that commitment for one more year—what happens after that is uncertain. But there needs to be clarity about it.

Q444 Karl Turner: The decision was made on 12 February. What were the discussions on this in your Department?

Mr Hurd: The decision was for the people at BIS—they made it, they communicated it to us and, frankly, it was welcome. I hope that the Committee welcomes it. What happens next, in terms of beyond that period, is now up for review, and that is part of the process that we are now actively trying to facilitate through the co-ordinating role that the Cabinet Office plays.

Q445 Karl Turner: I think there is a suggestion from the Government that the Consumer Financial Education Body will take over and provide national, free debt advice. Is that your understanding?

Mr Hurd: Again, that is off my turf, and I am sorry if that is frustrating for you. The review process is urgent. It’s under way. That is all in the mix of the discussion.

Q446 Karl Turner: There is no plan, as far as you are concerned.

Mr Hurd: I wouldn’t necessarily be aware of it, in terms of my day-to-day responsibilities at the moment, or in a position to give the Committee an absolutely definitive picture. Our job at the moment is to pool people together and have a discussion about the short term and the long term, and that is obviously part of it. The process started with a meeting last week.

Q447 Chair: I find it a bit puzzling that your Department is the one which has to pick up the pieces and has a particular responsibility for the voluntary sector, and even when good news comes along it seems almost to come as a surprise to the Cabinet Office. You are not part of the process of discussion—

Mr Hurd: That is not entirely fair, in the sense that there was an anticipation of a problem. We have gone through the transition fund in detail. We were brought into the loop as far as that was concerned. We were extremely aware, not least because of the conversations that I had with individual CABs, that part of the uncertainty was around the financial inclusion piece. Of course, we were informed when BIS announced that. We were part of the process of making that decision, taken at a higher pay grade than mine, and we are now holding the ring in the long-term review of what happens next. Obviously, what BIS does is part of that process. But can I tell you what the conclusions of that review are today? No.

Q448 Elizabeth Truss: Throughout the evidence process on looking into legal aid, we have heard a lot about how costs are being borne in legal aid that are really generated by other Departments, for example the DWP. One of the suggested ideas is the “polluter pays” principle, such that the DWP would have an incentive to make sure that its processes work effectively and that it doesn’t make mistakes, so that those costs do not have to be picked up in the legal aid process. What’s your view of that?

Mr Hurd: I don’t have a strong one, to be honest, because—again, this will be frustrating to the Committee—that is not my policy responsibility. The MOJ will lead on that issue, and the Minister has been before you discussing it in some detail. What I do know is that it is all wrapped up in the consultation process on the Green Paper, and it is clearly a very important part of that process. The MOJ is the ultimate arbiter on that.

Q449 Elizabeth Truss: The impression we got when we had an interview with Jonathan Djanogly, the relevant Minister, was that the Ministry of Justice sometimes collects costs from other Departments, but they do so in retrospect. Surely, it would be a role for the Cabinet Office to set up intergovernmental charging on those matters, because that is not something that the MOJ could necessarily obtain alone. The impression that I got when we gathered evidence before was that the Ministry of Justice did not feel able to do it. Is that a role that the Cabinet Office should take on, in your view?

Mr Hurd: I am not entirely persuaded by it. What one might call the “polluter pays” principle was one of the issues discussed, as you would expect, at the meeting last week, and I am sure that it will be discussed at ministerial level, but it is too early for me to say what the position of Ministers will be on that. My personal view is always that I am a strong supporter of the “polluter pays” principle in relation to environmental taxes. My philosophy in life is that if you are part of the problem, you should seek to be part of the solution. I was very struck by, and found myself very supportive of, what Jonathan was saying in evidence to you, and how it might be better if the whole thrust of the system was to try and make sure that problems were resolved before you got to the end of the process. It is clearly multiple inefficiencies in the system that
bring the system to bear on the front end rather than the back end. I come back to my starting point. This is not something on which I have had to take a strong view in my day-to-day life as a Minister to date.

Q450 Elizabeth Truss: It would, though, potentially be the role of the Cabinet Office to impose a system. In drawing up the overall budget, has that been taken into account in DWP, including, for example, the impact on legal aid when it is coming up with its programmes? The Committee feels that the legal aid budget is being looked at in isolation, and the cost drivers generating the legal aid budget have not necessarily been considered across Departments.

Has the Cabinet Office looked at the civil service structures in the Department, in particular in the MOJ, because another of the cost drivers for legal aid appears to be the long processes that the MOJ is involved in on various elements such as the CPS and the Legal Services Commission? The Cabinet Office is responsible for a review of public bodies. Is that something that has been looked at in terms of how those savings could be made, and how that compares with other Departments and internal efficiencies? I am concerned about the tail wagging the dog.

Mr Hurd: I can give you some reassurance that the cost-cutting exercise that we are conducting urgently is one in which the DWP is actively involved. The whole issue of looking in the round is something that the Cabinet Office is well set up to do and to facilitate, and that is very much part of the process. In relation to the specific issue on the “polluter pays” principle, I come back to my main point. The MOJ will respond to that in the consultation, because it is clearly going to be responded to. The Minister made that quite clear. It will form part of the discussions that have just started at inter-ministerial level, in which the DWP is actively involved. Can I give the Committee a forward look at what the conclusions of the discussion will be? I’m afraid I can’t.

Q451 Elizabeth Truss: Can I press you on the internal question within the MOJ? Has the Cabinet Office looked at the performance of the Department, in particular the performance of the various quangos within the Department, in comparison to other Departments to see whether that is a cost driver?

Mr Hurd: As you know, there has been a thorough review of quangos across the architecture of Government, and the Cabinet Office has played a leading role in that. The other things that we can look at are the whole procurement contract management and recording systems for the legal aid system, the opportunity for those to be managed in a more efficient way and the opportunity that that might provide to free up more resources. We are responsible for central procurement, and we have taken some pride in the efficiency that we have already brought to bear in that process. My boss, the Minister for the Cabinet Office, has put it on the record that he thinks that we have already saved something like £3 billion just through smarter procurement, which is an astonishingly large amount of money in a very short period of time. We would want to be assured that the ongoing process of contract management and procurement was as efficient as it could possibly be.

Q452 Claire Perry: On the related issue of innovation and social investment, a lot of that requires identifying and collecting benefits that are accruing across Government Departments. Obviously, we have a social impact bond that is entirely within the MOJ budget at the moment, but as we start to get more creative, what work is the Cabinet Office doing—I refer to Miss Truss’s point—to try to work across the silos, either in terms of the cost or benefits that different financing structures could deliver?

Mr Hurd: This is a fascinating area in which there is clearly huge potential, but the architecture of Government works against it, particularly in the policies of prevention and the opportunity to break down silos and get public agencies to work together. The problem is often defining who benefits and persuading them to pay for it. For example, if an intervention strategy keeps people out of hospital, who should pay the hospital when the system is very badly set up to deliver that? On the social finance market, you mentioned social impact bonds and they offer a fascinating opportunity to try to make that work. They carry with them the opportunity to bring in private capital to share some of the risk and some of the savings that arise from it. They are quite easy to talk about but they are incredibly difficult to do, which is why there is still only one in the market. We are actively working and trying to encourage other Departments to think about opportunities to structure social impact bonds that allow the system to be smarter—to take risks to try to facilitate more preventive work that might allow much greater savings down the track.

This is ongoing work, but I would not want to give the impression that there would suddenly be an explosion. They are really complicated to structure, but there is a great deal of interest out there in the financial world to get involved with this. The challenge is more governmental in terms of trying to get people to work together on this in a way that everyone is comfortable with.

Q453 Mr Llwyd: Can I take you back to the important question which Ms Truss put to you about a cost sanction, the “polluter pays” and so on? It was put to you quite properly as one of the drivers of expenditure within the legal aid budget. Could I ask you to look at it from the other end? If there were a potential cost sanction, would that not encourage good governance and thereby provide better service for our constituents?

Mr Hurd: I understood this was the thrust of the questioning at the previous sitting. I am uncomfortable going into terrain which is properly the responsibility of the Minister you spoke to. I would not expect him to express too many opinions on charity policy and I am therefore very reluctant to express too many opinions on areas for which he is responsible.

Q454 Chair: If we sound a little frustrated it is probably because the Green Paper itself rests on a
number of assumptions about what can happen across
government and in other parts of the public sector.
Progress in solving some of the problems it identifies
can only be made if there is a lot of work between
different Departments. If the Cabinet Office cannot
exercise some supervision and some forward
movement on that, who else can?

**Mr Hurd:** I am not saying that the Cabinet Office is
not doing that; I think I have given a reasonably
accurate picture of what we are trying to facilitate now
which is three things: more accurate mapping of what
happening on the ground; a cross-departmental
discussion, but also involving other stakeholders,
about the longer term and the short term in terms of
mitigation strategy; and the opportunity to improve
the resilience and sustainability of the voluntary
advice sector. That is cross-departmental.

What we are facilitating is very recent. The first major
meeting, very successful as it was, was last week and
so I am not in a position to give you the detail that
you quite understandably seek at this stage in your
inquiry, not least because the recommendations of this
meeting have to go to a ministerial meeting and then
be processed in a way that you are extremely familiar
with. I am sorry if that is deeply frustrating for the
Committee but it is just where we are.

**Chair:** I am sure you have given us an accurate
picture and we are very grateful for that and for your
evidence today. It does however show that there is lot
more colouring in to be done in this area.

**Mr Hurd:** There is and it is urgent, which is why we
are applying ourselves very urgently to it.

**Chair:** Thank you very much indeed.
Written evidence

Supplementary evidence from the Ministry of Justice following the evidence session with the Secretary of State on 15 December 2010 (AJ 49)

FOLLOW UP QUESTIONS ON ACCESS TO JUSTICE

LEGAL AID

Commentators have noted that the perpetrators of domestic violence will become ineligible for legal aid for private family law cases under the Government’s proposals and will become litigants in person, allowing them to cross-examine their victims. How will victims be protected in these circumstances?

It is worth noting that this is a situation that will already arise within the current system: there will be private law family cases where a perpetrator of domestic violence is unrepresented, whether because he fails the tests for legal aid and / or because he has simply chosen to go unrepresented. Judges have the powers and training to manage this situation and to ensure that it is handled sensitively for the victim, ordering “special measures” if necessary. For example, they can intervene to prevent inappropriate questioning, or have questions relayed to the witness, rather than asked directly. I consider that it would be inappropriate to provide legal aid for the perpetrators of domestic violence in this situation, especially when we are consulting on removing legal aid for family private law more generally.

The consultation says that “there is no reason to believe that such [private family law] cases will be routinely legally complex”. However rule 9.5 private law family cases are by definition complex, and can involve allegations of sexual and physical abuse. Why has the Department decided that legal aid should not be available to parents in these cases?

Rule 9.5 proceedings arise in cases where a judge considers that the interests of the child ought to be separately represented. We are proposing that legal aid for children should be retained in such circumstances. As you note, such cases may be factually complex, and could involve allegations of sexual and physical abuse. However, this does not mean that they will be legally complex. As such we do not consider that legal aid should routinely be available to parents in these situations, as they could still be expected to navigate the case themselves, whereas clearly this would not be feasible for a child. We do however propose that parents in individual cases will be able to receive exceptional funding where some measure of legal representation is required for the UK to meet its international or domestic legal obligations.

The Government proposes that legal aid be confined to cases where people are in imminent danger of losing their homes, life or liberty. CAB has told the Committee that it is usually more effective, and cheaper, to intervene in matters early. Why has the Department reached the conclusion it has? What research on this subject has it consisted?

The Government proposes to focus legal aid on those who most need help, for the most serious cases in which advice or representation is justified. We recognise that there are arguments that the withdrawal of legal aid for any issue could lead, by a chain of events, to serious consequences. However, the Government has been clear about the need to save money from these proposals, and therefore considers it appropriate to direct resources to cases where there are likely to be very serious direct consequences for the client.

The Government considers that many issues currently addressed through legal aid could in fact be addressed through other, less specialist means, including through action by individuals themselves. For example, parents who wish to challenge a school exclusion can find information available from a variety of websites and advice agencies. Where parents are disappointed by an admissions decision, they can appeal, and this requires them to set out in writing why they disagree with the admissions decision. Parents do not necessarily have to present legal arguments. The local authority choice advisor can assist parents, and can attend the appeal hearing with them. Advice is also available from the Advisory Centre for Education, and from Parent Partnerships, which are established by statute in every local authority area.

The legal aid consultation says that people should “generally” be able to represent themselves, for example at discrimination and education tribunals. Concerns have been raised about people with limited English, learning difficulties, mental health problems, or who are illiterate. What provisions will be made in such cases?

It should be remembered that under the current arrangements legal aid is not available for representation at the great majority of tribunals. This is because tribunals are designed to allow people to represent themselves. Interpreters are provided for those with limited English. For example, the Special Educational Needs (SEN) Tribunal is designed to be accessible to individuals without legal assistance, and they can generally present their case without specialist legal knowledge or representation. Individuals should only need to present the facts to the Tribunal; it is for the judge to interpret them in the light of the law. The Tribunal provides written guidance to appellants, and a free DVD (The Right to be Heard) which explains what to expect when attending the Tribunal. In addition, there is statutory advice and support for parents on SEN issues through Parent
He acknowledges the “good sense” in our decision to tackle these issues first.

We also intend to replace the existing exceptional funding scheme with a new scheme to provide legal aid for excluded cases where the Government is satisfied that the provision of some level of legal aid is necessary for the United Kingdom to meet its domestic and international legal obligations, including those under the European Convention on Human Rights (and, in particular, Article 2 and Article 6).

Can the Department tell us more about the research into litigants in person mentioned in the legal aid consultation. Is it qualitative or quantitative? What questions is it addressing?

The Department is pursuing three avenues of research. One is a literature review on the impact of litigants in person on the courts. This will look at international evidence as well as domestic research. It will look at questions such as
- who they are, how many there are, what are their motivations;
- what impact they may have on court processes;
- whether litigants in person have different outcomes compared to litigants with representation; and
- what action works in assisting litigants in person.

Ministry of Justice social researchers are conducting the literature review, rather than an external researcher, as they are better able to complete the project within the necessary timeframe.

The second avenue of research is an analysis of court case files for the Family Justice Review. Subject to the number of cases obtained, we will explore this data to identify any findings about unrepresented litigants. Lastly, we are exploring the quality of administrative data held by HMCS with a view to analysing differences between cases where litigants are represented and not represented.

This should enable us to better understand the impacts and will help to underpin the analysis in the final Impact Assessments due to be published alongside the legal aid consultation response in spring 2011. In addition, there will be a post-implementation review of any reforms.

Jackson Review

The civil court funding proposals are being implemented before the impact on access to justice of the legal aid reforms is clear. Why has the Department decided to do it in this order?

We believe that it is important to consider the changes to methods of funding civil cases—both publicly funded legal aid, and privately funded conditional fee agreements (CFAs)—together and in the round. At the same time as seeking to make savings from the legal aid budget, we are proposing to take forward those priority measures recommended by Lord Justice Jackson to address the disproportionate and unaffordable costs of civil litigation.

Most personal injury cases were excluded from the scope of civil legal aid in 2000, and most personal injury claims are now funded under CFAs. Certain categories of case, not least clinical negligence, will be affected by both sets of proposals, in that they are currently within the scope of civil legal aid, and are also commonly funded by CFAs. It is vital that the changes to civil legal aid scope (such as for clinical negligence cases) and the proposals for a Supplementary Legal Aid Scheme are considered at the same time as the proposals on reforming CFAs. The current CFA regime with its recoverable costs causes a significant financial burden on the NHS for example, and withdrawing legal aid for clinical negligence without reforming CFAs could increase that burden significantly. We are proposing to take clinical negligence cases out of the scope of legal aid but it will still be possible for such cases to be brought under reformed CFAs. However, we are seeking views in both consultations, on how the proposals should be implemented to ensure that these cases are appropriately funded.

Taken together, these proposals complement the wider programme of reform which the Government will be bringing forward to move towards a justice system which is more responsive to public needs and which encourages more efficient resolution of contested cases where necessary.

Lord Justice Jackson made extensive recommendations on civil funding, a number of which the Department is considering, awaiting reports on or will “take a view on in due course.” What has the Department done to identify possible unintended consequences from the reforms, given they are not being designed or implemented as a package?

Lord Justice Jackson made 109 formal recommendations; it would not be practicable to consult on all of these at once. The consultation paper therefore seeks views on the package of proposals on the reform of CFAs and the associated recommendations on litigation funding. Sir Rupert himself, at paragraph 8.1 of his response to the consultation, acknowledges the “good sense” in our decision to tackle these issues first.
In addition to analysing written responses to the detailed questions posed in the consultation paper, we are actively engaging with interested parties, to identify the potential impact of the reforms. We have also published a draft impact assessment as part of the consultation package, on which we also welcome views. The Justice Minister, Jonathan Djanogly MP, and officials have met with claimant and defendant lawyers, after the event insurance providers, liability insurers and other interested groups, to discuss the proposals. Officials are continuing to ask for data from various parties to help assess the impact of the reforms.

**Justice Reinvestment and Rehabilitation**

*Has the Department conducted the type of economic modelling that the previous Committee recommended in paragraph 302 of its report on Justice Reinvestment?*

The MoJ has continued to develop and improve its capacity and capability in terms of data analysis and economic modelling along the lines as that set out in the Justice Reinvestment report.

Recent examples include:

- The publication of an Evidence Report alongside the recent Rehabilitation and Sentencing Green Paper, including latest evidence of what works in reducing reoffending.
- The development of a set of cross-CJS models and financial planning tools to inform the recent Spending Review bid.
- Establishing a forecasting and modelling unit to ensure that we have reliable, consistent and accurate forecasts of Criminal Justice workloads.
- The ongoing engagement with the academic community in developing Criminal Justice policy.
- Commissioning a cost benefit analysis of the HMP Peterborough pilot by RAND Europe.
- Working across government departments to develop models of interventions to tackle drugs, mental health and worklessness.

*Why has the department chosen to pilot payment by results rather than testing place-based budgets to encourage local partnerships to meet their statutory duties to reduce re-offending?*

We recognise that, in the past, significant amounts of money have been spent on rehabilitating offenders without properly holding services to account for results they achieve. The Green Paper, Breaking the Cycle, outlines our commitment to move to a new approach where providers are increasingly paid by their results at reducing re-offending. Payment by results is intended to change the way in which services are commissioned to deliver better outcomes for the public at the same or less cost. It also supports the concept of justice reinvestment as it will ensure that providers retain a focus on achieving long-lasting rehabilitation of offenders, and will encourage the development of innovative practices.

We intend to apply the principles of payment by results for all providers of offender rehabilitation services by 2015. However, we know that introducing a change of this order to the criminal justice system will need careful design and testing on a smaller scale before national roll out. We will therefore introduce at least six payment by results pilots, covering a significant proportion of the offender population and testing a range of potential models. As part of this these pilots will be subject to economic evaluation.

We are strongly supportive of the work underway to provide local areas with more freedom and flexibility in how resources are used at a local level; and we are committed to addressing the barriers to local joint working. In particular, the Ministry of Justice is contributing to the cross-government initiative to test community budgets for families with complex needs in 16 local areas. Many members of these families are offenders or will become offenders. Intervening with them at an early stage will benefit both the families and their communities by reducing current re-offending and interrupting cycles of intergenerational crime. The Ministry of Justice will support the development and delivery of the 16 pilots locally and nationally, and continue to work with the Department of Education on our response to families with multiple problems.

The Green Paper also outlines our commitment to pilot a local approach to payment by results. We are currently developing a model which will share the savings if the local area is able to reduce crime and hence demand on criminal justice services. The savings could then be reinvested in further crime prevention activity at the local level. To test the local area approach, we will run two projects from April 2011 for two years in Greater Manchester; and across a number of London Boroughs, including Croydon and Lewisham.

*Finally in response to a question from Elizabeth Truss MP, about international comparisons (Q50) you said that you would try and find out more information about other countries experiences of successfully implementing effective rehabilitation are, particularly with regards to payment by results. I would be grateful if you could share any relevant information your Department has.*

We are keen to learn from others’ experiences of implementing effective rehabilitation programmes. As you are aware, we published, alongside the Green Paper, a very comprehensive summary of the evidence base for rehabilitation and the approaches proposed in the Green Paper including payment by results.
The use of payment by results to reduce offending is in the early stages of development. We will be evaluating the pilots as they develop and initial lessons learned from the Social Impact Bond pilot in Peterborough will be published in May 2011. The Green Paper consultation provides a further opportunity for all stakeholders to shape the design and development of our work on payment by results; and to influence how reductions in reoffending should be measured going forward.

January 2010

Written evidence from the Nottingham Law Centre (AJ 50)

WHO WE ARE

Nottingham Law Centre, formerly known as Hyson Green Law Centre, has been providing free, accessible, accountable and effective specialist service in areas of law that have the greatest impact on disadvantaged sections of the community, since 1982.

Nottingham Law Centre seeks to empower local people by promoting legal solutions to many of the problems they face.

As a legal practice we are constituted as an independent charity and a company limited by guarantee. We are directly accountable to the communities we service through a Board of Trustees drawn from local communities. The Manager and Senior Solicitor manage the Law Centre.

WHAT WE DO

We help people in Nottingham transform their lives. We offer specialist legal advice, casework and representation in debt, employment, housing and welfare benefits law. We tailor our service to the needs of every person or group we help, often assisting them with several problems at once. We are experts at helping the most vulnerable.

We help to transform communities. We spot trends in Nottingham’s communities’ needs and respond by raising awareness about legal rights, influencing social policy and supporting community groups. We are part of local networks of advice organisations.

We help to transform society. We seek out test cases and pursue them all the way to the highest courts if necessary. We work with our communities for social change within a wide national movement of over 54 Law Centres.

WHY IT WORKS

Our in depth knowledge of the law and local communities means we can identify the most effective way to solve people’s problems—and to prevent others from experiencing similar problems in the future. Our expertise and experience save time and money.

For every £1 spent by Law Centres on a typical housing case, £10 of ‘social value’ is created through benefits to the local community and savings to the government.

Every eviction avoided by Law Centres is estimated to save the taxpayer over £34,000.1

SPECIALIST & GENERALIST SERVICE

1 April 2009—31 March 2010

<table>
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<th>Service</th>
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<td>Employment</td>
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<td>Housing</td>
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<td>Welfare Benefits</td>
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HOUSING COURT DUTY POSSESSION SCHEME

1 April 2009—31 March 2010

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Thursday Evening Legal Clinic
1 April 2009—31 March 2010

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<tr>
<td>Income (LSC)</td>
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</tbody>
</table>

If we factor in the 10% cut in fees from November 2011 we will lose an additional £9,311. This means an 11% decrease in LSC income between FY10 and FY11.

Cuts in local authority spending mean an additional loss of income of £16,700, representing a 10% cut. Increases in certificated work will reduce the overall impact of the cuts to 11%.

If the proposed cuts go ahead we will reduce our contract to Housing only; a further loss of £111,211. This means that we face a 37% reduction in legal aid income in FY12, and the figure will be even higher taking into account local authority cuts.

The bottom line is that this could mean we are no longer able to serve 700 desperate people if the legal aid reforms go ahead, and 980 people including local authority cuts. As we are not the only agency in Nottingham contracted by the LSC to provide legal advice, these figures will increase considerably.

January 2011

Written evidence from the Law Centres Federation (AJ 40)

1. Introduction

1.1 The Law Centre movement will provide two oral witnesses to the Committee’s Inquiry on Access to Justice on 1 February 2011. A frontline Law Centre and Law Centres Federation will be available to answer the Committee’s line of inquiry based on the evidence which we and other members of Advice Services Alliance (ASA) contributed to ASA’s submission to the Inquiry. We have also agreed to testify to how legal aid helped individuals, like those in our case studies below, to access justice.

1.2 We believe that the Government’s proposals for legal aid reform would cut the best value-for-money legal advice. Preventative and early advice is already being cut in many areas, and a further 53% cut to legal help is proposed. Yet early intervention brings the best outcomes for clients, and can save up to £10 for every £1 invested.

1.3 Law Centres are the UK’s oldest, free, expert, community-run legal services provider, operating for over 40 years. We serve over 120,000 desperate people per year in their communities, and many of those people will be disproportionately affected by the cuts according to the Ministry of Justice’s impact assessment.

1.4 The Ministry of Justice proposes a number of alternatives to legal aid funding, but these are not suitable, available or affordable for the most vulnerable. Those we work with prefer face-to-face rather than telephone advice. People on low incomes will not afford to travel longer distances. Legal costs insurance will not reach the poorest.

2. Law Centres

2.1 Law Centres are not-for-profit legal practices. We are independent and directly accountable to the communities we serve through committees of local people.

2.2 We defend the legal rights of local people who cannot afford a lawyer. We help them to save their homes, keep their jobs and protect their loved ones. We work with our communities to tackle the root causes of poverty and inequality.

2.3 Law Centres:
  — are staffed by lawyers and caseworkers who specialise in the areas of civil law most relevant to our communities;
  — tailor our services to the needs of every person or group we help, often assisting them with several problems at once;
  — offer both legal advice and representation through to the highest courts if necessary;
  — tackle the root causes of poverty and inequality through test cases, public legal education, influencing social policy and campaigning for social change.

2.4 Our in depth knowledge of the law and local communities means we can identify the most effective way to solve problems—and to prevent similar problems in the future. Our expertise and experience save time and money. Every eviction avoided by Law Centres is estimated to save the taxpayer over £34,000.
3. CASE STUDIES FROM LAW CENTRES ON ACCESS TO JUSTICE

3.1 Under the Green Paper’s proposals legal aid will no longer fund advice and representation for cases such as the following. None of these clients could have represented themselves nor achieved the outcomes below.

3.2 Simon retained his job:
Simon was fired from a large retail chain for making a minor mistake, despite having worked there for eight years.
He had made a mistake on the till one day, which had cost the store a very small amount of money. His employer treated this as an issue of gross misconduct and, following an investigation and a disciplinary meeting, dismissed him without notice.
Simon felt he had been treated unfairly and went to Tower Hamlets Law Centre hoping for help to get his job back. The Law Centre advised him of his right to claim unfair dismissal and wrongful dismissal and agreed to represent him.
As a result, he was reinstated in his job and compensated for lost earnings. Simon is now back at work and getting on with his life.

3.3 Patience gained her freedom:
Patience was kept as a domestic slave in London after her employer confiscated her passport, physically attacked her and stopped her from leaving the house.
She had to work 16 hours a day, seven days a week, and, in three years, was paid no more than a few hundred pounds.
North Kensington Law Centre helped her to gain compensation at the employment tribunal. She is now getting on with her life and working with the Law Centre to campaign for an end to domestic slavery in the UK.

3.4 Tariq escapes bullying:
Tariq was severely bullied at school and was refused admission to an alternative school.
Tower Hamlets Law Centre drafted submissions to the Independent Appeal Panel setting out his case.
Tariq was suffering from psychosomatic pains and general distress.
The Independent Appeal Panel allowed the appeal and he was admitted to the alternative school of his choice.
Tariq now continues his education, free from the severe stress of bullying.

3.5 David gets the right education:
David has an autistic spectrum disorder and has been issued with a statement of special educational needs. He was excluded from school after an outburst, caused by his condition.
Like many autistic children, he finds it difficult to deal with others when he is stressed. In June, David acted out, which was wrong and he was ashamed. He got excluded permanently from the school, despite it being the only school in the area with a specialist unit for children with autism.
David missed out on schooling between June and November as there were no other school facilities for a child with his needs.
After an appeal was refused by the school governors, David’s parents sought legal advice from Cumbria Law Centre. A solicitor advised on grounds of appeal and spoke to the family and educational professionals who had worked with David to get a clear picture on the options for his future schooling.
The solicitor then helped David’s father put his case to an Independent Appeal Panel. He won, and David is now back at school for the first time in five months.
Without expert legal intervention we strongly suspect that the appeal would have been lost, and David would still be out of school, deprived of the vital specialist support that could be the making or breaking of his young life.

January 2011

Supplementary evidence from Julie Bishop, Law Centres Federation, following the evidence session on Tuesday 2 February 2011 (AJ 54)

Following the session on Tuesday 2 February, I provided hard copies of the verbal evidence, two documents outline the impact of the changes to Legal help alone. There will of course be an equivalent impact on certificated work as can be seen from the Nottingham document (Annex A).

The overall funds of Law Centres document is provided to be able to see the cumulative impact (Annex B). We do not know the full extent of the cuts as yet but it indicates the vulnerability impact. We estimate we will be left with about 30% of funds but that will not be evenly distributed.
I attach the client profile (Annex C) because it indicates the inability to self-represent and the inappropriateness of a compulsory telephone service for first contact.

The compulsory telephone gateway is our biggest concern. We have always provided telephone advice and believe the CLA is a good additional service. Our concern is that the telephone will be the ONLY way to access legal aid and that face-to-face service will be rationed through it. That triage works effectively only if provided by a specialist, the importance of the first contact in getting it right, and the need to establish a relationship of trust to ensure that the service on offer succeeds, is ignored and becomes impossible in the system envisaged.

Also attached are some sample cases (Annex D) but we have others in other areas if you need them.

The Theory of Change document (Annex E) shows what happens if legal advice is provided, and what happens without it, in an example which will be out of scope.

February 2011

Written evidence from Citizens Advice (AJ 18)

INTRODUCTION

1. Citizens Advice is the national body for Citizens Advice Bureaux in England, Wales and Northern Ireland. The CAB service is the largest independent network of free advice centres in Europe, with 430 main bureaux in England, Wales and Northern Ireland. Bureaux provide advice from over 3,300 outlets, including bureaux in the high street, community centres, health settings, courts and prisons.

2. The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:
   — To provide the advice people need for the problems they face; and
   — To improve the policies and practices that affect people’s lives.

3. In 2009–10 Citizens Advice Bureaux in England and Wales advised 2.1 million people with seven million problems in total.

4. We welcome the opportunity to inform this session with the Lord Chancellor, against a backdrop of proposed major reforms to the justice system and changes to the scope of legal aid funding. The Ministry of Justice, through the Legal Services Commission (LSC), is the most significant funder of Citizens Advice specialist services from its civil legal aid budget. In 2009–10, it provided £27 million for specialist advice delivered by the Citizens Advice service. This has enabled over 300 CAB specialist advisers to deal with 43,234 welfare benefit problems, 56,990 debt problems, 9,129 housing and 2,954 employment problems under contracts with the LSC. It accounts for over 20% of all publicly funded cases in these topic areas. Around 80% of social welfare legal aid cases record positive outcomes for clients, with additional savings for other public services.

5. Citizens Advice Bureaux also work across different settings in the justice system in providing information, advice and advocacy. Approximately 90% of bureaux are involved in providing advice and representation for tribunal hearings for up to 150,000 clients per year in the tribunal system. Fifty-six bureaux provide advice/duty desks in county courts. Bureaux provide services in 57 prisons, equating to 40% of all prisons. In addition the Royal Courts of Justice CAB has supported clients in 70 different prisons through its work to support victims of miscarriages of justice. Fourteen bureaux operate in 20 regular and 14 irregular probation offices. The CAB service therefore has a significant footprint in the justice system, and is well placed to comment on the Ministry of Justice’s business and structural reform plans.

6. In this submission, we cover our views on the following issues:
   — The Government’s proposals for reforming legal aid, following the recent Green Paper;
   — Other reforms to the civil justice system, including the proposed merger between HMCS and the Tribunals Service, and Lord Justice Jackson’s recommendation on civil costs; and
   — The Government’s proposals for criminal justice including the “rehabilitation revolution” and sentencing review as outlined in this week’s Green Paper.

Overview and General comment on justice reform

7. The context for this session is the Government’s proposals to reform the justice system as set out in the Ministry of Justice’s business plan and to reduce the Ministry’s budget by £2 billion over the next four years, including a reduction in legal aid expenditure by £350 million per year, and transferring the LSC’s statutory responsibilities to the Lord Chancellor as proposed in the recent Green Paper on legal aid. Citizens Advice acknowledges the need to make significant savings in the justice system, however, as the Justice Select Committee’s previous report shows, the route to achieving savings is to reduce demand for using the justice
system i.e. courts and prisons. Our evidence suggests that the surest way of achieving these outcomes is early intervention and advice in dealing with people problems.

8. We are therefore disappointed in the proposals contained in the Green Paper on legal aid reform which seeks to remove legal aid funding for advice on “social welfare law” matters, as in our experience, these services are vitally important in order to stop peoples’ legal problems spiralling out of control. As evidenced by LSRC’s civil justice surveys, those seeking legal aid tend to have multiple social welfare and legal problems. Timely intervention by debt and welfare benefit advisers—currently funded through the legal aid system—can help prevent the consequences of vulnerability family breakdown and homelessness, or even avoid consequences in the criminal justice system. For example:

Mr M is 80 years of age and has dementia and heart problems. He lives in a probation hostel. His probation officer asked a Staffordshire CAB to advise on his benefit entitlements prior to him moving to a supported living unit. The bureau helped Mr M apply for attendance allowance, and contacted the Pension Service with evidence of his release to reinstate his state pension. They also helped him apply for housing and council tax benefits, so that he could pay his rent and council tax at his new home. The bureau also found that he was entitled to an occupational pension with the local authority. Later Mr M’s probation officer told the bureau that he had moved into supported housing, a positive transition to living back in the community, was awarded attendance allowance, and has a support worker, to assist him with any further help he may need.

9. We welcome that the Government is now addressing the cost drivers, such as re-offending rates, within the criminal justice system, through the sentencing review and other reforms. They should take the same approach towards people facing injustice in social welfare and family matters. Instead of simply limiting the amount of help available, the Government should work across all departments to decrease the need for civil legal aid by:

   — addressing poor decision making by public bodies—to avoid the need for lengthy and costly appeals, for example, in the welfare benefit system.
   — taking lawyers out of tribunals—to allow the withdrawal of legal aid for representation without putting the poorest at an unfair disadvantage
   — making legal processes simpler—to empower people to resolve more of their legal problems themselves, eg: a simple procedure for uncontested divorces
   — Tackling rogue traders, including fee-charging debt management and claims management companies who make people’s debt problems worse rather than better;
   — improving public legal education—so people know their rights and responsibilities and how to avoid problems, or quickly resolve them.

10. However, there will still need to be good information and face to face early advice to ensure that issues can be resolved out of court—whether or not these services are funded from the legal aid budget. This provision needs to be organised around the real needs of clients rather than administratively convenient categories of scope. So whilst reform is necessary, the test of success is whether the Government’s proposals can introduce new ways to deliver more for less. If the proposals simply reduce the number of people being helped, then reform will have failed. Limiting the scope of issues which legal aid funded advisers can help with means they will not be able to solve people’s problems fully. For example, legal aid may help prevent a client losing their home because of debt, but not address the causes of housing debt such as unfair dismissal or refusal of sickness benefits.

11. Instead of looking to the frontline for savings, the Government should look to reduce spending on wasteful systems and bureaucracies in the justice sector. For example, overall administrative and procurement costs of the legal aid system have continued to rise disproportionately in recent years to the amount of funding available for delivering frontline legal advice and representation services. In 2008–09 the figure for the LSC’s administrative costs was £124.4 million.

12. There is also a significant role for the voluntary sector in delivering “added value” and complementary services. Indeed the 1995 Green Paper which first recommended that not-for-profit agencies be “franchised” to provide legal aid, explicitly recognised that the Citizens Advice service’s less legalistic approach to advice provision on civil matters would help deal with clients problems in the round and reduce costs. Subsequently the Citizens Advice service has become integral to the civil system, and we are disappointed that, under proposed arrangements, funding for the specialist work of advice agencies will largely be withdrawn.

THE GOVERNMENT’S PROPOSALS ON LEGAL AID

13. The Government’s approach to reforms is based on prioritising legal aid funds to “the most serious cases” and “those most in need”, whilst at the same time moving towards a simpler justice system to encourage people to resolve their issues out of court without recourse to public funds. Based on current case volumes, proposals to exclude most social welfare law issues from scope will mean over half a million fewer people getting help every year from the legal aid system according the Ministry of Justice’s own impact assessment.

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2 Causes of Action: Civil Law and Social Exclusion, LSRC, 2008

3 Justice Re-investment: Justice Select Committee Report 2009
14. The Green Paper suggests that other forms of legal advice and redress might exist, for example support from trade unions, legal expenses insurance, self-representation before tribunals, and self-navigation of complex complaints and review mechanisms. However our client group overwhelmingly have no such options, and therefore the reality is that withdrawal of legal aid will simply mean no service and no advice. Citizens Advice would willingly engage in discussions about alternative systems—for example, a levy on the finance industry to fund debt advice. We would also welcome discussions with the LSC on strengthening triage arrangements as recommended in the Green Paper (paragraph 4.270). However, if the Green Paper’s proposals on scope are implemented without amendment then all clients with benefits, employment, and housing or debt cases short of homelessness could only be directed to navigate the system themselves and argue their own case (as “unassisted claimants”).

15. There is a significant risk that restricting legal aid for social welfare matters could fill the court and tribunal system with unprepared cases, adding public cost, delay and difficulty in decision making. Many clients will be completely unable to pursue their case and will have no access to justice. Some may revert to other public services, such as health or adult services, or arrive at the surgeries of local politicians. Indeed there is a significant body of evidence on the types of problems which the Government intends to take out of scope, demonstrating that early intervention by effective legal help, can save public services money. A recent research paper by Citizens Advice analysing the LSC’s survey, costs and outcomes data has found that for key categories of social welfare law, the state saves between £2 and £8 for every pound invested, owing to the avoidance of adverse consequences which engage other public services.

16. Consequently we consider that there is a very poor business case for pursuing the proposals to take social welfare law out of scope. Using data from the Civil and Social Justice Survey on the adverse consequence costs of legal problems, and the Legal Services Commission’s outcomes data from legal aid work, Citizens Advice have developed a cost benefit analysis which sets off legal aid expenditure against the savings from early advice (Legal Help) interventions. This estimates that:

- For every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34.
- For every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98.
- For every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80.
- For every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13.

17. In light of the proposals to reform the Legal Services Commission, we also hope that Ministers will look at different and preventative approaches to commissioning services, “working alongside other justice agencies to improve access and to allow a more holistic approach.” (Green Paper para 10.2). We welcome the Green Paper’s recognition that there is a need to “improve efficiency and reduce bureaucracy in the administration of legal aid.” (paragraph 10.5). The proposals to establish a “leaner” agency with lower head count and administrative overheads is an opportunity to pursue lighter touch procurement and auditing methods, as well as application processes, and payment mechanisms. Better solutions could be found using online portals which integrate with providers’ case management software and devolve more responsibility for case decisions on merits, means and progression of cases to providers. In undertaking major organisational change, it will also be important that good relationship management with providers is maintained at local level. The trend in recent years for operational decisions to be centralised in London, has caused significant delays to getting services to those who need them the most.

**Proposals on courts, tribunals and costs**

18. We welcome the Government’s proposals that greater use should be made of shared services and that management efficiencies might be achieved through a single Courts and Tribunals service. However, we note that this merger between HMCS and the Tribunal Service is taking place within the context of a programme to significantly reduce the number of available court and tribunal venues—including the closure of 54 county courts and 107 magistrates courts. For court users in some areas this will mean significantly longer journeys, and in some areas it will be pretty much impossible to get to a court by public transport for a 9.00 or 10.00 am hearing. Whilst there is a clear business case for closing court houses that are under-utilised, poorly designed or inaccessible, many courts have been earmarked for closure which are currently operating at full capacity, serving their communities well and joining up with other local services. Closing these courts and moving cases elsewhere could be hugely disruptive and costly, at the expense of local peoples’ access to justice. Although these proposals have been subject to consultation, we are concerned at the number inaccuracies in the data used. For example, Abergavenny and Llangefni County Courts are still fully utilised although the consultation papers claimed they are not. Another example is the absence of consideration of alternative co-location options. Barnsley’s local authority and justice community proposed that the county court could be co-located with the magistrates court rather than seeing all civil cases moved to Sheffield, as was proposed in the consultation on the closure of county courts in Yorkshire.

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4 Towards a Business Case for Legal Aid, Citizens Advice 2010
5 ibid
19. There is also a risk in the Courts and Tribunals service merger that Tribunals will lose their distinctive character, as the Government seeks to merge judicial functions and tribunal hearings are increasingly taking place in court buildings which can be inappropriate for some types of cases. For example:-

A CAB in Wales reported two cases where clients had to have their appeals about refusal of employment and support allowance in the local magistrates court with the chair sitting where the judge usually does. The other client was vulnerable, having Asperger’s Syndrome, was very concerned and intimidated by the venue.

20. In particular we are concerned that the adoption of HMCS’s full costs recovery model in Tribunals could see the adoption of fee regimes, would significantly restrict access to redress for people with limited means. The increasing “legalisation” of tribunal jurisdictions appears to run counter to the Government’s intention in the Legal Aid Green Paper that tribunals should be informal and accessible for non legally aided and unrepresented claimants.

21. We welcome that the Government is looking to address the problem of high and disproportionate costs in the civil courts, taking the recommendations of Lord Justice Jackson as a starting point. To the extent that these proposals, including a ten per cent uplift in general damages, might reduce the costs of after the event insurance and lawyers success fees (CFAs), they are welcome, although the proposals also mean claimants accepting more risk of unrecoverable costs. However the Government needs to consider the many low value claims that never get to court, and will continue to incur disproportionate costs. Indeed as Lord Jackson’s report notes, costs are increasingly “frontloaded” at this stage, and pre-action protocols are frequently ignored leading to unnecessary litigation. Bureaux often see evidence of this, especially in housing possession claims.

For example:

A West Midland CAB’s client reported his social landlord had issued possession proceedings even when he had an agreement to pay £26 per week towards the rent and the arrears. He was liable to pay court fees of £100 for these proceedings, and was concerned that additional legal costs would be added to his rent account even though it was clearly the landlords who were in breach of the preaction protocol as they entered in a payment plan with the client and the client kept to the payment arrangement.

22. Lord Jackson’s report specifically recommended that there needs to a new pre-action costs regime including sanctions and enforcement for the protocols, and he also recommended that legal aid should be retained at current levels, and that court fees should be pushed up. We would urge that the Governments should study these aspects of the Jackson report more closely.

Proposals on Criminal Justice Policy

23. We welcome the recent Green Paper, Breaking the cycle: effective punishment, rehabilitation and sentencing of offenders, and the renewed urgency that it places on tackling re-offending behaviour and rehabilitating offenders within the community. The social and economic costs of reoffending by those released from short sentences alone are between £7–10 billion a year according to NAO figures. In our 2007 report, Locked Out: CAB evidence on prisoners and ex-offenders, we noted that prisoners and ex-offenders often have complex needs and may struggle to avoid re-offending without appropriate advice and support to deal with their problems.

24. In tackling re-offending it is important to recognise the issues that offenders face on release from custody, so that offender support services can be designed according to their needs. The Green Paper notes, for example, that 37 per cent of prisoners need help finding a place to live when they are released from prison. However there are other factors also that the Green Paper does not highlight; one pressing issue is that many offenders have only their discharge grants to live on until income can be secured from benefits or employment, and there is a significant issue around ex-offenders’ financial capability in accessing even basic services such as insurance, bank accounts and dealing with debts that may have accrued whilst imprisoned. For example

A CAB in Somerset reported that a 48 year old man had come out of prison in mid June 2010 after a three year sentence was commuted to 13 months. He was now living with his partner and their three year old child and claiming jobseekers allowance and tax credits. While he was in prison, the local authority wrote to him at the home he had lived in before his arrest, despite being aware he was in prison. Housing benefit had been overpaid to his landlord until a week after his conviction. The landlord, a housing association, continued to charge full rent until the end of 2009 when the tenancy was formally ended. A debt of over £800 unpaid rent had been passed to a debt collector and as soon as the client had left prison, the debt collectors wrote to the client at his new address to ask for payment. In the meantime the local authority were threatening court action to recover overpaid housing benefit. Whilst in prison he was not made aware of the relevant prison service forms to inform benefits offices and social landlords of his sentence and circumstances, and despite being tagged he had no support from a probation officer on release.

25. Offenders therefore need a whole package of holistic services both pre and post release in order to deal with multiple problems; for example help with opening a bank account and claiming benefits as well as finding sustainable accommodation prior to release. We welcome the Green Paper’s emphasis on innovation in the
ways in which the voluntary and community sectors can provide offender support services, but it is not at all clear how payment by results and the integrated offender management model proposed will help deliver the interventions most relevant to ex-offenders needs. And whilst the suggested approach for local planning of services could support innovation, it is also important for there to be strategic oversight of what services are being provided, so for example that all prisons have the same basic level of re-release advice services. It should also be noted that many prison based advice services are currently funded through the Financial Inclusion Fund and the Legal Services Commission, and these valuable services may not be able to continue under Government proposals.

26. Finally, we welcome the proposed reforms to the sentencing framework, such increasing the use of out of court disposals and diversion schemes, decreasing the use of remand, and using community penalties as alternative to short sentences. In our experience of working with clients with multiple needs and chaotic lifestyles, short sentences can be extremely disruptive to any stability such as work, settled accommodation and family relationships. For example:

A Hampshire CAB reported that a 39 year old man was released from a two month prison sentence in September with very little support. He had debts amounting to £4,500, and had lost his job and separated from his partner following the sentence. This resulted in loss of income, and in loss of his home which belonged to his partner. On release he received a travel warrant but no further help. The client tried to register as homeless with the local authority, but was told that he would not be offered anything but a night shelter out of his home area. He also had no source of income as his claim for jobseekers allowance was taking over six weeks to process. When he came to the bureau, he was staying in an overcrowded situation at his brother’s home, and was seeking help for further training in the use of building site machinery to help him get back to work.

December 2010

Written evidence from Citizens Advice (AJ 30)

1. Citizens Advice is the national body for Citizens Advice Bureaux in England and Wales. The CAB service is the largest independent network of free advice centres in Europe, with nearly 400 member bureaux providing advice from over 3,300 outlets, including health settings, high street outlets, community centres, health settings, courts and prisons.

2. The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:
   — To provide the advice people need for the problems they face; and
   — To improve the policies and practices that affect people’s lives.

3. In 2009–10 Citizens Advice Bureaux in England and Wales advised 2.1 million people with seven million problems in total.

4. We welcome the opportunity to inform this inquiry, against a backdrop of proposed major reforms to the justice system and changes to the scope of legal aid funding. The Ministry of Justice, through the Legal Services Commission (LSC), is the most significant funder of Citizens Advice specialist services from its civil legal aid budget. In 2009–10, it provided £25.7 million for specialist advice delivered by the Citizens Advice service. This has enabled over 450 CAB specialist advisers to deal with 43,234 welfare benefit problems, 56,990 debt problems, 9,129 housing and 2,954 employment problems under contracts with the LSC. It accounts for over 20% of all publicly funded cases in these topic areas, and 10% of civil funding.

What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

5. We will focus our answer on Citizens Advice Bureaux and not for profit providers, although we consider that the proposed changes will have a detrimental impact on the supplier base of all legal aid practitioners, including the ability of non-legal aid agencies to refer their clients to practitioners when legal advice is needed. In respect of not for profit providers, it is alarming that the Ministry estimates that suppliers in this sector will loose up to 97% of their legal aid funding, depending on the type of specialist work they do. The table below shows the estimated impact of funding cuts to Citizens Advice Bureaux following scope changes.

<table>
<thead>
<tr>
<th>Category of law</th>
<th>Current annual funding</th>
<th>Projected funding</th>
<th>Projected loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debt</td>
<td>£12,813,400</td>
<td>£3,203,350</td>
<td>£9,610,050</td>
</tr>
<tr>
<td>Welfare benefits</td>
<td>£8,789,711</td>
<td>£0</td>
<td>£8,789,711</td>
</tr>
<tr>
<td>Housing</td>
<td>£2,733,540</td>
<td>£1,749,465</td>
<td>£984,075</td>
</tr>
<tr>
<td>Employment</td>
<td>£769,580</td>
<td>£0</td>
<td>£769,580</td>
</tr>
<tr>
<td>Community care</td>
<td>£460,576</td>
<td>£460,576</td>
<td>£0</td>
</tr>
<tr>
<td>Immigration</td>
<td>£181,480</td>
<td>£74,407</td>
<td>£107,073</td>
</tr>
</tbody>
</table>


6. Losses of this level would be very destabilising, and could present a critical situation for the CAB network. Legal aid funding contributes significantly to the overall funding of the CAB service and the loss of such a considerable funding stream will have a significant impact on the ability of the service to deliver not only legal aid, but also other client services. We surveyed our members shortly after the Green Paper’s publication, asking them what impact would the reductions in legal aid scope would have on the CAB service. Around 100 bureaux responded as below.

<table>
<thead>
<tr>
<th>Number</th>
<th>Per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No difference</td>
<td>0</td>
</tr>
<tr>
<td>Withdrawal of specialist services</td>
<td>85</td>
</tr>
<tr>
<td>Reduced capacity to meet client need</td>
<td>90</td>
</tr>
<tr>
<td>Risk to continuation of the local CAB as a whole</td>
<td>54</td>
</tr>
<tr>
<td>Loss/reduction in capacity of key agencies to refer clients to</td>
<td>75</td>
</tr>
<tr>
<td>Increased referrals to other sources of help</td>
<td>52</td>
</tr>
<tr>
<td>Unable to represent clients at court or tribunal</td>
<td>64</td>
</tr>
</tbody>
</table>

7. It is important that legal aid funding should not be treated in isolation from what is occurring with other sources of funding for advice, especially given the Green Paper’s assumption that people unable to access legal aid as a result of policy changes may be able to access other sources of free advice. The free advice sector is suffering disproportionately from public funding reductions. For example, funding for free face-to-face debt advice via the Government’s Financial Inclusion Fund will not continue beyond March 2011. We are aware that many local authorities are reducing their budgets for voluntary sector support substantially. The financial stability of Citizens Advice Bureaux relies on a funding mix, and increasingly many projects which provide services which are complementary to legal aid ceasing be financially viable.

The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

8. These cases will be in the areas of law taken out of scope, namely welfare benefits, debt issues, housing cases not involving homelessness, employment, immigration and family issues. It should however be noted that that the “500,000 fewer cases” referred to in the Impact Assessment does not mean cases in the civil courts, but rather cases which might no longer fall within the scope of legal aid funding.6 Civil legal aid funding covers both advice (“Legal Help”) and representation (“Certificated cases”); however in many case categories such as debt, cases rarely lead to a full legal aid certificate where the client’s case will be presented in a civil court by a solicitor. Indeed, early advice from Legal Help can help resolve problems long before they ever get to court. We have summarized the Ministry of Justice’s estimates on caseload reductions overleaf:

<table>
<thead>
<tr>
<th>Category</th>
<th>Legal Help Cases (advice)</th>
<th>As % of current cases volume</th>
<th>Certificated cases (representation)</th>
<th>As % of current cases volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family</td>
<td>211,000</td>
<td>83%</td>
<td>53,800</td>
<td>48%</td>
</tr>
<tr>
<td>Debt</td>
<td>75,000</td>
<td>75%</td>
<td>220</td>
<td>57%</td>
</tr>
<tr>
<td>Employment</td>
<td>13,300</td>
<td>100%</td>
<td>70</td>
<td>94%</td>
</tr>
<tr>
<td>Housing</td>
<td>38,000</td>
<td>36%</td>
<td>2,400</td>
<td>22%</td>
</tr>
<tr>
<td>Immigration</td>
<td>37,300</td>
<td>41%</td>
<td>6,400</td>
<td>29%</td>
</tr>
<tr>
<td>Welfare benefits</td>
<td>113,100</td>
<td>100%</td>
<td>10</td>
<td>27%</td>
</tr>
<tr>
<td>Others</td>
<td>14,900</td>
<td>85%</td>
<td>4,230</td>
<td>45%</td>
</tr>
<tr>
<td>Total</td>
<td>502,000</td>
<td>68%</td>
<td>67,130</td>
<td>44%</td>
</tr>
</tbody>
</table>

9. What this table very clearly shows is that the proposals, as well as reducing the volume of publicly funded cases overall, will shift the balance of public funding away from early advice. Without access to early advice, many cases may not be able to get resolved at all. Some may revert to other public services, such as health or adult social services, or arrive at the surgeries of local politicians. Currently, well over 60% of legal help cases report positive outcomes; these outcomes can both save the costs of adverse consequences for clients such as homelessness and health problems but also save resources for other public authorities.7 For example:

A 59 year old woman sought advice from a Lancashire CAB about a benefits and debt problem. Her right leg had been partially amputated in an operation to save her life, and her husband had gave up work to look after her. The care and mobility components of her disability living allowance (DLA) were reduced when DWP reviewed her claim. Consequently her husband lost his right to carers allowance. This meant

6 See Impact Assessment: Scope Changes
7 See Towards a business case on legal aid, Citizens Advice, 2010
10. Consequently we consider that there is a very poor business case for pursuing the proposals to take
social welfare law out of scope. Using data from the Civil and Social Justice Survey on the adverse consequence
costs of legal problems, and the Legal Services Commission’s outcomes data from legal advice work, Citizens
Advice have developed a cost benefit analysis which sets off legal aid expenditure against the savings achieved
from early advice (Legal Help) interventions. This analysis estimates that:

- For every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34.
- For every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98.
- For every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80.
- For every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13.

11. The Government’s proposals assert that for those unable to obtain legal aid under the new criteria, they
may use private services, other sources of free advice, or pursue self help strategies. The first option is usually
unrealistic and affordable for clients—the Ministry estimates that 85% of legal representation and 80% of legal
help cases are from individuals within the bottom income quintile. Other sources of advice may be unavailable
as under current arrangements, most specialist casework undertaken by voluntary sector organisations is funded
through the legal aid system. Many of the alternative sources of help identified in the Green Paper are either
not advice services at all, or just provide information rather than independent, quality assured advice. Whilst
there is also a range of volunteer and pro-bono services, there is no evidence that these can provide an adequate
substitute to publicly funded specialist casework services. We provide more evidence on these issues in our
response to the Ministry of Justice and will forward a copy to the Committee.

12. Consequently, people with out of scope cases will have no or limited access to advice and will either
take to whether their problems or pursue “self help” strategies, such as self-representation before tribunals.
Those who seek to resolve problems without advice often fare poorly in dealing with complex systems. For
example:

A CAB in the West Midlands saw a 29 year old lone parent. She was receiving child tax credit, child
benefit and industrial injuries benefit and had made a claim for employment and support allowance (ESA)
after suffering back injuries at work. At the work capability assessment, she was awarded 12 points and
therefore was not entitled to ESA. Without getting advice, the client appealed this decision and opted for
a paper hearing because she was scared and unaware of what would happen at an oral hearing and did
not know that it would have been better for her to have attended. She was under the impression that it
was a very formal affair like a court of law which worried her a lot. Her appeal was then sent back to
her stating that the 12 points awarded “seemed appropriate” and that she would not be entitled to ESA.
If the client had received advice from the CAB, they would have advised her to apply for an oral hearing
as she would have had a better chance of success.

What action could the Government be taking on legal aid that is not included in the proposals (for example,
on high cost cases)?

13. In our response to the Green Paper and submissions to the Ministry of Justice for the Comprehensive
Spending Review, we recognised the need for significant savings in the legal aid system. However, the surest
route to achieving savings is to reduce demand on the legal system through early intervention and advice,
tackle the cost drivers of legal aid, and reduce the costly bureaucracy in the systems for resolving legal
disputes—including legal aid. We agree with the Green Paper that less costly alternatives need to be found to
using lawyers and the court system for resolving many civil problems, whilst maintaining equal access to the
legal system as a backstop.

14. However, so far Government have not proposed developing the alternative options they mention in the
Green Paper, or taken action to simplify procedures and make it any easier to seek redress without recourse to
legal aid. Other options for savings have not been explored, for example, action to reduce high cost cases. The
potential for administrative savings has not been explored, whilst the impact assessments suggest that there
will be significant implementation costs to their proposals which will require more bureaucratic procedures to
assess eligibility for funding. Overall administrative and procurement costs of the legal aid system have
continued to rise in recent years disproportionately to the amount of funding available for delivering frontline
legal advice and representation services. The funding scheme for Legal Help in particular could be far more
straightforward, for example using the block funding method used in the Legal Aid Board pilot in the 1990s.

8 ibid
9 In 2008-09 the figure for the LSC’s administrative costs was £124.4 million.
Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

15. It is welcome that the Government is looking to address the problem of high and disproportionate costs in the civil courts, taking the recommendations of Lord Justice Jackson as a starting point. We also welcome the package of proposals from the Jackson review, including a 10% uplift in general damages, which might reduce the costs of after the event insurance and lawyers success fees (CFAs), although the proposals also mean claimants accepting more risk of unrecoverable costs.

16. Lord Justice Jackson’s report specifically recommended that there needs to be a new pre-action costs regime including sanctions and enforcement for the protocols. However the Government needs to consider the many low value claims that never get to court and will continue to incur disproportionate costs. Indeed, as the Jackson report notes, costs are increasingly “frontloaded” at this stage, and pre-action protocols are frequently ignored leading to unnecessary litigation. Bureaux often see evidence of this, especially in housing possession claims. For example:

A West Midland CAB reported that a social landlord had issued possession proceedings against a client even when he had an agreement to pay £26 per week towards the rent and the arrears. He was liable to pay court fees of £100 for these proceedings, and was concerned that additional legal costs would be added to his rent account even though it was clearly the landlords who were in breach of the pre-action protocol as they entered in a payment plan with the client and the client kept to the payment arrangement.

17. Lord Justice Jackson also recommended that legal aid should be retained at current levels, and that other cost barriers to using the legal system such as court fees should not be pushed up. Recommendations to improve efficiency in the court system such greater electronic working and a more effective IT system should also be pursued. We would urge that the Government should study these aspects of the Jackson report far more closely.

What are the other implications of the Government’s proposals?

18. In withdrawing funding for social welfare law advice, the Ministry of Justice is taking away a key route to redress. The Justice Committee needs to look not just at the short term impact in terms of loss of legal aid providers, but rather the long term social policy impact of withdrawing such a vital publicly funded service. The proposition that the proposals will lead to “behavioural changes” in the way people address their disputes needs to be tested. The research and analysis undertaken by LSRC and others suggests that people give up trying to obtain help where this is hard to access. Clients in the social welfare categories are amongst the most vulnerable in society, they are affected by changes in the economy, labour markets, public services reform and policy initiatives impacting on rights and entitlements (eg welfare reform). We predict a significant increase in advice demand in coming years, but with far fewer advice services available.

Another impact is a significant risk that, for problems taken out of the scope of legal aid, advice seekers could be taken in by commercial services that do not provide an adequate or appropriate service to the client. 10, For example:

A Surrey CAB saw a woman who had left work because of changes made by her employer in her terms and conditions of employment, which were unacceptable to her. The client had contacted a company who offered to help with an application to the employment tribunal. She paid £247, but seemed to have received little and inadequate help from this company. All the company had done was a letter to her former employer and an incomplete ET1 form, which did not indicate what financial compensation she wanted.

A CAB in North-West Wales reported that a 32 year old woman was cold called by a claims management company offering to check the enforceability of her credit agreements taken out before April 2007 then dispute liability if the agreements are unenforceable. When the woman told the claims management company that she had one credit card debt, the company said that they had a 100% success rate with that credit card company. She was then asked to pay a fee of £475 to have her credit agreement checked and she paid the sum. However, the client was not advised that a second fee of £400 would be payable to make a claim against the credit card company after the agreement had been reviewed. The company’s literature only referred to a “small fee” and not specific sums. The CAB noted that if the claims manager had made the client fully aware of the full cost of making a claim against the credit card company, she would not have proceeded with the complaint as she could not afford it. The client had therefore lost £475 to simply have her credit agreement reviewed.

A CAB in Kent saw a woman who recently had to stop work because of health problems, and was claiming employment and support allowance. She had multiple debts including rent arrears of £555.87, council tax arrears of around £1,400 (which she was paying off at £150 a month and for which she was also paying the council’s bailiffs £81 a month) and water and sewerage arrears of £800 (which she was paying off at £10 a week on a card). In addition, she was paying a debt management company £28 a month to manage other debts (mainly credit cards). The debt management company would not deal with the client’s rent and council tax arrears. The client had now received a notice from the bailiffs collecting council tax that they would visit her home to levy goods for unpaid council tax. The CAB commented that as a result of

10 For example, see Debt management compliance review (OFT, September 2010)
the advice given by the debt management company, the client was paying money to non-priority creditors which should be going to her priority creditors.

20. Policy lessons need to be learnt from the past; the Access to Justice Act removed legal aid funding for personal injury cases in favour of a new conditional fee (CFA) regime funded through recoverable after the event (ATE) insurance premiums. This resulted in widespread misselling of conditional fee agreements for low value claims and the development of a new predatory claims management sector. To assess this risk we would suggest that policymakers have regard to the findings of the Claims Management Regulator on sector activity in relation to unenforceable consumer credit debts.

January 2011

Supplementary evidence from Sir Anthony May, President of the Queen’s Bench Division, following the evidence session on 7 February 2011 (AJ 63)

You ask whether I have in mind a mechanism for making legal aid available for meritorious cases but not for those with no merit.

When I was first at the Bar, legal aid in civil cases was available for claims judged to have sufficient merit. The judgment was made by local Legal Aid Committees who scrutinised the claim and the material available to support it and who usually required a written opinion from counsel as to the merit of the proposed claim. This system worked well but it depended, I believe, on the gratuitous goodwill of the practising lawyers who served on the committees. It was also at a time when a judicial review challenge to the refusal of legal aid was unheard of. I imagine that such a general scheme would not be regarded as economically viable today.

If legal aid is to continue to be available for classes of civil claims (eg judicial review claims or asylum appeals), it may be appropriate for it to be available for the initial claim or the first appeal without a rigorous merits test. But a view could be taken—such as I touched on when I gave evidence—that legal aid should not automatically be available for a second attempt within the court system, where the first has failed, unless the court is persuaded that the second attempt has merit. Almost all emergency applications in the Administrative Court in asylum cases are at least second attempts where the first has failed. It could be regarded as proportionate and sensible if these did not attract automatic legal aid, but only of the initial (unsupported) application was successful, so that the case proceeded to a full merits hearing. The judge could then order legal aid funding for the permitted proceedings. The merits judgment for legal aid purposes would reside in the judge's decision to permit the case to proceed.

This is essentially what now happens in appeals in criminal cases to the Court of Appeal Criminal Division. The trial legal aid extends to an advice on appeal and the drafting of grounds of appeal. If the application for leave to appeal is refused, there is no legal aid for a subsequent renewal of the leave application, unless that application succeeds, in which case the court makes an order for legal representation at the subsequent appeal which usually includes the now successful application. If the renewed application fails, there is no public funding for it. This has the salutary effect of reducing the number of meritless renewed applications.

Consideration could also be given to extending this proposal to other instances where permission to proceed is required, especially for an oral renewal of a failed application. Permission is required to bring judicial review proceedings, or to appeal most first instance decisions in ordinary civil proceedings. A renewed application for permission to bring judicial review proceedings, where permission has been initially refused on paper, could be without legal aid unless the renewed application succeeds. The same could apply to any renewed application for permission to appeal in civil proceedings.

March 2011

Written evidence from Shelter (AJ 34)

EXECUTIVE SUMMARY

Shelter is extremely concerned at the legal aid reform proposals. We believe that they will have a serious impact on clients and providers. Tens of thousands of the most vulnerable in society will be deprived of the advice they need to resolve their housing, debt or benefits problems. The proposals fail to recognise that early advice resolves problems before they escalate, and that people often have multiple inter-dependent problems all of which need to be addressed. They further fail to recognise the complexity of the legal issues involved and the need for specialist advice. They will drive many experienced providers out of legal aid. Shelter stands to lose 70% of its legal aid funding and can not fill the gap. Those clients still eligible—and those who work with them, such as MPs, local authorities,—will struggle to find sources of advice.

INTRODUCTION

1. Shelter is a national campaigning charity that provides advice, support and innovative services. More than one million people a year come to us for advice and support via our website, helplines and national network of services.
2. Shelter is a leading national provider of specialist social welfare law advice, and we help over 25,000 people each year under legal aid contracts. We employ over 200 advisers and 40 solicitors to give legal aid advice to the public.

3. We provide advice through a national network of services, a free housing advice line open seven days per week and through Shelter's website (shelter.org.uk/getadvice) which provides advice online. Shelter also provides services under the CLG-funded National Homelessness Advice Service, offering specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, who are approached by people seeking housing advice.

4. This work gives us direct experience of the problems faced by those in need of social welfare law advice and well places us to comment on the Government’s proposals for the reform of legal aid. Shelter specialises in legal advice on housing, welfare benefits and debt and therefore we restrict our comments to these areas.

Question 1: What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

5. The proposals, when taken together, severely threaten the future viability of social welfare law provision. The removal of so much advice work from the scope of legal aid will destabilise the sector and damage the viability of many providers. Cuts to scope, eligibility and fees will mean that there will not be enough work, or enough income generated, for it to be economically viable to continue to provide advice where work remains in scope. Many providers would be forced to close. This risks deskilling the sector, losing crucial specialisms and expanding advice deserts.

6. At a national level, we estimate there would be a reduction of 70% in our income from legal aid advice work. This represents 46% of the total statutory and contract income into Shelter services (see Table 1). This includes an allowance for the proposed 10% cut in fees but does not factor in the capping of enhancements or the other cuts to certificate rates. The cuts to fees on work remaining in scope may tip the balance away from viability for many providers.

7. These figures are extremely worrying to Shelter, but they are of wider concern. Shelter is the only provider of housing advice under social welfare law contracts in Norfolk, Plymouth, much of Devon, Cornwall, Dorset and East Cheshire, and there are other areas which rely on a sole (non-Shelter) provider. In such areas there is no backup should the existing provider not be able to continue and the risk of creating an advice desert even higher.

Table 1

<table>
<thead>
<tr>
<th>Service</th>
<th>Income Loss (% of income from all statutory / contract)</th>
<th>Numbers of cases out of scope</th>
<th>Percentage of cases out of scope</th>
</tr>
</thead>
<tbody>
<tr>
<td>North West:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lancashire</td>
<td>43%</td>
<td>653</td>
<td>74%</td>
</tr>
<tr>
<td>Cheshire</td>
<td>35%</td>
<td>452</td>
<td>73%</td>
</tr>
<tr>
<td>Cumbria</td>
<td>28%</td>
<td>583</td>
<td>86%</td>
</tr>
<tr>
<td>Manchester</td>
<td>25%</td>
<td>1250</td>
<td>70%</td>
</tr>
<tr>
<td>North East:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Newcastle</td>
<td>51%</td>
<td>701</td>
<td>86%</td>
</tr>
<tr>
<td>South West:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dorset</td>
<td>55%</td>
<td>1109</td>
<td>68%</td>
</tr>
<tr>
<td>Cornwall</td>
<td>48%</td>
<td>426</td>
<td>77%</td>
</tr>
<tr>
<td>Devon</td>
<td>58%</td>
<td>998</td>
<td>69%</td>
</tr>
<tr>
<td>Somerset</td>
<td>41%</td>
<td>892</td>
<td>77%</td>
</tr>
<tr>
<td>Gloucester</td>
<td>47%</td>
<td>443</td>
<td>67%</td>
</tr>
<tr>
<td>South East:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ThamesValley</td>
<td>60%</td>
<td>1238</td>
<td>73%</td>
</tr>
<tr>
<td>Kent</td>
<td>57%</td>
<td>1892</td>
<td>75%</td>
</tr>
<tr>
<td>Milton Keynes</td>
<td>49%</td>
<td>1046</td>
<td>82%</td>
</tr>
<tr>
<td>Herts</td>
<td>70%</td>
<td>1061</td>
<td>81%</td>
</tr>
</tbody>
</table>

East:

51 “Outcome of tender process”, http://www.legalservices.gov.uk/civil/tendering/social_welfare_family.asp
8. The Scope Impact Assessment makes clear that some £274 million will be lost to providers of legal services, of which £60 million will be lost to the not for profit (NfP) sector, representing 77% of the sector’s total legal aid funding. These figures are borne out by Shelter’s projections. It is clear that the impact on the NIP sector will be particularly devastating. This is most concerning as the government points to the presence of the sector as an alternative source of advice—specifically citing Shelter as an alternative to housing legal aid. The reality is that much of the sector is dependent on legal aid funding and that, far from being able to fill the gap, will suffer most from the proposed cuts. Shelter was not consulted before the assumptions about its capacity in the paper were made.

Question 2: The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

9. The reduction in case volume is likely to be greater than 500,000 and will include a significant percentage of vulnerable clients with serious housing, benefits and debt problems. Not all those cases will be in the civil courts, but all will be matters of civil law.

10. The MOJ estimates that the Legal Help case volume would be reduced by 502,000 cases as a result of the proposed changes to the scope of legal aid. This figure does not include the reduced case volume for Legal Representation and does not include estimates for reduction in cases due to other proposed changes eg reductions in eligibility or the telephone gateway. It reflects the estimated impact of only one part of the proposed reforms and therefore is an underestimate.

Which Cases Will These Be?

11. About half of those targeted for cuts would be family law cases. Housing, debt and welfare benefits constitute 45% of the cuts to case volume.

Housing - 38,000 (36%) of all Legal Help Housing Cases

12. Shelter is alarmed that the Government proposes to remove so many housing matters from scope. Legal aid plays a crucial role in helping the most vulnerable to enforce their housing rights and thereby access justice and improve their housing situation. It is key in ensuring the most excluded access the statutory homelessness provisions including temporary and permanent accommodation. It enables incorrect housing decisions to be challenged and possession proceedings to be defended. It is key in resolving disrepair and challenging rogue landlords; it helps to address rent arrears and avoid eviction before court procedures commence. Public funding has played a pivotal role in promoting early intervention before housing problems escalate. In so doing it prevents homelessness, provides access to justice for the most vulnerable and creates savings to the public purse.

13. The proposals will remove from scope the pre-court work which is so very successful in both resolving issues early and saving costs further down the line. Shelter finds particularly shocking the proposal to remove advice and assistance in relation to homelessness, except in cases which involve an appeal to the County Court under s.204 Housing Act 1996. The Government asserts: "we consider that cases concerning homelessness…. are sufficiently important to justify legal aid funding, given the seriousness of the immediate consequences (4.193). Yet it defines cases concerning homelessness so narrowly as to exclude essential legal advice precisely to those grappling with the ordeal of homelessness.

14. These proposals are also concerning at a time when the government is proposing major changes to housing and homelessness law, through the Localism Bill and other announcements. Major change in the system creates complication, at least in the short term, and increases the need for advice.

15. Advice and representation on re-housing issues would go out of scope under the proposals. This would include, for example, detailed legal advice on transfers and assignments of tenancies, and any issues regarding the allocation policies of local authorities. Similarly, legal advice on landlord harassment and unlawful eviction would go. Shelter believes it is wrong to describe this as “practical” rather than legal assistance and therefore not a priority for legal aid funds. Shelter believes that cutting such areas of work from scope would seriously disadvantage vulnerable clients for whom legal advice provides the best outcome.

13 p16 Table 1 http://www.justice.gov.uk/consultations/docs/legalaidiascope.pdf
WELFARE BENEFITS 113,000 (100%) of ALL LEGAL HELP WELFARE BENEFITS CASES

16. Shelter finds it most worrying that those with benefit problems would be excluded from legally aided advice. This comes at a time of major upheaval in Housing Benefit and with an entirely new benefits system (the proposed Universal Credit) in the pipeline. Welfare benefits law is complex and very often claimants are elderly, ill, disabled or otherwise vulnerable. Welfare benefits problems are often the underlying cause of other issues, such as debt and homelessness. Preventing resolution of these at an early stage will worsen problems and increase costs later.

DEBT 75,000 (75%) of ALL LEGAL HELP DEBT CASES

17. Shelter is also very concerned that those in debt would only able to access help once their problems have spiralled out of control and there is an immediate risk of losing their home. By that time, it is often too late to resolve the underlying problems. Problems causes by the lack of legal advice will be compounded by the withdrawal of the Financial Inclusion Fund.

CLIENT PROFILE OF THOSE MOST LIKELY TO BE AFFECTED BY THE CUTS

18. In the Scope Changes Equalities Impact Assessment, the Government considers the impact of the changes on clients, concluding that the cuts to housing, benefits and debt advice would have a potential disproportionate impact on ill or disabled people, female clients and BAME clients.14 We believe that the proposals would exclude large numbers of vulnerable people, including many who are ill or disabled. They may have complex, interrelated problems relating to housing and homelessness, welfare benefits and debt. By definition they will be poor, as they would have been eligible for legal aid.

How will the issues be resolved?

19. Shelter believes that the clients excluded by the proposed changes will often be ill equipped to resolve their problems on their own. Legally aided clients are by their very nature poor. Paid-for services will simply not be a feasible option and to suggest otherwise fails to acknowledge the degree of financial hardship faced by legally aided social welfare law clients.

20. Recent research15 into the challenges people face when dealing with civil justice problems has brought to light important findings. Disadvantaged groups (lone parents, those with a long term illness or disability, mental ill health, those renting publicly, in receipt of welfare benefits, those with no academic qualifications) were less likely to have knowledge of rights and legal processes than more affluent and educated groups and were less likely to handle their problems alone. The research demonstrated low levels of knowledge relating to welfare benefits, rented housing and homelessness. A previous research study16 had already highlighted that young people’s lack of knowledge of their rights and entitlements, legal processes or where to go for help impeded their ability to recognise that they were dealing with an issue with legal elements. This in turn would affect their ability to plan how to resolve the issue. The findings in both these studies are borne out by Shelter’s experience. We do not believe that such clients would be able to represent themselves or find alternative specialist advice.

21. As set out in our answer to question 1 above, nationally Shelter would lose approximately 46% of the statutory and contract income to our advice services if the cuts go ahead. We could not possibly fill from our charitable resources the gap left by such far-reaching cuts. Shelter envisages that many people will turn to local MP and councillor surgeries in search of help and that referrals to local advice agencies and solicitors will be much more difficult.

22. The Government acknowledges that there may be a deterioration in case outcomes for those no longer able to access legally aided advice. The Scope Impact Assessment also points to the wider social and economic costs such as reduced social cohesion and increased costs for other departments.

23. Shelter has little doubt that these cuts, if implemented, would hit the poorest and most vulnerable hardest and those excluded from assistance would not necessarily find their way to alternative remedies. Some clients would still receive advice, but much later in the day, once their problem had escalated enough for court proceedings to be involved. At that point, they may then find themselves able to access legally aided advice. However, the situation would be much more difficult and costly to resolve and the personal consequences for the client may be irreversible.

Question 3: What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

24. We do not intend to respond to this question.

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15 Balmer, N., Buck,A. et al Knowledge, capability and the experience of rights problems Plenet/LSRC, 2010
16 Measuring young people’s legal capability, Plenet, 2009
Question 4: Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

25. We do not intend to respond to this question.

Question 5: What are the implications of the Government’s proposals?

Implications of the scope cuts

26. Shelter does not agree with the government’s contention that much of the work covered by social welfare law is “practical” rather than “legal” and therefore should not be funded by legal aid. The idea that problems only become legal at the point of court proceedings seems fundamentally to misunderstand the type of work we do. In any event, the current legal aid does not fund “practical help”. There has to be a legal issue at stake as a first condition for receipt of funding.

27. The cuts to housing, for example, would remove access to advice to those whose homeless application to the council has been rejected. Currently advice and representation at review stage are available. The new proposals would only provide representation once the matter had reached appeal to the County Court. Shelter believes that early advice on housing, debt and benefit problems is key in resolving them before they escalate. If the aim is to avoid litigation, then a properly conducted review is essential. A section 204 appeal can only be brought on a point of law, and whether a point of law exists is often dependent upon the correct issues of fact and law having been put to the authority as part of the applicant’s representations on review. The scope cuts would remove opportunities to right wrongs at the earliest stage and increase the numbers of cases that go to County Court and judicial review—but both of those are very limited in what can be considered, so many people will not be entitled to advice at all.

28. The cuts would prevent advisers addressing multiple, interrelated problems. Certain issues tend to occur together in clusters eg someone with a rented housing problem is more likely to face homelessness or difficulties with benefits. To address problems early on and in their entirety is precisely to address the drivers of the demand for social welfare law legal aid further down the line.

Implications of the Telephone Gateway

29. Shelter is in favour of a multi-channel approach to advice delivery. Telephone helplines can make it easier for those with problems to reach an advice provider promptly. However, many vulnerable clients prefer to walk in to their local advice office. Research shows that in 52% of cases where people seek advice, they do so initially via the telephone. However in around 37% of cases, people make a direct approach in person to an agency. Different people benefit from different approaches in different circumstances. Under the MOJ’s proposals, even those with mental illhealth or with language difficulties would be expected to use the telephone line in the first instance. Shelter’s experience is that those who need translation, those who have papers which need to be considered and those with sensitive and difficult stories to tell benefit from a face-to-face interview with a local adviser who has knowledge and expertise in local services.

30. Shelter runs a national housing advice helpline funded by our charitable income and holds a contract to deliver specialist advice on the telephone and face-to-face, as well as by web and email. All delivery models have their place and their different approaches benefit people in different ways. Diversity of provision and client choice are essential to provide services that meet peoples’ needs, and forcing a single approach will restrict access to justice.

31. Furthermore, if the Government takes forward the proposals to cut scope, then the telephone gateway system seems less and less appropriate. If, going forward, the only cases left within scope are those which involve proceedings of some sort, then it will be inappropriate for there to be compulsory telephone access and a presumption of telephone advice. Advisers will need to take detailed instructions and see paperwork. Shelter believes that an improved telephone access is to be welcomed, but only as one option.

32. Driving all cases through a telephone gateway will reduce further the clients available to existing face to face providers, further impacting the viability of the supplier base.

Implications of the Cuts to Eligibility

33. Only 35% of the population are currently eligible for legal aid (compared to 52% in 1998). Only those on benefit level incomes are automatically entitled. No one receives legal aid unless they have passed both eligibility and merits tests. Shelter believes that legal aid for social welfare law is already very targeted.

34. Any cuts to eligibility would disproportionately impact on those with least ability to pay. Shelter is aware that there is already a small but significant percentage of people with problems who either do not seek advice, or who attempt to obtain advice but fail to do so. Shelter believes that a tightening of eligibility and raising of contributions will deter people from seeking advice, adding to a build up of unresolved problems, human misery and greater costs to the taxpayer further down the line. The specific cuts proposed will

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25 Report of the 2006-09 English and Welsh Civil and Social Justice Survey
disproportionately impact on low income homeowners, many of whom are in need of housing and debt advice. Requiring an initial payment of £100 will further deter many from seeking the advice they need.

**Implications for Providers**

35. Please see our answer to question 1 above.

**Conclusion**

36. Shelter cannot reconcile the stated aims of protecting the most vulnerable with proposals to cut social welfare law advice in this way. Social welfare law only uses around 5% of the total legal aid budget (around £136 million of a total £2.1 billion pot). It provides extremely good value for money.

   For every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34.
   For every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98.
   For every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80.\(^{18}\)

37. The proposals have been developed with the aim of providing a substantial contribution to the MOJ’s 23% budget reduction, aiming to deliver savings of approximately £350 million by 2014–15. Yet, Shelter believes that these proposals, if implemented, are likely to drive up the need for civil legal aid rather than reduce it and therefore increase costs to the taxpayer further down the line. They will also damage the provider base, particularly in the NfP, with consequent implications for the availability and quality of advice

January 2011

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**Written evidence from the Law Society of England and Wales (AJ 05)**

The Law Society welcomes the opportunity to provide evidence to the Select Committee. The Society has significant concerns about the effect of the proposals in the Green Papers on Legal Aid and Civil Litigation Costs on the ability of individuals, particularly those on low incomes or with complex cases to obtain proper advice and representation. In particular The Society considers that:

- The cuts in scope and eligibility for civil legal aid will mean that many fewer people will be able to bring cases to court;
- The cuts in legal aid fees and, in particular, the reductions in the amounts that lawyers can recover from the other side in successful cases will mean that many solicitors will either find other areas of work or “cherry pick” cases which are simple;
- The cuts do not address the real cost drivers in the present system;
- The courts will either be faced with significant numbers of litigants in person or many will find themselves denied justice.

The Society urges the Select Committee to look in detail at these questions.

1. What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

1.1 The Impact Assessment accompanying the Green Papers estimates that the proposals could lead to a 67% decrease in income in rural areas and a 59% decrease in urban areas.\(^{19}\) The consequence of this is likely to be that only the largest firms in cities will survive by employing lower quality staff, as firms already operate on the margins of viability. Inevitably expertise will be lost. In particular, specialist firms and advice agencies such as Law Centres and CABs, providing social welfare law services (debt, housing, employment, welfare benefits, education) are likely to be wiped out with catastrophic consequences for people in need. There have been no remuneration increases in cash terms since 2004 and efficiency savings have already been made against inflationary cost increases. The Society does not see how many firms can continue to operate in this environment.

**Private Family**

1.2 Apart from cases involving domestic violence or forced marriage, parties will not qualify for legal aid for ancillary relief, contact and residence issues beyond basic help with mediation.

1.3 Most firms undertake all aspects of family work. If the bulk of private family law work is taken out of scope, firms may well consider that there is insufficient public law work to justify continuing to take on publicly funded family work and that the investment in the Specialist Quality Mark required by the LSC is no longer justified. Thus, especially in firms in small market towns, the public law work involving serious childcare cases may also cease.

\(^{18}\) Towards a business case for legal aid, Citizens Advice, 2010

\(^{19}\) Legal Aid Reform Scope Changes, paragraph 68
WELFARE BENEFITS, EDUCATION AND NON-ASYLUM IMMIGRATION AND ASYLUM SUPPORT

1.4 This advice will be completely removed from scope, save for cases involving discrimination, judicial review and immigration detention; and there is very little alternative private or insurance-backed sources of funding. Not for profit organisations, such as the CABs, stripped of their funding from the LSC (20% of their overall funding) and also from local authorities funding, will be unable to take on the extra work. These areas of law are highly technical and complex. The expertise acquired over the years will be lost. Welfare benefits are highly technical and complex. The expertise acquired over the years will be lost. Welfare benefits and education advice will be almost completely wiped out. According to the MoJ,20 the immigration proposals will result in a 14% to 30% loss of legal aid income for providers nationally. This is likely to result in a significant reduction in immigration providers.

HOUSING

1.5 While much housing work remains, the loss of so much other social welfare work is likely to have a knock-on impact, as many organisations offer a range of social welfare law services and rely on the combined income. There is likely to be a significant reduction in the number of offices offering this advice.

CIVIL AND FAMILY FEE REDUCTIONS

1.6 In addition to the reduction to hourly rates, fixed fees and enhancements, there will be additional income cuts as fixed fees have been based on an average case cost, and some of the cheaper cases will be removed from scope. Firms may not be able to take on more complex cases.

1.7 The LSC asserts that there is an oversupply of legal aid firms based on the experience of the recent tender rounds. Even if that is the case, the reduction in the amount of work available combined with the reduction in fees means that there will be little economic incentive for firms to continue with this work.

CRIME

1.8 The proposals to run a tender exercise based purely on price may mean that firms currently providing a high quality service may find it difficult to continue to do so. The NAO survey a year ago found that substantial numbers of legal aid firms operated on the margins of profitability. The reduction in fees is likely to mean that firms are unlikely to devote more time to cases beyond that required by their professional obligations.

2. The Government predicts that there will be 500,000 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

2.1 The following cases are likely to be affected:

2.1.1 Disputes between separated parents. The Law Society agrees that, wherever possible, such disputes should be resolved without litigation. However, sometimes that will be impossible. Where there is violence, legal aid will still be provided. However, without legal aid, issues of neglect, abuse or simple obstruction by one party will go unaddressed. This may cause harm to the child and, in extreme cases, lead to parties taking the law into their own hands. It may also cause a growth in the number of litigants in person causing delay to the justice system.

2.1.2 Clinical negligence, which often involves complex and expensive evidence gathering where the final result is hard to predict. The Legal Aid Green Paper acknowledges that there are some cases, such as those involving babies who are catastrophically injured at birth, where a CFA is unlikely to be available. No provision is made for such cases. Families suffering such a tragedy will be left without assistance; meaning that the costs of care of the child are transferred to the state and there is no challenge to the doctors involved.

2.1.3 Relatively low value civil cases. The proposed cap on the proportion of damages that can be taken as a success fee will mean firms are less willing to take on such cases. However, sums of £2-£5,000 are very significant to those on incomes low enough to qualify for legal aid (and many others). It is likely that many meritorious cases in this field that will in future go unresolved, denying access to justice to many accident victims and meaning that the costs of care or loss of earnings are borne by the state or their employer.

2.1.4 Some housing disrepair cases will be removed from legal aid. Since such claims usually require expensive experts’ reports, removing legal aid will also remove effective access to the Courts. While some cases may be suitable for conditional fee agreements, a proportion will go unresolved unless and until the disrepair becomes so serious as to threaten the client’s health.

2.1.5 The cuts in the fields of education, employment, immigration and welfare benefit will largely affect matters heard in Tribunals. These are complex areas of law and while some people will feel able to present them themselves (which may itself cause delay and cost to the court system), many will just not pursue their rights.

2.1.6 The proposals to increase the threshold for eligibility for legal aid to include a client’s equity in their home even if the client is on income support is likely to exclude entirely many people who currently

20 Legal Aid Reform Scope Changes EIA, Annex 1 Table 17.
qualify, including many income support claimants. The Society believes that only a tiny handful of those excluded under these new rules will be able to get help in some other way.

3. What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

3.1 The Green Paper is narrowly focussed on reducing the cost of legal aid by cutting services to clients though cuts in scope and financial eligibility, and by reducing fees paid to solicitors who have seen little or no increase for the last ten years.

3.2 The Law Society believes that it would be preferable to address the drivers which lead to legal aid expenditure through a “whole system” approach which encourages greater efficiency within the system and penalises poor decision making by public bodies, thus preventing a significant number of legal aid cases arising in the first place, including expensive judicial review proceedings.

3.3 In its recently published “Access to Justice Review” the Law Society makes a number of recommendations for addressing legal aid costs drivers; these include:

3.3.1 Every consultation paper that introduces new rights or offences should identify the costs of enforcement and state how these are to be met.

3.3.2 Judges should be trained, and encouraged to use modern case management procedures for ensuring that cases progress efficiently and that unnecessary costs to the parties are eliminated.

3.3.3 Public authorities whose administrative decisions are overturned by courts and tribunals should be required to pay the costs of the claimant to the legal aid fund, together with a surcharge.

3.3.4 Greater investment in new technology (e.g. video links with prisons, improved listing arrangements and greater use of electronic communications) would reduce the time wasted by solicitors and others in attending courts unnecessarily.

3.3.5 Courts should use their wasted costs powers to penalise public authorities and others who cause unnecessary costs to be incurred by practitioners and the Legal Aid Fund.

3.3.6 The CPS should review its charging policy in Very High Cost Cases (VHCCs). A more strategic approach is needed to reduce costs in complex VHCCs.

3.4 The Society’s Access to Justice Review also considers ways in which additional funds can be generated for legal aid; these include:

3.4.1 Seized assets of defendants being made available to pay their defence costs.

3.4.2 A levy on the financial services industry to cover the costs of fraud cases arising out of financial crime.

3.4.3 An increased tax on alcohol with the money going to the legal aid fund and other criminal justice agencies.

3.5 The Society also takes the view that legal aid services could be delivered more efficiently if providers were relieved of the large bureaucratic burden imposed on them by the current contracting regime. The Green Paper raises this question but provides few specific proposals. The Society’s Access to Justice Review makes the following recommendations:

3.5.1 Consideration should be given to granting powers to a local body to allocate funds, and identify local priorities and gaps in order to mitigate the disadvantages of a pure market approach.

3.5.2 The Defence Solicitor Call Centre should be abolished and replaced with local arrangements.

3.5.3 Firms should have greater choice and flexibility to determine how they take on and run cases.

3.5.4 Simplification of contractual requirements for firms and specifying an element of tolerance for unintentional non-compliance.

3.5.5 Streamlining of accreditation schemes to ensure that they are pitched at the correct level to ensure quality and to avoid duplication.

3.5.6 Rationalisation of hourly rates to make it easier to identify the relevant fee.

3.6 The Society also consider that arrangements could be made to ensure that individual practitioners are not able to make significant sums of money out of legal aid (The Society believes that £250,000 is an appropriate maximum) and that the rates paid to practitioners, should be calculated on this basis.

4. Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

4.1 The Law Society had substantial reservations about the effects of the Jackson recommendations and it is pleased to note that some of these appear to have been noted by the Government. What is disappointing is that neither Jackson LJ nor the Government seek to address the procedural and systemic inefficiencies that lead to costs in the first place. Our major concerns about the report were:

4.1.1 If success fees are not recoverable then clients are likely to lose a proportion of their damages, particularly if their claims are for relatively low amounts so that the proposed 10% increase in general
damages will not provide compensation for the difference and this will also provide an incentive for defendants to outspend less well-resourced claimants;

4.1.2 The proposed 10% increase in general damages was not supported by published research into its effects;

4.1.3 If After The Event (ATE) premiums are not recoverable, many potential litigants might be deterred by the risks of adverse costs orders and, more seriously, by the costs of disbursements—which would be particularly serious in complex cases, particularly clinical negligence;

4.1.4 The proposal on Qualified One Way Costs Shifting (QOCS) was likely to cause uncertainty and satellite litigation and would disadvantage small businesses and other defendants who did not have the benefit of Before the Event (BTE insurance);

4.1.5 The BTE market is not in a state to fill the gaps and there are significant concerns about the way in which it works;

4.1.6 The proposals for regulating damages based agreements (DBAs) were unnecessarily complex.

4.2 The Government’s proposals address some of these points but a number of concerns remain:

4.2.1 The proposals for permitting success fees to be recoverable in complex cases or those where damages are not claimed are likely to introduce unnecessary complexity which consumers may struggle to fully understand, together with unnecessary satellite costs litigation.

4.2.2 The proposal that ATE premiums for disbursements should be recoverable in cases where no other form of funding is available may well introduce further uncertainty and potential satellite litigation.

4.2.3 The proposal that the 10% increase in damages should apply only in CFA cases may well lead to increased arguments over quantum and a reduction in out of court settlements—thus increasing costs overall.

4.2.4 The proposed refinements to the proposals on QOCS add complexity and still may not provide sufficient certainty at the outset for a client or avoid the risk satellite litigation.

4.3 The Society is pleased that the Government has decided that significant regulation of DBAs is unnecessary.

4.4 In his report Jackson LJ recommends financial modelling on the viability of a SLAS after, and subject to, any decisions announced by the Government in respect of all of his recommendations. However, the Government is proposing to introduce a SLAS scheme funded by a 10% levy on any damages recovered by assisted persons to fund other cases before all of the Jackson recommendations have been fully considered.

4.5 The Government does not deal fully with a number of recommendations including those to do with fixed recoverable costs in fast track claims. The Government is proposing to do this in April 2012 based upon the experience of the new process for lower value personal injury claims in road traffic accidents (RTA) which was introduced in April 2010. Since it is anticipated that the current RTA process will encompass over 80% of all personal injury claims, it is crucial that this process is fully evaluated before any reforms to litigation costs and funding are introduced.

4.6 The Society is disappointed that the Government is not taking forward proposals in the report on referral fees but can understand why other recommendations are not taken forward. The Society was sceptical of the view that Jackson LJ’s recommendations were an unchangeable package.

5. What are the implications of the Government’s proposals?

5.1 On the Government’s own predictions there will be 500,000 fewer Court cases. Even if some of these can be resolved by alternative mechanisms the Society believes that reforms avowedly preventing some people from enforcing or defending their rights are deplorable. What is most unsatisfactory is that Government has taken no steps to establish whether there are alternative methods of providing access to justice if state support is removed.

5.2 The reforms will have the following effects:

5.2.1 Those on income support who have some equity in their property or who are otherwise required to pay what is likely to be an unaffordable contribution towards their costs;

5.2.2 People with low value claims or complex claims are unlikely to be able to pursue these cases without taking on risks which they are likely to consider unacceptable; People who, as a result of CFAs were able to bring actions will find it more difficult to do so and will not have the option of legal aid as they did before 1999.

5.2.3 Parents where one party is being obstructive and where mediation fails will have no way of resolving their disputes, causing damage to children;

21 Paragraphs 69 -73
22 Paragraph 174
23 Paragraph260
5.2.4 Poor and disadvantaged clients will be unable to enforce their rights against landlords or public authorities;

5.2.5 The courts will have to deal with more unrepresented litigants in person;

5.2.6 QOCS may even result in speculative claims if the claimant has no risk as to costs and can find a solicitor willing to share the risk;

5.2.7 The costs of care for people with serious injuries will be transferred to the state;

5.2.8 There will be an increase in satellite costs litigation as the insurers test the implications of the new rules;

5.2.9 Many firms, advice agencies and charities will be unable to offer services which, as well as causing unemployment and damage to the local economy will penalise those who can afford to pay privately;

5.2.10 Many firms will find that the standard of service they provide to clients is reduced.

5.3 It is deeply disappointing that Government is making these proposals and that the opportunity to address the existing inefficiencies of the justice system, the root causes of expenditure on legal aid and to obtain funding from “polluters” is not being taken.

December 2010

Written evidence from the Family Law Bar Association (AJ 16)

WHO WE ARE

1. The Family Law Bar Association (FLBA) represents the interests of approximately 2,300 barristers nationally who specialise in family law.

2. The overwhelming majority of work carried out by the Family Bar can be summarised as follows:

(a) State intervention in the care of children (“public law”).

(b) Private individuals’ disputes concerning family life, in particular the care of children (“private law”).

(c) The financial consequences of divorce or separation (“ancillary relief”).

3. In all areas, the Family Bar works with those, and for those, who are among the poor and increasingly fractured society in which we live. Many of our clients are vulnerable—emotionally, socially, and financially. Many are victims of violence, or are perpetrators whose need for representation and advice is just as great. Many have lives blighted by alcoholism or drug abuse. Many of our clients do not have English as a first language; many speak no English at all—vital instructions are communicated through interpreters. The work is challenging, yet rewarding.

4. The FLBA wishes to address some of the questions posed by the Justice Committee as follows:

INTRODUCTION

5. On 15 November 2010, the Ministry of Justice launched Green Papers on “Proposals for the Reform of Legal Aid in England and Wales” and “Proposals for Reform of Civil Litigation Funding and costs”.

6. We concentrate on some of the proposals in the Green Paper “Proposals for the Reform of Legal Aid in England and Wales” (“the 2010 Green Paper”) which affect family justice. The particular proposals to which we make reference here are as follows:

(a) §4.215 All private law children cases and family cases (except where domestic violence—undefined, but envisaged to involve physical harm—is present) will be excluded from the scope of legal aid.

(b) Legal aid in domestic violence cases will only be available to the alleged victim not to the alleged perpetrator (notwithstanding that at the point of the issue of proceedings for a protective injunction and possibly the simultaneous issue of Children Act 1989 and ancillary relief proceedings the allegations will be unproven).

(c) §4.158 All ancillary relief cases will be excluded from scope (except where domestic violence is present).

(d) §4.70 Legal aid is to be retained for family mediation in private law family cases, including private law children and family proceedings and ancillary relief proceedings. This will generally apply to cases where domestic violence is not present, but even in those cases where domestic violence is present, it is intended to offer support through family mediation.

(e) §7.6 All fees paid under the civil and family legal aid scheme will be reduced by 10%.
What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

7. We address the impact on the number and quality of practitioners in family law.

8. Advocates who specialise in family law on public funds do not do this work for the money. It is vocational work. As Lord Justice Moses recently observed, it is a "difficult and demanding jurisdiction" in which to work.

9. In 2008, a study of the Family Bar was conducted by King’s College. This was to provide quantitative (statistical) evidence of the work undertaken by the Family Bar and to understand the role that legal aid plays in the income of the Family Bar. At the time the surveys went into the field, proposed cuts to the legal aid graduated fee system for the family work of the Bar had been proposed; the cuts were projected to be about 13%–14%. This was the explicit basis on which barristers answered questions about their intentions.

10. Following this piece of research, in fact the Government consulted again and further cuts to the budget were proposed under the Family Advocacy Scheme (yet to be implemented).

11. The results of the 2008 survey revealed that:
   (a) In the event that no changes were made to the legal aid system, a quarter of family barristers were intending to change the way that they practise—mostly to reduce their reliance on legal aid.
   (b) In the event that cuts of around 13%–14% were introduced, over 80% of barristers indicated their intention to change their practices. These were predominantly senior practitioners. For example, 40% of barristers over 16 years call intend to stop totally or reduce greatly the amount of legally aided public law final hearings that they undertake.

12. It can thus be reasonably predicted how the Family Bar will respond to the proposed further 10% cuts in legal aid remuneration; practitioners will cease doing legally aided work, and the fund of experience and talent acquired over many years will dissipate; junior practitioners will not be able to afford to replace them.

13. To set this in context—it should not be thought that family barristers doing publicly funded work are overpaid for what they do. Far from it. The King’s College research revealed that family barristers work long anti-social hours, and their personal lives suffer considerable and constant disruption. Half of family barristers surveyed work more than 46 hours in a given week, with a quarter working more than 56 hours, 1 in 20 working more than 70 hours, and 1% working more than 83 hours. Specialist barristers work longer hours than generalists.

14. A quarter of family barristers have taxable profits lower than £44,000 a year from their practice at the Bar, median taxable profits are in the region of £66,000 a year. From this figure there needs to be deducted the barristers’ clerks fees and contributions to chambers rent (often in the region of 20%), their pension contributions, their sickness and critical illness cover, their professional insurances, and all of their expenses of practice.

15. Female Black and Minority Ethnic (BME) barristers have disproportionately high dependence on legal aid, with 30% depending on legal aid for between 60% and 80% of their turnover, and a further 22% more than 80% of their turnover. White men are the least dependent on family legal aid for income.

16. The proposed changes will have a serious and irreversible effect on the number and quality of family barristers who offer services funded by legal aid.

The Government predicts that there will be 500,00 (sic) fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

17. The Government proposes that many family private law disputes concerning children and post-divorce division of assets will be, or ought to be, resolved by way of mediation.

18. The FLBA recognises that mediated agreements and negotiated outcomes for children bring many advantages to parents who are wrestling with the difficulties of relationship breakdown. It is obviously highly desirable that arrangements are reached with the minimum of conflict and stress.

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25 Ibid. §5.
26 This is a quantitative study of the work of the family bar in 2008, and the current functioning of the legal aid graduated fee system for barristers in family law cases. The study was commissioned in June 2008 by the Family Law Bar Association (FLBA), and was undertaken by researchers in the King’s Institute for the Study of Public Policy (KISPP) at King’s College London, from July 2008 to December 2008. Data was gathered through surveys of (i) chambers where any family work is undertaken, (ii) barristers who undertook any family work (whether publicly funded or privately paid) in the year to 30 August 2008 and (ii) all family work completed by barristers in England and Wales in a random week, known as the “Week-At-A-Glance”.
27 Reforming the Legal Aid Family Barrister Fee Scheme” Ministry of Justice/Legal Services Commission consultation on interim changes to the Family Graduated Fee Scheme”; 18 June 2008.
28 Family Legal Aid Funding from 2010 Fee structures and funding changes that form the second phase of family reform (17 December 2008).
19. However, there are large numbers of cases which will not be capable of resolution by mediation. Indeed it will be wholly inappropriate to require parties to mediate in many cases (such as, for example, where either parent has mental illness, where there is a background of domestic violence or alleged child harm); and where there is a significant power imbalance between the parties, mediation becomes unworkable, and is potentially abusive.

20. There is a widely (though not universally) held view that mediation is by its very nature a voluntary process; the motivation and willingness of parties to negotiate and compromise is critical to the success of mediation. Compelled mediation has a poor prospect of success. It is reasonable to predict that many cases will still come to court after the failure of mediation.

21. Difficult cases which are not resolvable by mediation at present will be no more resolvable by mediation in the future, and will require court intervention. Yet it is in these difficult cases that the Government has proposed that parents will have to enter the court process unrepresented.

22. We reject the inference that legal aid is wasted in pursuing “lengthy and intractable family cases which may be resolved out of court if funding were not available”, and that disputes are protracted “unnecessarily by having a lawyer paid for by legal aid” (§4.211). Only a very small percentage of children from separated parents have their futures decided by the courts, and those cases are by their very nature the intractably difficult cases which are incapable of resolution outside of the courts.

23. It is precisely these difficult cases which cannot be mediated, and where parties ought to have representation.

24. The FLBA makes no comment in this respect.

25. The FLBA makes no comment in this respect.

26. We would like to address the implications of the proposals under two headings:

(a) Access to Justice.

(b) Impact on the Court System.

27. We turn first to consider Access to Justice:

Generally

— Many parents in the throes of relationship/family breakdown suffer from learning disabilities, or mental ill-health, or have lives affected by abuse of drink or drugs, or do not speak English as a first language. Many people are from cultures where accessing a court would be uncommon, even unacceptable. Many of these people will be unable effectively to access a court, and equally unable to represent themselves before a family court in relation to issues concerning the upbringing of their children.

— Many parents in the throes of relationship/family breakdown suffer acute anxiety, stress and depression; it is reasonable to predict that many of these people will be deterred from seeking relief through the courts if they know that they will have to represent themselves.

— We believe that the inability or reluctance of parties to access the Family Court unrepresented will have significant implications for the safety and welfare of their children in that:

— non-resident parents may abandon genuine claims for contact (or increased contact) with their children;

— parents will hold back in expressing their concerns about the care or contact arrangements for their children (which may genuinely be adversely affecting the welfare of the children) because they cannot face embarking on litigation unrepresented; and

— cases which verge on the edge of child protection will go undetected.

In each situation, it is the children who suffer.

Domestic Violence

— Under the 2010 Green Paper proposals, funding is deemed to be justified for the victims of domestic violence (§4.64) in injunction and associated proceedings. However, there is no definition anywhere in the 2010 Green Paper of the phrase “domestic violence”; the phrase appears to be narrowly construed as necessarily importing “physical harm” (see §4.67). It follows that large numbers of victimised women will not qualify for legal aid where they cannot demonstrate actual physical harm.
— The concept of domestic violence as necessarily importing "physical harm" is out of step with current thinking:
   — Women’s Aid defines domestic violence “as physical, sexual, psychological or financial violence that takes place within an intimate or family-type relationship and that forms a pattern of coercive and controlling behaviour”; and
   — the shared ACPO, Crown Prosecution Service (CPS) and (we believed) the Government definition of domestic violence is: “any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender and sexuality.” (Family members are defined as mother, father, son, daughter, brother, sister and grandparents, whether directly related, in-laws or step-family.)

— The FLBA supports and encourages all initiatives—legislative and otherwise—to protect the victims of domestic violence (in its wider definition of "abuse"). However, proof of domestic violence as an act of physical harm is a crude and inapposite test for the grant of public funds. Moreover, it is widely acknowledged that domestic violence perpetrators obsessively exert power and control over their partners and also over their children; they often maintain control by seeking to ensure that their victims are too frightened or too ashamed to mention the abuse to anyone else or to flee from the family home. We recognise that many women who fear domestic violence may not seek injunctive relief (it should not be overlooked that the perpetrator will usually make sure that there is no opportunity for the non-violent parent or the children to speak freely), but would nonetheless wish to have support in resolving issues concerning the children.

— Under the 2010 Green Paper proposals, there will be an “inequality of arms” in cases involving domestic violence before the courts—where the alleged victim will be entitled to public funds, whereas the alleged perpetrator will not be so entitled. In this regard, there is an unfortunate anomaly in the proposals of the 2010 Green Paper, because although the Government “considers that those who are accused of criminal offences should be able to benefit from publicly funded legal assistance when they cannot afford to pay for their own representation, if the interests of justice require it” (§4.6), the same person is not entitled to legal aid to defend themselves in respect of allegations of criminal conduct (assault and associated offences representing domestic violence) in the family courts.

— There is a real risk of a surge in the number of allegations, and possibly cross-allegations, of domestic violence in order to be able to qualify for public funds (see below—impact on the courts).

**Rights of child**

— There is a worrying contradiction in the approach of the 2010 Green Paper on the assessment of the nature of rights involved [§2.27]. Can it be said on the one hand that all parties who face removal of children from the family should have legal aid (even if they have not had any interest in/contact with the child for many years), but that a father who is being unreasonably denied any contact, and therefore at risk of losing his relationship with his child, should not?

— The 2010 Green Paper appears to be geared towards proportionately meeting the interests of the party seeking legal aid, as opposed to meeting the interests of the children involved in the proceedings. That should be the focus of the system.

— The UN Convention on the Rights of the Child places an obligation on public authorities to prioritise the welfare of children but the 2010 Green Paper proposals appear to be failing to do so.

**The section 37 cases**

— In a private law children case, if a Judge considers that serious child protection issues arise such that the threshold for a care or supervision order with respect to the child may be satisfied, the court may direct the appropriate authority to undertake an investigation of the child’s circumstances (section 37 CA 1989).

— At the same time as directing that section 37 investigation, the court may make an interim care order or an interim supervision order with respect to the child concerned (section 38). Under an interim care order, the Local Authority will acquire parental responsibility for the child which they may not seek in/to contact with the child for many years), but that a father who is being unreasonably denied any contact, and therefore at risk of losing his relationship with his child, should not?

— In this way children can be removed into foster care by a Local Authority under court order made in proceedings in which the parents would not be entitled to legal aid and will have been unrepresented.

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31 §2.27 “In civil and family legal aid, our aim is to introduce a targeted scheme which directs resources to those areas of law we judge to be priority. Our consideration of the justification for public funding for civil and family cases is based on an assessment of the nature of the rights involved, the client’s ability to represent his or her own case and the availability of alternative assistance, remedies or funding.”
The Rule 9.5 cases

- Where private law children cases raise issues of “significant difficulty”, the Court may join the child to the proceedings as a party (this is done under Rule 9.5 of the Family Proceedings Rules 1991). These cases include cases:

- Where there are serious allegations of physical, sexual or other abuse in relation to the child.
- Where there are complex medical or mental health issues to be determined or there are other unusually complex issues.
- Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute (see above).
- Where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court.
- Where there is a contested issue about blood testing.

- These cases are invariably not suitable for mediation.
- The 2010 Green Paper proposes that parents will remain ineligible for public funds for representation in these cases (even though the child will be represented).

- The Courts will therefore have unrepresented litigants before them:
  - Being required to marshal the relevant evidence in a case concerning physical or sexual abuse of a child, where there may be, for example, concurrent police involvement/investigations.
  - Having to deal with (and cross-examine on) expert evidence relevant to serious allegations of physical or sexual harm of a child.
  - Having to consider and deal with expert evidence relevant to the court practice of a foreign jurisdiction.
  - With “mental health issues”, who will be expected to represent themselves even though the “significant difficulty” envisaged in the case is precisely the fact that the parent has such a condition.

Abuse/29 Child homicides

- The Committee should consider the report of Hilary Saunders into “Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection”. This is a review of cases in which children were killed while under contact or residence orders. While many of the deceased children were in families where there was a history of domestic abuse, in others there was not—simply an ex-partner’s obsessively controlling behaviour (a characteristic feature of domestic violence); in another case there were concerns about the child’s safety which were not picked up by the court.

- One of the clear recommendations of the report was that “Legislation should require the courts to assess risk and to prioritise the safety of the child in all cases involving allegations of abuse, because there is always likely to be risk in contact disputes involving domestic violence.”

- Where unrepresented litigants appear before a Court a significantly greater onus falls on the Judge to investigate the case; the chances of the Judge failing to pick up undercurrents of abuse are high. “Inexpert, sometimes emotional, and procedurally naive litigants pose a number of ethical and managerial problems for judges.”

Sexual abuse

- Among the most difficult cases in private law are cases where a parent alleges that another parent has sexually abused the child, their child. This allegation often involves detailed and expert evidence. Legal aid will not be available for the parents in these circumstances (see above).

- We would want to draw the Committee’s attention to an apparent anomaly in the 2010 Green Paper proposals. The Government intends to retain legal aid:
  - “for money claims against both private individuals and public authorities where (i) they arise out of allegations of the abuse of a child or vulnerable adult; or (ii) they arise out of allegations of sexual assault. This provides legal aid for cases concerning, for example, allegations of abuse in local authority care, or in private educational or care institutions” (§4.56)
  - “… for an applicant in “a damages claim which arises out of the abuse of a child or vulnerable adult...”” (§4.17)
  - “We consider that money claims which arise out of allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault, have an importance that goes beyond a simple money claim.” (§4.57)

— “In the light of the importance of the issue at stake, the seriousness of the alleged harm suffered by the litigant, the likelihood of their vulnerability and the lack of sufficient alternative forms of assistance to justify the withdrawal of legal aid, it is our view that the provision of legal aid funding is justified. We propose that it is retained for these claims.”

§4.58

— But note that where the same allegation is made in the context of family proceedings, and the issue is whether the alleged abuser should have contact with the alleged victim child, or whether a prohibited steps order should be considered to prevent the alleged perpetrator having contact, legal aid is not available for either parent to be represented on this vital issue.

Intractable contact cases

— Intractable contact disputes are some of the most difficult private law cases which the Court has to resolve. The issues are stark—often involving a question of whether a parent should be able to see their child at all, and how to compel the parent with care to facilitate the contact. The authority of the Court is necessary.

— As Baroness Hale said in Re G (Children) [2006] UKHL 43 [2006] 2 FLR 629 “Making contact happen and, even more importantly, making contact work is one of the most difficult and contentious challenges in the whole of family law” (emphasis added).

— These cases are no more suitable for mediation than they are for resolution by the courts through unrepresented parties.

28. We turn now to consider the Impact on the Court system:

— In cases involving family/relationship breakdown, there is a particular concern over cases where both parents will be unrepresented; the nature of the cases is such that parties have or have had an emotional connection to each other. This factor alone inhibits the parties’ ability to view the issues objectively, look for compromise, consider settlement; this is likely to make cases longer.

— It is likely that we will see an increase in the number of allegations of domestic violence by parties seeking entitlement to public funding/representation in domestic violence/children and ancillary relief proceedings. The focus on providing funding only for cases involving domestic violence is likely to lead to a proliferation of cross-allegations by respondents to Family Law Act applications as a means of obtaining public funding. This will inevitably lead to further pressure being placed on court resources due to the additional time required to hear such matters.

— It is likely that there will be an increase in the number of contested hearings to determine allegations of domestic violence, given that entitlement to public funds in associated proceedings will depend on the alleged victim having obtained an “order” (the resolution of domestic violence proceedings by the giving of undertakings as to future conduct, a common and proportionate manner of dealing with many of these cases, would not appear to entitle the alleged victim to public funds in associated proceedings). This will have an impact on the legal aid budget and on the congestion in the family courts.

— There has been no, or no effective, assessment of the impact on the Family Justice System of the proposals in the 2010 Green Paper to remove from scope the large number of private law children and ancillary relief claims.

2005 Research

— The 2010 Green Paper seeks to draw on the 2005 Research to support the proposition that there is not a significant difference “in terms of court time” (§4.268) between a case in which a party is represented, and one in which he/she is not.

— In fact the 2005 Research revealed the opposite in family cases:

“For family proceedings … where the applicant was unrepresented or where both parties were unrepresented, cases appeared to take significantly longer.”

34 (emphasis added)

— Moreover, cases involving litigants in person are (so the researchers found in 2005) less likely to be settled.35 This plainly adds costs and delay to the court system.

Further research

— It is acknowledged in the 2010 Green Paper that there will be an increase in the number of litigants in person in the family courts [§4.266]. It is acknowledged by the MoJ that this will “potentially” have consequences for the family justice system—“delays in proceedings, poorer outcomes for litigants (particularly when the opponent has legal representation), implications for the judiciary and costs for Her Majesty’s Courts Service”.

— As practitioners, we advise that the “potential” consequences identified will in fact be the inevitable consequence of the proposals. It is our view that there will be:

— a huge surge in the number of litigants in person in the family courts;
— an undoubted increase in the financial burden on HMCS;

34 2005: page 257.
— longer delays in the family court system;
— unfair burdens placed on the judges to manage the cases; and
— higher risk of the wrong outcomes being reached for children.

— The Government has done no further or other research into the impact of the proposals on the Court System. Although the Government indicates that it is “undertaking further research into this area” [§4.269] we understand that this research is only just being “scoped”. We have no further details.
— It is a particular concern that the results of the proposed research will not be available until after the conclusion of the Consultation period (see §4.268–9).

December 2010

Written evidence from the Criminal Bar Association (AJ 17)

EXECUTIVE SUMMARY

1. The Criminal Bar Association ("CBA") represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

We apologise for the late submission of this response.

2. The CBA acknowledge the government is dealing with a huge financial crisis. However the current proposals are a depressing reversion to the frequently targeted area of advocacy fees, broadly stagnant over the last 15 years and recently subject to heavy cuts described as “salami slicing” by the Lord Chancellor. The cuts and the absence of any proposals for considering other sources of funding will further depress hard working and diligent professionals praised by Lord Carter in his review of legal aid for their industry.

3. The fundamental structural reforms that are in the pipeline are merely foreshadowed and are not set out even in outline in the consultation paper. There are arguments of principle, which are yet to be heard and resolved, concerning whether it is necessary or appropriate to implement fundamental changes to the way in which legal services in criminal cases should be delivered in future. The government is, in any event, imposing on itself a dangerously ambitious timetable for implementation of complex reforms. The current proposal to proceed to phased implementation without the safeguard of a properly assessed pilot scheme borders on the reckless.

SUBMISSIONS

4. The CBA seek to address some of the specific issues posed by the Justice Committee as follows:
— What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

5. There is a present danger of quality practitioners and entrants to the profession deserting criminal work. The Chairman of the Bar has stated publicly that publicly funded practitioners will have to diversify away from legal aid. The process is already happening and one leading criminal set has recently relocated to the City to be closer to their desired market. There has been a dramatic fall in the number of pupillages available at the self employed bar (20% fall over the last two years). LSC funding for training contracts for solicitors (available until recently) was never extended to assist pupillage at the Bar. Anecdotal evidence suggests the missing pupillages are in criminal sets while commercial sets are able to offer financially attractive prospects. The present approach in chapter 6 of the Green Paper will further deter quality entrants to the profession from pursuing criminal work and accelerate the progress towards a two tier system with a gulf between the private and publicly funded sectors.
— The Government predicts that there will be 500,000 (sic) fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

6. We do not seek to comment on this question.
— What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

7. The government is seeking to reduce the number of criminal cases subject to the VHCC contracting regime. The government should look again at the GFS plus alternative proposed by the CBA and Bar Council to the last government. GFS Plus is a proposal designed by the Bar Council to replace VHCCs. Like RAGFS, GFS Plus provides simple formulae for calculating in advance the fee for a case and thus does away with the need for contract managers and negotiation with the LSC. It would provide simplicity, predictability and administrative savings. The current proposals, following the pattern set by the last government of slashing
rather than slicing fees are crude, risk driving quality practitioners out of the market and threaten to increase the administrative complexities that beset the funding of these cases.

8. Looking at legal aid more widely, it is disappointing to see no reference in the proposals to research into alternative sources of funding. One obvious example is to permit the use of restrained assets (with appropriate capping) as a source of funding for the defence of criminal proceedings. Consider the example of a defendant accused of a serious fraud who has £1 million on deposit in a bank account frozen under a restraint order. At the moment, the legal aid fund has to fund his defence to the criminal charges. He is not allowed to use his own money. This type of case is a huge drain on scarce resources and it is a burden assumed by the government of its own volition. The argument that the sums restrained need to be preserved in the hope that some time down the line after the expenditure of a great deal of legal costs a confiscation order may be obtained to benefit other departments is no answer to the problems created for the hard pressed legal aid fund. By all means let there be a cap on the amounts released but let the tap be turned on.

— Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

9. We do not seek to comment on this question.

— What are the implications of the Government’s proposals?

10. The crude proposals on fees come as the 13.5% cuts to advocacy fees made by the last government are being implemented. Junior barristers will be the worst affected by the proposals to alter the fees in either way cases that plead guilty in the Crown Court since solicitors will seek to pass on the potentially unprofitable cases to the junior bar at cut prices. Meanwhile, those QCs who defend in murder cases and who accepted significant cuts in 2006 to fund the Carter rebalancing to the benefit of the Junior Bar now face what is said to be a 25% cut in their fees on top of the current 13.5% cuts. These proposals undermine professional confidence in the government’s commitment to retaining quality advocacy in the system.

11. The detailed proposals on structural reform of legal aid funding are still awaiting. There are arguments of principle, which are yet to be heard and resolved, concerning whether it is necessary or appropriate to implement fundamental changes to the way in which legal services in criminal cases should be delivered in future. For example, the introduction of a competitive market will for the first time formalise a system where there will be an incentive to instruct the cheapest qualified rather than the best available advocate. At present, we are focussing on any and all ways in which the Criminal Bar can make constructive proposals to enable the MoJ to deliver the savings demanded in the CSR. That present necessity is an entirely different matter from principled arguments about the system.

12. As far as timing is concerned, the government acknowledges that the criminal defence market is complex (para 6.54). The paper accepts that work has to be done to design an appropriate model for the introduction of competitive tendering. No such model exists or has yet been proposed. The paper suggests a consultation next year with phased implementation of the final scheme later beginning with tendering later in 2011 (para 6.62). The CBA are frankly alarmed at the proposed timetable being considered for changes that will completely alter the landscape of criminal defence services. These are long term changes and there seems to be no justification for ignoring the National Audit Office’s recommendation for a properly controlled and monitored pilot project for an innovation of this type and scale. The consequences of getting things wrong would be serious and irreversible.

December 2010

Written evidence from the Legal Action Group (AJ 21)

THE LEGAL AID SYSTEM’S RETREAT FROM THE HIGH STREET

ABOUT LAG

Legal Action Group (LAG) is a charity which promotes equal access to justice as a fundamental democratic right. LAG is independent of the providers and funders of legal services, and seeks to represent the interests of the public, particularly the vulnerable and socially excluded, by improving legal services, the law and the administration of justice. We also aim to increase lawyers, advisors and the general public’s knowledge of the law through our programme of publications and training.

LAG is concerned about the potential impact of the proposals in the government’s green paper on legal aid. We believe these will have a significant effect on many ordinary members of the public’s ability to access to justice. Vulnerable and socially excluded people particularly will find it increasingly difficult to get the help and advice they need on civil legal problems. The government’s own analysis shows they will be disproportionately hit by the proposals. This paper discusses the decline in the numbers of legal aid providers over recent years, as well as the likely impact of the government’s proposals on both criminal and civil legal aid.

1. CIVIL LEGAL AID AND THE NUMBERS GAME

The following table breaks down the number of legal aid contracts over the last five years by category of law.
Table 1

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Family</td>
<td>2,434</td>
<td>2,677</td>
<td>2,692</td>
<td>2,756</td>
<td>2,887</td>
</tr>
<tr>
<td>Housing</td>
<td>501</td>
<td>561</td>
<td>542</td>
<td>571</td>
<td>592</td>
</tr>
<tr>
<td>Welfare Benefits</td>
<td>428</td>
<td>445</td>
<td>435</td>
<td>459</td>
<td>467</td>
</tr>
<tr>
<td>Debt</td>
<td>404</td>
<td>423</td>
<td>405</td>
<td>407</td>
<td>411</td>
</tr>
<tr>
<td>Personal injury</td>
<td>386</td>
<td>354</td>
<td>833</td>
<td>914</td>
<td>960</td>
</tr>
<tr>
<td>Immigration</td>
<td>223</td>
<td>247</td>
<td>263</td>
<td>313</td>
<td>367</td>
</tr>
<tr>
<td>Mental health</td>
<td>210</td>
<td>243</td>
<td>250</td>
<td>273</td>
<td>283</td>
</tr>
<tr>
<td>Employment</td>
<td>190</td>
<td>218</td>
<td>200</td>
<td>216</td>
<td>222</td>
</tr>
<tr>
<td>Clinical negligence</td>
<td>218</td>
<td>175</td>
<td>262</td>
<td>275</td>
<td>273</td>
</tr>
<tr>
<td>Community Care</td>
<td>100</td>
<td>113</td>
<td>93</td>
<td>73</td>
<td>76</td>
</tr>
<tr>
<td>Actions against the police</td>
<td>57</td>
<td>67</td>
<td>69</td>
<td>72</td>
<td>75</td>
</tr>
<tr>
<td>Public Law</td>
<td>45</td>
<td>46</td>
<td>49</td>
<td>44</td>
<td>46</td>
</tr>
<tr>
<td>Education</td>
<td>38</td>
<td>44</td>
<td>46</td>
<td>51</td>
<td>57</td>
</tr>
<tr>
<td>Consumer</td>
<td>33</td>
<td>37</td>
<td>38</td>
<td>39</td>
<td>40</td>
</tr>
<tr>
<td>total non family</td>
<td>2,833</td>
<td>2,973</td>
<td>3,485</td>
<td>3,707</td>
<td>3,869</td>
</tr>
<tr>
<td>total</td>
<td>5,267</td>
<td>5,650</td>
<td>6,177</td>
<td>6,463</td>
<td>6,756</td>
</tr>
</tbody>
</table>

In most areas of law there has been a steady decline in the number of contracts held by firms and NIP organisations as they continue to leave the legal aid system. The number of legal aid contracts is greater than the number of individual firms and NIP organisations in the system, as many hold contracts in more than one area of law and some have more than one contract in the same category of law if they operate from locations in different areas of the country. There are now only 2,058 individual civil legal aid solicitor firms in the legal aid system, down 195 on the previous year (2008–09), and 28 not for profit organisations have left civil legal aid in the last year leaving 332. The table below breaks down the numbers of civil legal aid contracts held by firms, telephone contracts and NIP organisations over the last year.

Table 2

<table>
<thead>
<tr>
<th>Contracts</th>
<th>2009–10</th>
<th>Provider type</th>
<th>NFP</th>
<th>telephone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solitors</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Family</td>
<td>2,414</td>
<td>16</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Housing</td>
<td>326</td>
<td>165</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>Welfare Benefits</td>
<td>124</td>
<td>297</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Debt</td>
<td>129</td>
<td>267</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>Personal injury</td>
<td>386</td>
<td>62</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Immigration</td>
<td>161</td>
<td>62</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mental health</td>
<td>207</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment</td>
<td>103</td>
<td>78</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Clinical negligence</td>
<td>218</td>
<td>29</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Community Care</td>
<td>121</td>
<td>29</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Actions against the police</td>
<td>57</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Law</td>
<td>45</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Education</td>
<td>29</td>
<td>7</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Consumer</td>
<td>31</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>total non family</td>
<td>1,887</td>
<td>910</td>
<td>36</td>
<td></td>
</tr>
<tr>
<td>total</td>
<td>4,301</td>
<td>926</td>
<td>40</td>
<td></td>
</tr>
</tbody>
</table>

Until early 2000 any solicitor could undertake legal aid work provided they’d held a practicing certificate for more than three years. From January 2000 firms and NIP agencies had to hold a quality mark awarded by the Legal Services Commission in the relevant area of law to be able to provide a legal aid service. In civil legal aid, after the introduction of compulsory quality marks the number of providers was reduced from around 10,000 to 4,860 and further falls have left the number at around 2000 currently. The attrition rate for criminal providers has not been as great, but it is still significant. In 2000 there were 2,925 criminal legal aid providers. There are now 1,997 criminal legal aid firms, 84 less than last year.

In LAG’s view the introduction of compulsory quality marks improved both the quality and management standards in organisations providing legal aid services. However, it did significantly reduce the number of access points for legal aid and changes to legal aid, such as the introduction of fixed fees three years ago, has caused a continued decline in the number of legal aid providers.

In civil legal aid, family law has always been predominant with most large towns having at least some family legal aid providers. As both tables show though, in other areas of civil law the numbers of providers is much smaller which means that coverage outside the larger conurbations has always been at best patchy.
From Retreat to Rout

The following table estimates the numbers of contracts in each area of law after the proposed cuts to scope are implemented. In family law it is estimated that around 60% of firms would be forced out of the system. This estimate is based on the loss of 82% of the existing spend on legal help, the system of initial advice and help on a legal problem, and 41% of the spending on legal representation.(iv) The other figures are based on the loss of legal help income. A dash indicates the areas of law which have been cut entirely from scope.

Table 3

<table>
<thead>
<tr>
<th>Contracts</th>
<th>Provider type</th>
<th>Solicitors</th>
<th>NFP</th>
<th>telephone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family</td>
<td></td>
<td>965</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Housing</td>
<td></td>
<td>226</td>
<td>165</td>
<td>10</td>
</tr>
<tr>
<td>Welfare Benefits</td>
<td></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Debt</td>
<td></td>
<td>32</td>
<td>66</td>
<td>2</td>
</tr>
<tr>
<td>Personal injury</td>
<td></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Immigration</td>
<td></td>
<td>120</td>
<td>45</td>
<td>-</td>
</tr>
<tr>
<td>Mental health</td>
<td></td>
<td>207</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td>Employment</td>
<td></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Clinical negligence</td>
<td></td>
<td>-</td>
<td>71</td>
<td>29</td>
</tr>
<tr>
<td>Community Care</td>
<td></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Actions against the police</td>
<td></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Public Law</td>
<td></td>
<td>45</td>
<td></td>
<td>-</td>
</tr>
<tr>
<td>Education</td>
<td></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Consumer</td>
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<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>total non family</td>
<td></td>
<td>701</td>
<td>308</td>
<td>16</td>
</tr>
<tr>
<td>total</td>
<td></td>
<td>1,666</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

It is difficult to estimate accurately the total numbers of providers which would be left in the system with such a large number of contracts being cut. LAG believes it would be around 900 firms of solicitors, but this figure could be much lower as it would not be viable for many firms to continue in the legal aid system especially with the proposed cuts to scope in family law. Around 100 NIP providers might remain, but again this figure could be much lower as the areas completely cut from scope, such as welfare benefits have a larger impact on NIP agencies. LAG believes if the government’s proposals are implemented the attrition in the numbers of providers over recent years will become a rout and legal aid will cease to be viable as a nationwide public service.

The solicitor firms continuing with legal aid would tend to specialise in child protection and domestic violence cases and would be concentrated in large urban areas such as London and the West Midlands, with the risk of up to 60% of the population who live outside these areas being excluded from being able to access legal aid services. LAG fears this would result in a substantial risk of there being insufficient firms to allow for conflicts of interests. Firms would also tend to be more geographically isolated than they are now, making it less likely for clients to be able to travel to alternatives if their local firm was conflicted out in a case.

LAG is suggesting that a more detailed assessment of the impact of the proposed changes in civil family legal aid needs to be undertaken. This impact assessment needs to accurately model, as far as possible, the numbers and location of firms specialising in family law which would remain in the system to ensure that the general public in all areas of the country are within reasonable travelling distance of a family lawyer. LAG is asking the Justice Committee to support this request.

The situation is worse with regard to other areas of law. Housing law providers currently tend to be mainly confined to the large conurbations with a few trying to cover big geographical areas, clients either have to travel long distances or, rely on telephone advice services. LAG believes it is difficult to progress cases beyond initial advice through telephone services and the findings of our recent opinion poll on legal aid services indicate that the lowest social groups, while being more likely to qualify for civil legal aid, are the least likely to use telephone advice services.(v)

In the other areas of law services are currently confined to a small number of providers. Over the years civil legal aid services have tended to develop in conurbations with a large number of eligible clients living in close proximity to solicitor firms and NIP providers. This has led to an uneven spread of services with some areas being served relatively well while others have not.

Table four shows the top five spending areas and five lowest areas in the country for civil legal aid. The table was compiled for LAG’s book on legal aid policy which was published in 2009.(vi) Especially in the low spending areas the civil legal aid expenditure tends to be concentrated in family cases. The indicative spend figures are what the LSC has calculated would be the appropriate level of spending in the area if civil legal aid resources were evenly spread across the country according to demand, this is compared to the actual spend per area.
Table 4

<table>
<thead>
<tr>
<th></th>
<th>LSC Indicative</th>
<th>Actual</th>
<th>% Spend against indicative</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Top five Spenders</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Camden</td>
<td>590,983</td>
<td>2,206,712</td>
<td>373.4</td>
</tr>
<tr>
<td>Hackney and City</td>
<td>663,945</td>
<td>2,209,640</td>
<td>332.8</td>
</tr>
<tr>
<td>Tower Hamlets</td>
<td>639,317</td>
<td>1,689,447</td>
<td>264.26</td>
</tr>
<tr>
<td>Ealing</td>
<td>642,831</td>
<td>1,579,569</td>
<td>246.1</td>
</tr>
<tr>
<td>Liverpool</td>
<td>1,187,302</td>
<td>2,798,663</td>
<td>235.72</td>
</tr>
<tr>
<td><strong>Bottom five Spenders</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Surrey</td>
<td>52,9271</td>
<td>226,4806</td>
<td>23.37</td>
</tr>
<tr>
<td>East Riding</td>
<td>710,950</td>
<td>191,296</td>
<td>26.91</td>
</tr>
<tr>
<td>Kingston</td>
<td>632,527</td>
<td>173,065</td>
<td>27.36</td>
</tr>
<tr>
<td>South Herefordshire</td>
<td>1,396,982</td>
<td>425,061</td>
<td>30.43</td>
</tr>
<tr>
<td>Bexley</td>
<td>407,806</td>
<td>144,457</td>
<td>35.42</td>
</tr>
</tbody>
</table>

It should be stressed that the high spending areas are reacting to the demand for services and that the demand for services in the low spending areas is suppressed by the lack of services. The history of civil legal aid shows that the pattern of provision on the ground determines whether the public can access their legal rights. If no services are available the public are marooned from both advice and representation in civil law. LAG fears that if the planned scope changes go ahead this will be exacerbated, as the remaining legal aid services will be further concentrated, leading to a postcode lottery for services, which the bulk of the population will lose.

POOR AND VULNERABLE DENIED ACCESS TO JUSTICE

The document “Legal Aid Reform: Scope Changes- Equalities Impact Assessment” was published with the green paper on legal aid along with other impact assessments. The document, using the available data, sets out to assess the likely impact of the proposed cuts on groups of people protected by equalities legislation. It would be fair to say that the report pulls no punches with regard to detailing what the proposed legal aid cuts will mean for the most poor and vulnerable in society. For example the removal of debt, family, non-homelessness housing matters and welfare benefits would impact on the following:

- Debt- a disproportionate impact on sick and disabled people,
- Family legal aid cuts- 65% of the client group are women,
- Non-homelessness housing matters will have a disproportionate impact on women, Black Asian and Minority Ethnic (BAME) and ill or disabled clients,
- Welfare benefits- will have a disproportionate impact on women, BAME and ill or disabled clients.

The paper acknowledges that civil legal aid is a service which tends to serve higher numbers of people from protected groups compared to the general population. LAG would add that as the service is subject to a means test it overwhelmingly serves the very poorest people in the country. The impact assessment paper argues that while most of the proposed scope cuts will have a disproportionate impact on protected groups this can be justified by the need to control public expenditure, the availability of other sources of advice and the need to focus legal aid on meeting domestic and international treaty obligations.

As demonstrated above if these cuts are agreed the number of civil legal aid providers would be substantially reduced cutting off many people from the civil legal advice that remains within the scope of legal aid scheme. Those people seeking advice on the areas of law cut from scope would have to rely on voluntary advice services which are under pressure from legal aid and other public spending cuts. In December last year LAG wrote to the Ministry of Justice asking ministers to consider establishing a commission to enquire into the future of social welfare law (SWL) services. To date we have not had a response from the government to our request. We are requesting that the Justice Committee consider supporting LAG’s suggestion to establish such a commission.

The aim of the Commission (or review as it could be called), will be to provide a future strategy for SWL balancing the need for society’s most vulnerable people to have access to quality independent legal advice within the government’s spending plans. The Commission’s tasks would be to-

1. Assess the availability and quality of services to the public in each area of law,
2. Research the funding and other resources available for advice services across government,
3. Make recommendations on the better integration of funding and infrastructure for advice services
4. Make recommendations on the future provision of SWL services including appropriate sources of funding.

LAG is urging the government to think again about its proposals for civil legal aid as if they proceed as they now stand, many people would be unable to obtain advice on or enforce many of their civil legal rights.
We fear that this would lead to an underclass of people disenfranchise from civil justice and indifferent to the rule of law.

2. CRIMINAL LEGAL AID

As advice and representation has to be guaranteed in criminal cases due to the European Convention on Human Rights, LAG believes that criminal legal aid is less vulnerable to reductions in access to justice. However, due to legal aid changes, such as the reintroduction of the means test, and other pressures, over the last ten years a process of consolidation has been taking place as firms merge, take over other firms or decide to leave criminal legal aid work.

At £700 million the cost of advocacy before Crown and other higher courts makes-up the bulk of expenditure in criminal legal aid. Just under 18%, (£125 million), of this budget was spent on 397 Very High Cost Cases (VHCCs) in the year 2008–09. VHCCs, which include complex fraud and terrorism cases, make-up less than 1% of the higher courts cases and have been the target of a number of government inspired initiatives to cut their costs in recent years. There have been two stand-offs, in 2004 and 2008, between the Bar and the government over VHCC pay rates. On both occasions the Bar has managed to boycott taking on new cases as a protest against rate cuts and wrung concessions from the government, the most eye catching being a £17 million overall increase in cash in 2004. In 2008 also a compromise was reached over fee rates.

Reductions to advocates’ fees in criminal cases were pushed through prior to the general election last year. Only five days after a consultation on proposed new rates closed, the government tabled the changes in a statutory instrument. From 27 April last year, nine days before the general election, fees in crown court cases were cut by 4.5% with further cuts planned over the next two years to lead to a total cut of 13.5%.

From 14 July 2010, the threshold at which VHCC fees apply was raised from 40 to 60 days. The government also decided to abandon the VHCC specialist panel system and revert to contracts with individual firms for new cases. As the terms of reference to this enquiry imply the government could look again at fees in VHCC’s, but it would be difficult to make any further cut while the current cuts are being implemented, also LAG believes time is needed to assess the impact of the change to the threshold at which VHCC’s apply.

COMPETITIVE TENDERING

In a paper published on 22 March 2010 the government outlined plans to reduce the number of criminal legal aid firms through a Best Value Tendering process. They believed the process would leave around eight to ten firms in each of the 42 criminal justice areas and these firms would be compelled to do the full range of criminal law work. Up to 75% of firms would have been forced to close under the proposals. The government abandoned these plans after pressure from the Law Society and others.

In the green paper on legal aid the government has announced its intention to introduce a competitive tendering process for criminal legal aid work. LAG believes that around 10% of the budget for criminal legal aid could be saved if such a system was introduced. However, we see two main drawbacks. Firstly, the supplier base would shrink which could eventually leave a few national firms forming a cartel which could dictate prices. Secondly, it would end choice for criminal legal aid clients, they would be forced to take the representative available rather than being able to pick from a range of local firms. LAG believes that this lack of choice would risk a reduction in quality and independence of legal services.

(i) Tables 1 and 2 appear in the LAG Legal Aid Handbook which is due to be published in February 2011.
(ii) LSC Statistical Information 2009–10 p 1.
(vii) We define Social Welfare Law as housing, benefits, immigration, debt, employment, community care and other areas of public law.
(ix) Restructuring the delivery of criminal defence services, 22 March 2010 pub MoJ.

January 2011
Written evidence from Young Legal Aid Lawyers (AJ 29)

Young Legal Aid Lawyers is a group of lawyers who are committed to providing legal aid services. The group includes those who are still studying and training as well as recently qualified barristers and solicitors. It has a national membership of around 2,000 people. We share in common a strong belief in the importance of good quality representation and advice at all levels to those who could otherwise not afford it. We have chosen to commit ourselves to legally aided work despite the current lack of financial sponsorship or reward, because we want to provide a good quality public service within a justice system that does not favour the wealthy. We believe that without access to justice, there can be no justice at all.

Summary

YLAL considers that the flow of new, qualified, entrants into the legal aid sector is essential for a sustainable future for legal aid. Since our inception in 2005, we have become increasingly concerned about the lack of social mobility, the over use of paralegals and the lack of emphasis on quality legal aid service. We draw your attention to three discrete papers:

(i) YLAL’s paper on social mobility in legal aid36 (February 2010) highlighted key problems facing young legal aid lawyers and how these affect the number and quality of entrants to the profession. These problems include the lack of subsidised training opportunities; low salaries and the requirement for candidates to have copious and often unpaid work experience in legal aid.

(ii) YLAL has conducted research on the growing use of paralegals and believes the increased use of paralegals in place of trainees is adversely affecting the flow of newly qualitative solicitors into legal aid work37.

(iii) YLAL is very concerned about quality. In our paper published in September 201038 we also raised the issue of quality in the legal aid sector raising concerns about paralegalisation, poor supervision and lack of robust quality controls which have a particular impact on junior lawyers.

YLAL considers it essential that the Justice Committee recognises the need to ensure a sustainable system that promotes and encourages new and good quality lawyers to ensure our justice system is fair. The government’s proposed changes to legal aid would have far reaching implications for vulnerable members of society. They would also have a serious and negative impact on the number and quality of practitioners remaining in and entering all areas of law currently funded by legal aid. These constraints will drain the profession of qualified and dedicated lawyers in those areas of law affecting the most vulnerable in society.

1. What impact will the proposed changes have on the number and quality of practitioners, in all areas of law who offer services funded by legal aid?

New and aspiring entrants to legal aid work already face challenges identified in YLAL’s previous reports and responses (attached) that affect the number of entrants to the profession and in particular the diversity of entrants. We are concerned that further cuts and radical changes to the delivery and nature of legal aid will impact on young legal aid lawyers and exacerbate these issues.

1.1 Number of practitioners

1.1.1 Cuts to the budget for legal aid and potentially dramatic changes to delivery will reduce legal aid to an unacceptable level and leave many vulnerable members of society unable to seek redress and access justice. Although the telephone gateway proposals in the legal aid paper are vague and short, it is possible that entire sections for what is currently first tier face to face advice will be replaced by telephone advice. This could mean that new lawyers will either be stuck in call centres or may never deal with the early stages of cases. Routes for progression could become unclear and extremely difficult. Certainly, the roll out of competitive tendering without quality requirements across all areas of law in due course will reduce incentives for firms or providers to have trainees as volume takes precedence over quality. The cuts will necessarily reduce the size of the profession and in turn reduce the availability of jobs and training contracts.

1.1.2 Training contracts have already been reduced following the Legal Services Commission to scrap training contract grants in July 2010. This system financially supported firms who were unable to afford to train graduates. The recent scrapping of the LSC’s sponsored training contract grants has meant that many aspiring legal aid lawyers face as they are unable to find training contracts and are considering turning to other areas of law.

1.1.3 The recent reforms to the legal aid system have led to a total dearth of training opportunities in the legal aid sector. In our experience, several firms that used to offer many training contracts per year, now offer

It was in response to in response to a Government consultations “New opportunities: Fair Chances for the Future” (January 2009) and The Panel on Fair Access to the Professions report “Unleashing Aspirations” (July 2009).


none, or instead take on one or two paralegals “with a view to a training contract”, but with no firm guarantees of when that training contract may materialise. A few firms continue to take on trainees every year, but these placements have become increasingly competitive.

1.1.4 YLAL has long campaigned against the unfairness of the increasing trend that new entrants to the legal profession must have several weeks or months (often unpaid) work experience, before they are able to secure a post as a paralegal and eventually as a trainee or pupil.

1.1.5 YLAL’s research into social mobility, “Legal aid lawyers: the lost generation in the ‘national crusade’ on social mobility” (February 2010), indicated that there are a great many, highly talented candidates who cannot enter the legal aid sector because they cannot afford to. Increasingly in order to make themselves attractive to prospective employers, candidates have to work on a voluntary basis. This in turn has implications for quality standards and social mobility.

1.1.6 Bright students from poorer backgrounds will be forced to turn elsewhere, depriving clients of the most talented lawyers, and the profession of its future.

1.1.7 A recent Times Survey carried out by the College of Law found that over a third (35% in 2010) of students have more than £20,000 study debt, a rise on last year’s figure (27% in 2009). Of the nearly 2,000 who responded to the survey, more than 28% said that they would like to pursue a career in Legal Aid. However, 65% of these said that they were unlikely to take this further because of potential Legal Aid cuts. 80% of students feel that legal aid/publicly funded lawyers are underpaid. Nearly three quarters of the students believe that the Legal Aid budget should be ring-fenced to uphold access to justice for all.

1.2 Quality of practitioners

1.2.1 Training and supervision: YLAL’s survey on the optimal ratio of supervisors to caseworkers found that most people felt that quality became compromised if supervisors were responsible for over four caseworkers or trainees. The LSC’s supervisor standard only requires one supervisor to every six fee-earners.

1.2.2 Fee-earners at all levels appear to be taking on an increasing volume of cases. The impact of the proposals would result in the need to increase volume at all levels and thus supervisors would spend less time monitoring the work of paralegals and trainees. Supervision is often already regarded as a rather fluid commitment. Other deadlines and priorities often take precedence.

1.2.3 The reality is that very junior members of Young Legal Aid Lawyers now find themselves undertaking all levels of casework. In criminal cases, this can include everything from drafting the client care letter to analysing the prosecution evidence to finalising the defence case statement and effectively running crown court cases. Giving serious cases to a trainee or paralegal generally may have adverse consequences on clients. While a bright trainee or paralegal with all the time in the world may be able to research the answer to any question, the stress of handling so many cases with such little experience—let alone the stress of handling so many cases with such little experience. In cases where clients face prison sentences, handing the litigator’s role to junior fee-earners is a high-risk strategy.

1.2.4 Since the time management required to successfully run a large number of files only comes with experience, many junior fee-earners are working overtime to make up for their inexperiene. The result is that even the brightest and most enthusiastic new lawyers are likely to burn out with sheer exhaustion—let alone the stress of handling so many cases with such little experience. In cases where clients face prison sentences, handing the litigator’s role to junior fee-earners is a high-risk strategy.

1.2.5 These concerns apply equally to the over-reliance on paralegals in civil work where clients face the prospect of losing their homes, children or access to key health and social services.

1.2.6 There is a lack of robust quality controls. The criteria to become a supervisor in some areas of law is not based on any objective analysis of quality but often on having done certain types of work for a certain number of hours over a certain period of time.

1.2.7 Fixed fees, “paralegalisation”, low levels of supervision and lack of robust quality controls in the legal aid sector are having a profound effect on the sustainable flow of good quality new entrants and social mobility within the sector.

1.2.8 Pro Bono is not a replacement for quality legal aid services

1.2.9 The government appears to suggest that there will be others to fill the “justice gap”: charities such as the Citizens Advice Bureaux and Shelter are referred to in the consultation, as well as private lawyers working pro bono. While YLAL believes that pro bono can be incredibly valuable it is in no way a replacement for a properly funded and comprehensive system of legal aid.

1.2.10 The legal aid minister has stated that: “Pro bono can be a good filler for those lawyers out of work, or women who want to get back into the legal job market after having children.”40 The provision of access to justice for the vulnerable and voiceless in society must not become the domain of those lawyers to use as a “stop gap” while they wait for work somewhere else. By contrast, our members are driven by a commitment to social justice.

1.3 The importance of good quality services

1.3.1 Good quality legally aided representation should enable any individual to challenge failings and abuse of power by the State on an equal footing. Quality legal aid services enable the most vulnerable members of society to have an effective voice. It is only when both the State and the individual are able to stand as equals before the law with good quality representation on both sides that real justice is achieved. YLAL firmly believe that bad quality representation is worse than no representation at all.

2. The Government predicts that there will be 500,00 fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

2.1 The impact assessment notes that “[l]egal aid recipients are amongst the most disadvantaged in society, reflecting both the nature of the problems they face as well as the eligibility rules for legal aid41.” Having explicitly acknowledged this, the assessment then highlights that looking backward, the changes to scope would have meant that:

— 44% of cases where legal representation was granted in 2008–09 would never have been funded;
— 68% of cases where legal help was used would never have been funded; and
— between 80%–85% of the people who got legal aid in these cases would have been in the poorest 1/5 of the population42.

2.2 The obvious implication of this is that between one half and two thirds of these legal problems would never have been resolved. The impact of this—the denial of access to justice—would have fallen almost entirely on the very poorest in society. The impact assessment acknowledges the severe impact this could have on health and well being.

2.3 A survey produced to inform the Constitutional Affairs Committee’s review of legal aid provision in 200643 found that the overall motivation of young legal aid lawyers entering the profession is a belief in social justice. Financial gain is no longer a reason to enter this area of work. In our survey only 1% of respondents listed financial reward as a motivation for doing legal aid. The overwhelming majority (76%) of respondents listed working towards a more just society as a chief motivation for doing legal aid work.

2.4 Today, most new and aspiring legal aid lawyers are even more likely to be devoted to social justice as there is little other good reason to do legal aid work. Therefore, those who are currently committed to this work are likely to be further deterred from doing it is the very poorest are unable to access the help they need through the service.

3. What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

There have been a number of positive suggestions put forward by legal aid practitioners that the Government has not considered. This includes ideas such as the “polluter pays” principle. YLAL also believes that the introduction of quality controls could in fact mean that where legal aid is spent it is much more likely to be effective in the long term and more likely to result in cost savings across all areas of spend. YLAL notes that there is virtually no reference to quality in the paper other than that the professions should be self regulating.

4. Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

4.1 YLAL believes it is not possible to consider the impact of the Jackson proposals without also considering the proposals on legal aid reform, and his report supports our contention, since he makes it clear that he considers that any further cutbacks in legal aid will undermine access to justice. At paragraph 4.2 of his report he states:

“I do, however, stress the vital necessity of making no further cutbacks in legal aid availability or eligibility. The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas. The statistics set out elsewhere in this report demonstrate that the overall costs of litigation on legal aid are substantially lower than the overall costs of litigation on conditional fee agreements.

Since, in respect of a vast swathe of litigation, the costs of both sides are ultimately borne by the public,
the maintenance of legal aid at no less than the present levels makes sound economic sense and is in the public interest.”

4.3 He also accepts (at paragraph 3.4) that legal aid providers cross subsidise, and profits from inter-partes costs allow legal aid practitioners to carry out unprofitable work.

4.4 While the Green Paper on legal aid repeatedly states that it holds financial claims to be of low objective importance and that money claims do not require legal aid due to alternative sources of funding, it appears that the paper following the Jackson proposals will also discourage small value claims and significantly reduce access to justice. The result is that poor people will be less likely to gain just satisfaction even where the law allows it. In turn, this affects the extent to which state authorities may act without fear of being held to account. This is unjust and not the kind of legal system in which young legal aid lawyers wish to work.

4.5 As legal aid shrinks, and more of the population become ineligible for legal aid, the cost and viability of the private legal services insurance market may change very quickly and dramatically to the detriment of access to justice.

5. What are the implications of the Government’s proposals?

5.1 The Government itself warns of the “wider social and economic costs” of the cuts including: 44

— reduced social cohesion;
— increased criminality;
— reduced business and economic;
— increased resource costs for other Departments;
— increased transfer payments from other Departments

5.2 YLAL considers these consequences and those at paragraph 2.1 above are unacceptable. They entail an unquantified economic cost and human cost which undermines the government’s stated aim of cutting the deficit. These consequences will fall on the poorest members of society. The impact of the proposals may be to totally destroy the current legal market which is the only major public service to have developed through independent competitive practices. In the process, and without any safeguards to protect quality and the future training of legal aid lawyers, YLAL believes it will be virtually impossible for new entrants to become good quality, qualified practitioners achieving meaningful social justice for those who otherwise cannot afford it.

6. Recommendations the committee should consider including in its report

6.1 If the Government truly wishes to be judged by the quality of legal aid services and not by the money spent (The Times, 24 June 2010), quality must be central to any further changes. Proactive steps need to be taken to ensure quality and encourage new lawyers to qualify into legal aid practice.

6.2 There are tried and tested methods to ensure quality. These have been considered and reviewed by the Institute of Advance Legal Studies and range from properly conducted peer review to the use of membership to accredited panels. If quality is placed at the very heart of legal aid provision, firms will want and need to train new entrants to work towards qualification. The survival of the firm will require a steady flow of committed and qualified lawyers.

6.3 The Government’s proposals for a sustainable future for quality legal aid services must signal an end to irrational decision making on behalf of the State that undermines rather than promotes access to justice. The new proposals must champion quality legal aid provision. The dynamic and independent structure of legal aid provision in England and Wales is ideal for promoting quality through clients’ freedom to choose the best provider. This must be protected by ensuring that firms remain financially viable and are subject to robust quality measures.

January 2011

Supplementary evidence from Paul Mendelle QC, Bar Council, following the evidence session on Tuesday 8 February 2011 (AJ 53)

I was grateful to have the opportunity to give evidence, on behalf of the Bar Council, to the Justice Committee in connection with its inquiry into Access to Justice.

As soon as I left the session, I realised that I had misheard Christina Blacklaws’ point about capping advocates’ fees following which Ben Gummer asked me whether the Bar Council agreed. I thought the issue was directed to whether the Bar Council has, like the Law Society, considered capping. The position is that the Bar Council has indeed considered this idea in the past but has been firmly against it as it can see a number

of principled objections and practical problems which would make it unfair and unworkable. That remains the position.

February 2011

Supplementary evidence from the Ministry of Justice (AJ 56)

Average Duration of Divorce Cases when Parties Represented/Unrepresented

1. During his evidence giving at the select committee session yesterday morning, the Minister stated “HMCS management information shows that in 2009–10, divorce cases where both parties were represented took over 50% longer on average than those where neither were represented.” The Committee asked for more information on this.

2. This information was based on that set out in a written response to Simon Hart MP on 13 December (see Annex A, below). This shows that the mean duration of divorce cases was 34.1 weeks where neither party was represented, and 55.7 weeks where both parties were represented (an increase of around 63%).

3. This information should be treated carefully. It does not demonstrate a causal link between representation and case duration. It may be that a case where both parties are unrepresented is simpler, for example.

4. It is also important to note that “divorce” is being used in the legal sense of the dissolution of a marriage, and not the colloquial sense of including the issues that might arise from divorce, such as child contact. These latter cases are covered under the ‘Private Law’ heading in the figures below.

5. The data is subject to a number of other issues which should be borne in mind when drawing inferences from the figures, and as a result should be treated with caution. Many of these were highlighted in the original PQ reply. For example, the statistics are simply based on whether or not the case management information system has details recorded of a legal representative for the parties in these cases; the absence of information being recorded does not necessarily mean a party has represented themselves; the recording of such details does not mean that a party did not represent themselves at some stage(s) in the process. The statistics cover only cases dealt with at the High Court and county courts and do not include cases dealt with at Family Proceedings Courts (although for divorce cases specifically the vast majority are dealt with in the former two courts). More generally, all family court statistics carry the limitations associated with management information sources.

6. This said, we can safely assert that the data as it stands does not support the proposition that cases where parties are unrepresented take longer than those with representation (especially where both parties are unrepresented).

7. The Department will seek to further analyse this data, along with conducting the review of existing published research on litigants in person and analysing the information from the case file review which the Secretary of State referenced in his letter of 27 January to the Committee. This evidence will contribute to the analysis in the final Impact Assessments due to be published alongside the legal aid consultation response in spring 2011. There will also be a post-implementation review of any reforms.

February 2011

Annex A

FAMILY COURTS

Simon Hart: To ask the Secretary of State for Justice what assessment he has made of the effect on the average length of time a case is in the family courts of litigants choosing to represent themselves; and if he will make a treatment. [29691]

Mr Djanogly: The Ministry of Justice has not made an assessment of the effects on the average length of time a case takes in the family courts of litigants choosing to represent themselves.

We do have information on whether or not the applicant(s) and respondent(s) in the case had a legal representative. It should be noted that parties without a recorded representative are not necessarily litigants in person.

The following table gives details of the average durations of family cases completed in the financial year 2009–10, split by case type and by whether or not the applicant(s) and respondent(s) in the case had a legal representative.

Figures are only given for the High Court and the county courts as information is not available for all Family Proceedings courts. The High Court and county courts hear almost all divorce cases, about 25% of all public law cases and about 80% of all private law cases.
AVERAGE DURATION OF CASES COMPLETED IN COUNTY COURTS OR THE HIGH COURT IN ENGLAND AND WALES BETWEEN 1 APRIL 2009 AND 31 MARCH 2010, BY LEGAL REPRESENTATION

<table>
<thead>
<tr>
<th>Legal representative</th>
<th>Divorce</th>
<th>Public law</th>
<th>Private law</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean number of decrees absolute</td>
<td>Mean number of orders</td>
<td>Mean number of orders</td>
</tr>
<tr>
<td>Both applicant and respondent</td>
<td>55.7</td>
<td>40,088</td>
<td>54.5</td>
</tr>
<tr>
<td>Applicant only</td>
<td>44.6</td>
<td>44,904</td>
<td>36.5</td>
</tr>
<tr>
<td>Respondent only</td>
<td>59.7</td>
<td>2,707</td>
<td>56.2</td>
</tr>
<tr>
<td>Neither applicant nor respondent</td>
<td>34.1</td>
<td>28,796</td>
<td>34.1</td>
</tr>
</tbody>
</table>

Notes:
Figures are given where the applicant/respondent's representative has been recorded or left blank. Therefore, it should be noted that parties without a recorded representative are not necessarily litigants in person.

Divorce:
1. Figures include dissolutions of marriage or civil partnership and annulments of marriage or civil partnership.
2. The duration is calculated from the earliest recorded petition date to the earliest recorded decree absolute date.
3. Figures exclude cases where there is no record of a petition and cases where the decree absolute date is before the petition.
4. Time from petition to decree absolute may be affected by the time it takes the applicant to apply for the decree absolute once the decree nisi (first order) has been issued. In normal circumstances the applicant may apply for the decree absolute six weeks after the decree nisi has been issued, but (s)he may choose to wait longer than this.
5. The mean is the total of all of the durations, divided by the number of decrees absolute.

Public and Private Law:
1. Private law refers to cases brought under the Children Act 1989 where two or more individuals, usually separated parents, are trying to resolve a private dispute about their child(ren). Public law refers to child welfare cases where a local authority, or other authorised person, is stepping in to protect a child from harm or neglect.
2. Private law includes cases where a section 8 order (contact, residence, prohibited steps, specific issue) was made or where a parental responsibility order was made. Public law includes cases where a care order or a supervision order was made. This does not necessarily mean that these were the orders applied for.
3. The durations in both case types are calculated from the earliest application date (or the date the case was transferred in to the court if that is earlier) to the date of the order event.
4. A case is defined as applicant represented if at least one applicant in the case has a recorded representative. Similarly with respondents.
5. The mean is the total of all of the durations, divided by the number of orders.

Source:
HMCS FamilyMan system

Supplementary evidence from the Ministry of Justice following the evidence session with Jonathan Djanogly on Wednesday 16 February 2011 (AJ 60)

Follow Up Questions on Access to Justice

Following my appearance at the evidence session on 16 February, I undertook to write to the Committee on a number of issues. I am also responding to the Committee’s request for further information later that day.

(a) International cost comparisons

Suma Chakrabarti wrote to you on 16 December explaining the sources for the international comparisons that had informed the legal aid policy assessment and the formulation of the reform proposals. Subsequently you have taken evidence from Professor Roger Bowles who headed the York University team that carried out the October 2009 study for the Ministry.

The York study concluded that legal aid expenditure per head was higher in England and Wales than in the other jurisdictions studied, due to three main factors:

— more cases per capita are funded in England and Wales than elsewhere, in both criminal and civil justice;
— more criminal suspects are brought to court than elsewhere, and more of them are given criminal legal aid; and
— there is higher spending per case on both criminal and civil cases.
A range of factors are likely to contribute to the higher costs per case than elsewhere. These include, for example, differences in criminal procedure (e.g., length and nature of proceedings). It should also be noted that the figures quoted in the York Study do not control for differences in the cost of living or the relative value different countries place on access to justice.

The other major source of information is the biennial publication from the European Commission for the Efficiency of Justice. We are aware of some issues with the expenditure data for England and Wales in the most recent edition published last autumn. The CEPEJ figures are not consistent with their previously published figures. We are working with CEPEJ to ensure they are corrected in the next publication. The general position is that the England & Wales figure remains at £38 per head.

**How is MoJ bearing down on its internal functioning (of LSC) to make sure that its services are dealt with more efficiently?**

Our recognition that there are administrative efficiencies to be achieved at the LSC forms part of the rationale for our proposal that the LSC’s status be changed from an Executive NDPB to an Executive Agency of the MoJ. As an agency, the LSC will be able to realise efficiencies in a greater number of areas than would be the case if it was to rationalise but remain a NDPB. Savings will result from working reforms and efficiencies in HR, communications, IT, legal and governance, planning and assurance, shared services and finance. Additionally, the agency will have a significantly reduced headcount.

**Do you see cost per case or scope as being more important in terms of reducing the overall cost burden of legal aid?**

As mentioned during the hearing, they are both important issues.

(b) **The operation of tribunals**

The Committee referred to the view expressed by His Honour Judge Robert Martin, the President of the Social Entitlement Chamber, that welfare benefits law had become increasingly complex. The Government introduced its Welfare Reform Bill to Parliament on 16 February. The Bill represents the biggest set of changes to the welfare system in the last 60 years. The Universal Credit will restore fairness and simplicity to an overly complex, outdated and expensive benefits system that often acts as a barrier to getting back to work. It will find the right balance between the welfare state as a safety net and a benefits system that sends out a clear message: if you can work, you should work. Universal Credit is a fundamental reform of the benefits system. It will replace current means tested working age benefits and Tax Credits with a single welfare payment that rewards people for moving into work.

According to the 2007–08 report by His Honour Judge Martin when he was President of the Appeal Tribunals, since 2001 it is a regular theme of the Tribunal that DWP decisions are most commonly overturned because the Tribunal elicits additional factual information from the appellant, rather than through legal arguments. This is mainly in the form of oral evidence readily available from the appellant.

As I mentioned at our session, MoJ and DWP are already working closely together as part of wider Welfare Reform initiatives to improve the decision making and reconsideration processes for social security cases and increase efficiency throughout the appeal system, including at the Tribunal. This work should reduce the number of cases overturned at Tribunal by getting more decisions right first time.

With regard to the specific concerns associated with our legal aid proposals that tribunal cases could take longer, that poor cases will be brought which are not brought at present, or that winnable cases might not reach the Tribunal, we will be considering in the coming weeks the responses to the consultation, as well as the potential impact of our changes, including on the Tribunal Service. Our consideration will also include our literature review of the potential impact of litigants in person. All of this will be used to inform the final decisions on our proposals.

The social security appeals jurisdiction maintains a very strong focus on an accessible and informal tribunal process using informal tribunal rooms, clerks who have had customer service training and most importantly judges who are trained in helping unrepresented appellants give their side of the story and the appropriate consideration of equality and diversity and other cultural issues.

(c) **The funding arrangements for, for example, drug tests or psychiatric assessments—where these might be needed to determine whether an adult poses a risk to a child’s safety—in cases involving litigants in person**

Under the consultation proposals, legal aid would continue to be available in public law cases, such as care and supervision proceedings, which involve concerns about a child’s welfare. The consultation proposals included removing private law cases, such as disputes over contact with children, from the scope of legal aid, except where there is evidence of domestic violence. This would mean that legal aid would no longer be available for the parents’ share of the costs of expert assessments.

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45 "President’s Report: Report by the President of Appeals Tribunals on the standards of decision-making by the Secretary of State, 2007–08.”
Legal aid would continue to be available for children who need their own separate representation in family proceedings. Under rule 9.5 of the Family Proceedings Rules, to which I referred when I appeared before the Committee, the court can make a child a party to proceedings and appoint a guardian in circumstances including those you have raised. In such cases a public funding certificate would be issued for a legal representative for the child, and it could cover a proportion of the costs of expert assessments, depending on the circumstances of the case.

In addition, exceptional funding will be available for individual out of scope cases where legal aid is required in order to meet our domestic and international legal obligations. The issue of funding expert reports has also been raised in responses to the consultation, and we are giving it careful consideration.

(d) The availability of trained mediators

As a result of the LSC tender in 2010 to deliver publicly funded family mediation services, the number of organisations delivering mediation under legal aid has increased by 11%. There are now 201 organisations, quality assured by the LSC, which deliver mediation services across 1,002 locations in England and Wales (up from 742 locations previously) ensuring strong and improving levels of client access to mediation.

We are working with the Family Mediation Council to enable this growth to continue and to meet the increase in demand for services. This includes a programme of training courses for new mediators and “refresher” events for those who may not have done mediation work for some time.

There are at least 600 family mediation services in England and Wales listed on the database of the Family Mediation Helpline service. These are a mix of both private and voluntary sector family mediation services. Organisations responding to the consultation have indicated to us that there has been increased interest in training for mediation as a result of the Government’s legal aid proposals.

In addition, the Committee raised six questions as follows:

**Questions from the Committee**

**Transfer of funds from DWP to MoJ**

1. What mechanism is in place for the transfer of funds from DWP to the MoJ relating to the cost of tribunals where the DWP is found to have been at fault?

2. How is the level of funds to be transferred determined?

3. What value of funds have been transferred in each of the last five years; and what proportion of the cost of tribunal cases involving cases where the DWP was shown to be at fault this represented in each year?

4. Do any other mechanisms exist to transfer funds between the DWP and the MoJ to reflect the cost to the legal aid budget of providing advice and representation in cases involving DWP decision-making?

   As I also mentioned at the hearing, the Department of Work and Pensions provide more funding for the tribunals system if they provide more work for it. This derives from their responsibility to fund the additional cost of any policy change that they make. It does not relate to the success rate of the Department at the tribunal. At the moment DWP are funding additional costs resulting from the introduction of Employment Support Allowance which replaced Incapacity Benefit. The number of appeals against decisions made in relation to this benefit has been the major cause of an expected 71% increase in Social Security and Child Support appeals between 2008–09 and 2010–11. Funds have been transferred from DWP in relation to Employment Support Allowance for initial training costs and the cost of increased appeal hearings and comprise £1.3 million in 2008–09, £9 million in 2009–10 and an expected £21.1 million for 2010–11. There has also been a small transfer of funds for DWP changes to the child maintenance system comprising £0.2 million for each of the years 2008–09 and 2009–10.

   There are no further mechanisms in MoJ to receive funding from DWP on a case-by-case basis once policy changes have been put into effect.

**Family law**

5. What research has the Department considered on the likely impact of removing legal aid funding from most private family law cases on the numbers of cases which will reach court?

   The Department is not aware of any research that exists on this specific topic. While we have considered research suggesting that court engagement can sometimes exacerbate the conflict and distress of both children and parents, and that mediation can hold considerable advantages for some cases, the behavioural response of clients to changes in the availability of legal aid is uncertain and very difficult to accurately estimate. However, we consider that our proposals will incentivise people to take up mediation and as a result more family matters would be resolved through that route. We are currently conducting a review of the existing published research on litigants in person. We have also recently conducted a review of published literature looking at the impact of different types of advice, which set out to establish what evidence exists on the impact of advice on civil and family
justice issues. Specifically, it aimed to address whether the advice provided is acted upon, whether the issues being faced are resolved following the provision of advice, whether those receiving the advice were satisfied with the advice, whether the advice led to those receiving it being more educated on the issues faced and hence more able to deal with similar issues in the future, and whether the advice was an efficient method for addressing justice-related issues. We intend to use both literature reviews to inform our response to the consultation.

6. The Minister referred to figures which suggested that cases in which both parties were not represented took half of the court time than those in which both parties were represented. Could we please have a copy of the source of these figures (along with any relevant commentary you might like to provide)?

The Department provided an answer to this question to the Committee on 17 February 2011. I am attaching a copy of this response as an annex to this letter.

I hope this is helpful. A copy of this letter is being sent to the Clerk of the Justice Committee, Mr Tom Goldsmith. If you have any further queries please do not hesitate to contact my office.

January 2011

Supplementary evidence from the Ministry of Justice (AJ 61)

TRENDS IN LEGAL AID EXPENDITURE 2000–01 TO 2009–10

Overall expenditure

1.1 In the period from 2000/01 to 2009/10, expenditure on legal aid rose by almost 3% in real terms. While the cost of civil legal aid has gone down by 6% the cost of criminal legal aid has risen by 9%.

<table>
<thead>
<tr>
<th>Year</th>
<th>Civil (at 2009–10 prices)</th>
<th>Criminal (at 2009–10 prices)</th>
<th>Total Legal aid</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000–01</td>
<td>998</td>
<td>1,101</td>
<td>2,099</td>
</tr>
<tr>
<td>2001–02</td>
<td>905</td>
<td>1,211</td>
<td>2,117</td>
</tr>
<tr>
<td>2002–03</td>
<td>972</td>
<td>1,310</td>
<td>2,282</td>
</tr>
<tr>
<td>2003–04</td>
<td>1,044</td>
<td>1,370</td>
<td>2,414</td>
</tr>
<tr>
<td>2004–05</td>
<td>956</td>
<td>1,348</td>
<td>2,304</td>
</tr>
<tr>
<td>2005–06</td>
<td>923</td>
<td>1,330</td>
<td>2,253</td>
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<tr>
<td>2006–07</td>
<td>869</td>
<td>1,258</td>
<td>2,128</td>
</tr>
<tr>
<td>2007–08</td>
<td>882</td>
<td>1,232</td>
<td>2,114</td>
</tr>
<tr>
<td>2008–09</td>
<td>928</td>
<td>1,207</td>
<td>2,135</td>
</tr>
<tr>
<td>2009–10</td>
<td>941</td>
<td>1,205</td>
<td>2,146</td>
</tr>
</tbody>
</table>

1.2 As can be seen from the above table, expenditure peaked around 2003/04, and having fallen back has been broadly flat in the last four years.

1.3 In 2000–01, civil and family legal aid comprised 48% of expenditure. In the intervening years the proportion of expenditure on criminal legal aid increased significantly so that by 2007–08 it comprised 48% of spend, thereby reducing civil legal aid to 42%. However, in the last two years the balance has again shifted so that it now consumes almost 44% of the legal aid budget.

CIVIL AND FAMILY LEGAL AID

2.1 Figure 1 below shows that in real terms expenditure on civil representation has declined by around 10%, mainly as a result of a reduction in scope (the Access to Justice Act 1999 removed personal injury and other money claims). However, in the last three years there has been an 8.3% increase, mainly from public law children cases where volumes have increased significantly in the wake of the Baby Peter case. Legal Help has risen by almost 19% in the last year where we have seen increased demand in areas such as housing, debt, employment and welfare benefits driven by the recession. Spending on immigration has been flat since 2006/07 as volumes continued to fall.
2.2 The large increase seen in social welfare law categories in recent years (Debt, Housing, Employment and Welfare Benefits) have been driven by the recession, where the previous Government was keen to ensure the provision of early advice. The increase in family expenditure in the last three years was primarily due to growth in both volumes and costs per case in public law children cases (volumes up 33% since 2008–09 from 30k to 40k per annum, as a result of the Baby Peter case); costs per case remain relatively high (c £10k) and taken together these have exerted a pressure of around £100m per annum. The decline in immigration spend, despite an increase in volume, reflects a shift from more expensive asylum cases to cheaper immigration and nationality cases. Although volumes of Mental Health cases have risen sharply, expenditure has declined substantially as a result of the introduction of the new fees schemes in January 2008.

2.3 MoJ and LSC have no evidence of increasing complexity being a cost driver on the civil and family side. For example, the LSC care proceedings file review (December 2008) did not show a strong link between factors said to be driving complexity in care cases (such as parents under 25, multiple local authority involvement, child born during proceedings) and case costs. More generally, when most cases are covered by fixed fees, as they are in the majority of civil and family work, it is numbers of cases that drive expenditure.

Criminal Legal Aid

3.1 Figure 2 shows that there has been, in real terms, a marked shift from Crime Lower (down 6%) to Crime Higher (up 9%)
3.2 Expenditure on VHCCs peaked at £125 million in 2007–08, but has now stabilised at c £98 million.

3.3 Since 2006, there have been some significant shifts in the workloads of the Crown Court and magistrates’ courts:

— the number of cases received for trial in the Crown Court increased by over 26% (around 20,000 cases), to 98,000 cases. The majority of the increase is accounted for by either way cases committed for trial, which increased by 15,750, or 33%. The increase in the volume of indictable only cases was 4,400, or 14%; in contrast, the number of defendants proceeded against in the magistrates’ courts fell by 13% between 2007 and 2009; and

— the proportion of Crown Court cases that resulted in a plea of guilty also rose by 35% between 2006 and 2009. The average overall expenditure on guilty pleas and cracked trials within the Advocates’ Graduated Fee Scheme (AGFS) has increased by 103% and 67% respectively since 2007, taking into account changes in the volume of cases.

3.4 As discussed in the Consultation Paper on Legal Aid Reform:

— While there are likely to be a number of factors behind these trends, it is notable that almost 60% (around 39,000) of defendants in either way cases sentenced in the Crown Court received a sentence on conviction that a magistrates’ court could have imposed. This suggests that although more cases are being committed to the Crown Court, it is not necessarily more serious work, and most could appropriately have been dealt with in the magistrates’ courts.

— In 2008–09, 63,000 either way cases were committed for trial in the Crown Court. Of those cases, nearly three quarters (73%) entered a guilty plea at an average total cost of both litigation and advocacy of over £1,700 (for guilty pleas) or just over £3,200 (for cracked trials). In comparison, MoJ has estimated that the average fees available for all either way cracked trials and guilty pleas in the magistrates’ court is around £295 (excluding VAT and disbursements). There has therefore been a significant cost to the legal aid fund in cases which might more efficiently have been handled in the magistrates’ courts.
3.5 It has been argued that the complexity of criminal cases has increased in recent years for several reasons. For example, it has been suggested that changes to criminal justice legislation (eg on hearsay and bad character) have increased the time that cases take to pass through the court system and created additional avenues of appeal. In addition, changes in digital technology have seen the amount of evidence in criminal cases increase. For example, between 2004–05 and 2010–11 the average page count in Crown Court trials increased by 65%.

**Key Policy Changes**

4.1 A number of initiatives aimed at reducing costs have been implemented in recent years. These include:

- Putting all VHCCs under individual case contracts from 2004–05.
- Re-introduction of means testing in magistrates’ courts 2006–07.
- Introduction of civil and family fixed fees and revised Magistrates’ Court standard fees in 2007.
- Extension of Advocates Graduated Fees Scheme to encompass cases of up to 60 days duration July 2010.

February 2011

**Supplementary evidence from the Ministry of Justice following the evidence session on Monday 14 February 2011 (AJ 65)**

Further to my appearance before you on Monday evening, I promised to write with further details concerning the impact on Housing matters under the proposals, as well as the use of Guardians ad litem in Family matters.

In relation to the Housing point, the Scope impact assessment, published here http://www.justice.gov.uk/consultations/docs/legalaidiascope.pdf outlines the potential impact in this area. Tables 1 and 2 in that document indicate that the proposals in relation to Housing would lead to a reduction in case numbers of approximately 40,400, with attendant savings of approximately £12 million.

In relation to the Family point, the Department for Education is responsible for the Children and Family Court Advisory and Support Service (CAFCASS) and that they hold data on the use of guardians. LSC data does not indicate whether a guardian was appointed in a matter and as such we are not able to provide information on the profile of their use in cases over the last five to six years.

February 2011

**Supplementary evidence from Jonathan Djanogly MP, Parliamentary Under-Secretary of State, Ministry of Justice, following the evidence session on Wednesday 16 February 2011 (AJ 66)**

I am writing in response to a letter dated 21 February sent to the committee from Mr Will Horwitz at Community Links and copied to me (AJ 59).

In the letter Mr Horwitz refers to the oral evidence that I gave to the Justice Committee on the 16 February in relation to Access to Justice: the Government’s proposed reforms for legal aid. In particular in my response to Q355 where I state that an East London agency is “... using legal aid to provide a fundamental benefits advisory service.” I am of course happy to accept the clarification from Community Links about their funding streams as provided in the letter. However, there are two more fundamental points to be made here that I was drawing to the attention of the Justice Committee. It is generally considered to be the case that legal aid is often used for advice which is usually of a general nature. This is particularly in social welfare matters. For example, in the case of debt, LSC figures from 09/10 show that the proportion of legal help (initial advice and assistance) funding spent on negotiating payment arrangements, and advising clients on managing their affairs better, accounts for approximately 62% of the spend. Conversely, liability for the debt itself was reported as successfully contested in less than 2% of cases. Whilst we recognise that advice on money management is often of clear benefit to the client, it is not necessarily an issue which requires specialist legal advice funded by legal aid.

Secondly, we are keen to ensure that the first port of call for the initial decision making should be for the government agencies administering the service. We consider that it is important to resolve issues such as simple entitlement with the government agency concerned rather than resorting to legal advice.

I am copying this letter to Will Horwitz at Community Links.

February 2011
Submission from Community Links (AJ 59)

RE: CORRECTING ORAL EVIDENCE ABOUT COMMUNITY LINKS, AND INVITATION TO MEET

We have heard the audio recording of Parliamentary Under-Secretary of State for Justice Jonathan Djanogly’s appearance before the Justice Committee last week and believe he may have misunderstood and so misrepresented a visit he made to our charity.

In his evidence he related an anecdote about an “east London advice agency” (which he later called a Law Centre) he visited recently, saying that clients were sent across the road from the Jobcentre to find out what benefits they were entitled to, and implying this advice was paid for by legal aid.

Since the Minister visited us in relation to this matter at the start of February we believe he may have been referring to us. If so, he has misunderstood or misremembered what we told him. It is true that we often see clients referred by statutory agencies including the Jobcentre for quite simple advice, but this advice is paid for by the local authority, as we pointed out to Mr Djanogly several times. Indeed, it is outside the scope of legal aid to provide this kind of advice and we would have failed our recent audit had we done so.

Our clients whose advice is funded by legal aid are experiencing complex and very distressing problems which requires legal expertise (although not necessarily lawyers) to resolve. We believe Mr Djanogly misunderstood and misrepresented the role and the importance of legal help in this organisation and drew the wrong conclusions for the future of social welfare advice. Legal aid is a vital part of a wider social welfare advice service, and we would be horrified if he used a visit to our charity to justify cutting it.

We suggested to Mr Djanogly that funding for advice work is complex, but that various funding streams (local authority, legal aid, pro bono support, other grants) have been woven together to create a comprehensive service. Our attached briefing gives a breakdown of our own funding, for example.

We are delighted, therefore, that the committee has chosen to call the Minister for Civil Society Nick Hurd MP to give evidence next week. We have included a set of questions we think it might be useful to ask and a short briefing.

We would also urge you to follow up on a recommendation we made in our submission to your Committee’s enquiry: to convene a joint hearing with the Work and Pensions Select Committee on the impact of changes to social welfare advice on the rollout of Universal Credit. Given the burden on advice services caused by the Jobcentre, the extent of the changes to the benefits system and the proposed removal from scope of legal aid for benefits advice, we feel this is an issue of crucial importance for both departments. We will shortly be writing jointly to you and the Chair of the Work and Pensions committee to suggest such a hearing.

February 2011