PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

CRIMINAL JUSTICE AND COURTS BILL

Second Sitting

Tuesday 11 March 2014

(Afternoon)

CONTENTS

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS
LONDON – THE STATIONERY OFFICE LIMITED

£6·00

PBC (Bill 169) 2013 - 2014

Members who wish to have copies of the Official Report of Proceedings in General Committees sent to them are requested to give notice to that effect at the Vote Office.

No proofs can be supplied. Corrigenda slips may be published with Bound Volume editions. Corrigenda that Members suggest should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 15 March 2014

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: Sir Roger Gale, † Mr David Crausby

† Bray, Angie *(Ealing Central and Acton)* (Con)
† Buckland, Mr Robert *(South Swindon)* (Con)
† Champion, Sarah *(Rotherham)* (Lab)
† Evennett, Mr David *(Lord Commissioner of Her Majesty's Treasury)*
† Hilling, Julie *(Bolton West)* (Lab)
Huppert, Dr Julian *(Cambridge)* (LD)
† Jarvis, Dan *(Barnsley Central)* (Lab)
† Kane, Mike *(Wythenshawe and Sale East)* (Lab)
† Metcalfe, Stephen *(South Basildon and East Thurrock)* (Con)
† Neill, Robert *(Bromley and Chislehurst)* (Con)
† Opperman, Guy *(Hexham)* (Con)
Paisley, Ian *(North Antrim)* (DUP)
† Qureshi, Yasmin *(Bolton South East)* (Lab)
† Scott, Mr Lee *(Ilford North)* (Con)
† Slaughter, Mr Andy *(Hammersmith)* (Lab)
Smith, Sir Robert *(West Aberdeenshire and Kincardine)* (LD)
† Vara, Mr Shailesh *(Parliamentary Under-Secretary of State for Justice)*
† Vaz, Valerie *(Walsall South)* (Lab)
† Wright, Jeremy *(Parliamentary Under-Secretary of State for Justice)*

Georgina Holmes-Skelton, Matthew Hamlyn, *Committee Clerks*

† attended the Committee

Witnesses

Alison Burtt, Public and Commercial Services Union

Sally Brett, Trades Union Congress

Juliet Lyon, Prison Reform Trust

Nina Champion, Prisoners' Education Trust

Jeff Gardner, Victims' Services Alliance

Fay Maxted, Survivors Trust

John Gallagher, Shelter

Professor David Ormerod, Law Commission

Nicholas Fluck, Law Society

Nicholas Lavender QC, Bar Council

Public Bill Committee

Tuesday 11 March 2014

[Mr David Crausby *in the Chair*]

Criminal Justice and Courts Bill

2 pm

The Committee deliberated in private.

Examination of Witnesses

Alison Burtt and Sally Brett gave evidence.

2.1 pm

The Chair: Our first witnesses this afternoon are speaking on behalf of the Public and Commercial Services Union and the Trades Union Congress. We have until 2.30 pm for this panel of witnesses, but there may be a vote during that time, in which case we will have to take that time out of the time available for these witnesses. I hope that I have the co-operation of the Committee in understanding that and perhaps being a little briefer. Could the witnesses please introduce themselves for the record?

Alison Burtt: I am Alison Burtt, from the Public and Commercial Services Union.

Sally Brett: I am Sally Brett, from the Trades Union Congress.

Q77 Yasmin Qureshi (Bolton South East) (Lab): Good afternoon. I want to ask you about what you have heard about judicial review changes. What is your view regarding the change proposed in the Bill and its effect on the TUC?

Alison Burtt: Judicial review is an action that trade unions and, very occasionally, the TUC have used to hold public bodies to account when we feel that decisions are potentially being made unlawfully. I should also say that trade unions and the TUC will always seek to exhaust all other means of resolving disputes that we have with Government or public bodies through negotiation before we embark on any legal challenge.

We are particularly concerned about the changes that the Bill introduces. We are concerned about the introduction of a "makes no difference" defence at permission stage. We believe that that will allow public bodies to argue that, regardless of whether they have followed the proper procedure, even if they had, they would have ended up making the same decision. We think that that will drag courts and judges at a very early stage into having to consider a great deal of evidence and having to put themselves in the mindset of those making the decisions in public bodies, rather than focusing on whether the proper procedure has been followed, which is the proper purpose of public law. They will have to make a decision on whether it was likely that, had the proper procedure been followed, the same decision would have been reached.

We have particular concerns about that in relation to the public sector equality duty. Trade unions have been great supporters of the public sector equality duty and the various forerunner equality duties, because we have seen how public bodies have often failed to take account of the most vulnerable service users and members of the work force. At the moment, as our evidence to the public sector equality duty review showed, trade unions are struggling to get public bodies to listen to the voices of the most vulnerable or minority groups at substantive points in decision making, which is the purpose of the public duty.

If public bodies can say, "Well, even if we had listened to them, it would not have made any difference to our final decision," which we think is quite likely, given the current climate of austerity and cuts and hostility on the part of some within public bodies to equality processes and procedures, it will undermine everything that is going on in workplaces and communities, trying to get public bodies to consider properly the evidence of the impact of their decisions on vulnerable and disadvantaged groups.

Also, if it ever got to the point where a legal challenge was brought, and the public body primarily focused on arguing that it would have made no difference even if it had considered the evidence of impact on vulnerable groups, if it lost that judicial review, the decision was quashed and it went back to remake the decision, having invested so much time in arguing that it would have made no difference, it would be difficult to get it to engage properly in the process again and properly consider the evidence with an open mind, which is what the public duty requires.

Q78 Yasmin Qureshi: You are probably aware that, when someone applies for a judicial review, it is not the case that every time you put in an application, it will go before the full court to be considered; you have to go through the first process to get the leave to seek judicial review. Therefore, any sort of rubbish or weak cases would be sifted out, and only cases that a judge has looked through and said, "There is something here for further consideration" will go forward to be considered for judicial review. From your experience of when you were involved in such things, when employment law cases happen, how many millions of working people in this country will be affected by a possible decision in judicial review, especially if the decision is positive?

Sally Brett: It depends on the particular issue being challenged. Thinking of a TUC judicial review challenge, which was to the implementation of the parental leave directive in this country, we challenged the cut-off date that the previous Government were planning to use. It would have been every working parent with a child who was under five but born before the cut-off date that they were proposing—December 1999. I imagine that that would be in the region of millions.

The recent Unison challenge to the introduction of employment tribunal fees potentially affects the entire work force, because at any point a member of the work force could want to bring a claim to an employment tribunal but are unable to because of the high fees.

Q79 Stephen Metcalfe (South Basildon and East Thurrock) (Con): I would like to change track a bit, if I may, and talk about the criminal court charges. The Bill makes provision to cover some of the costs of criminal courts from offenders. What implications do you think that will have for the Courts Service?

Alison Burtt: There are two aspects of that. First, there is the sheer complexity of the financial penalties. We already have offenders' fines, compensation and arrears of the road fund licence. The cost of the prosecution is recovered by the public purse, the victim surcharge is recovered even if the victim is a public authority or the state, and a further charge is now going to be levied. The tendency of the victim surcharge—and I am fairly certain the Bill will be similar—is to restrict the power of the court not to levy it.

You have to remember that the magistrates courts that impose financial penalties deal with people who have the most limited incomes—often, they have no homes and their lives are not even organised enough to have benefits. The court is told that it must impose a victim surcharge, and now a criminal courts charge. Magistrates have the discretion to use their common sense and not impose charges on people who are not in a position to hand over anything at all—who are not eating and are sleeping rough on the streets—but, even in those cases, the Bill seems to insist on it. So there is its complexity, and there is its effect on the most vulnerable in society.

Q80 Stephen Metcalfe: Do you know what the split is between those whom you just described and the others to whom charges are applied? I think £1.9 billion is outstanding in uncollected debts and fines. How many of those fines fall into the category that you are describing, and how many have just not been collected?

Alison Burtt: Magistrates have the discretion, so I hope that a relatively small number falls into that category. Magistrates generally exercise their discretion sensibly, and if they know that somebody is impecunious, they will not load them with anything that they have the discretion about. The priority is to recover compensation for victims, and they try to do that.

We do not know anything about the vast majority of people against whom fines are imposed because the vast majority do not go to court. The courts deal with hundreds of cases, and an even more straightforward procedure is proposed by the Bill, which is concerning in itself. The vast majority of fines are imposed in the absence of the defendant and any knowledge of their means, so we do not know whether they are earning a footballer's salary or are on basic benefits. They are assumed to have an income of £400 a week, which means that a lot of that money is uncollectable.

Q81 Stephen Metcalfe: I think that whenever a fine is applied you request information about household income. Are you saying that it is not necessarily forthcoming?

Alison Burtt: It is certainly requested, but even in guilty plea cases people do not often take the opportunity to provide that information. The court deals with a fair proportion of the bulk offenders—more than 50%—in the absence of financial information.

Q82 Stephen Metcalfe: Do you think the fact that such a high proportion of charges is outstanding undermines public confidence in non-custodial justice?

Alison Burtt: It is difficult to gauge public confidence, which is based on a lack of knowledge. When a member of public thinks about a fine, they think about an individual going to court and being fined. They do not think about the courts. In Warwickshire alone, which is a relatively small county, it is not unusual to have 160 cases in the road traffic court and 250 in the TV licence court, although that includes west midlands TV licences. That gives you some idea of the numbers that are being dealt with every week in a small county. It is difficult, because public confidence is usually based on soundbite information from either the television or the press, and this is a complicated picture. The victim surcharge increased the number of impositions, and the proposal will also increase the number of impositions. It will probably increase the uncollected impositions as well.

Q83 Stephen Metcalfe: If the collection of those penalties were contracted out, what would be the objection? They could perhaps find out more information and do that service better to rebuild confidence.

Alison Burtt: The staff who have been dealing with collection and enforcement have improved year on year. The worst offenders are non-payers on trains, who are often the homeless, who get on trains to keep warm during the day. They are trying to collect the uncollectable. All the databases in the world do not give people with no money the money to pay fines.

In terms of traceability, why do you need a private company? Most of the information used for tracing people is held by the state. We find very objectionable the suggestion that private companies will have access to Her Majesty's Revenue and Customs information. Up until now, those who collect fines have been given access to the information held about those on benefits, who, by that fact, have a limited amount to pay fines, but not information relating to those who are working, who have the money to pay fines. The civil servants charged with collection have not been given that help. Our members find it very objectionable, but it is then suggested that it is contracted out and that private individuals are given access to Department of Work and Pensions information and HMRC information to enable them to do better a job that our members would like to do with a public duty, maintaining priorities like collecting compensation for individuals, rather than for straight financial targets. That is the other thing that you have to remember. Some priority is given to compensation awarded in criminal courts to somebody who has suffered. We do not just measure everything in terms of how many million is outstanding, because the rest may be TV licence fines.

Q84 Stephen Metcalfe: So is your only objection that the companies who are contracted to do this would have access to different information?

Alison Burtt: They are going to be making a profit out of this. Would that money not be better spent on providing a better service? They are not doing it for fun.

Q85 Stephen Metcalfe: No, I accept that, but if the overall package is more efficient, is the objection that someone might make a profit out of this?

Alison Burtt: We make no secret of the fact that we object to privatisation. We do not believe that, with the same resources, it will produce a better product.

Stephen Metcalfe: Thank you.

Q86 Valerie Vaz (Walsall South) (Lab): I want to turn back to judicial review. You alluded to a couple of cases that either or both of you have taken in the public interest. Could you expand on the types of public interest cases that you have taken to judicial review and where you have been interveners? In your answer, could you address clause 53, "Interveners and costs"?

Sally Brett: I cannot think of a judicial review in which the TUC has intervened, although we have intervened, for example, in the Wilson and Palmer case that went to the European Court of Human Rights, where the issue affected the wider trade union movement and rights to freedom of association and collective action. Trade unions have tended to take cases where a decision that the Government or public body is taking would have a direct impact upon the working people that they represent and where they feel that that decision has not been properly or lawfully made. Human rights, EU law or the public sector equality duty might, for example, be the basis of the challenge.

Some trade union cases have had third-party interveners. Often where the public sector equality duty is being cited as a ground for challenge, it has been the Equality and Human Rights Commission. As parties to that action, we have generally welcomed that intervention, because third-party interveners have the ability to bring out the key issues and some of the key points of law that two parties in an adversarial system cannot address. I think that you see from the senior judiciary's response to the consultation on points of third-party intervention and from various speeches by senior judiciary that they see real value in these kinds of interventions.

One recent case in which I think the trade union movement generally welcomed an intervention was the Ladele *v.* Islington borough council case where a non-governmental organisation—Liberty—intervened as well as the Equality and Human Rights Commission. Liberty brought up a number of points that had not been fully addressed by the parties and clarified a number of points. I think the courts agreed that it added value to that decision-making process. Most third-party interveners meet their own costs, but we are concerned that if they become liable for the parties' costs, we could well see the end of those kinds of intervention, particularly by NGOs, because they cannot risk exposing themselves to that kind of financial risk.

Q87 Mr Andy Slaughter (Hammersmith) (Lab): The Government's argument seems to be that judicial review is being misused for political—with a small p—or campaigning purposes. I guess that organisations such as yours do mind when they say that. Do you recognise that as the way in which judicial review is used by the trade union movement at the moment? If not, what purposes do you and, in the case of the TUC, your member organisations use it for?

Sally Brett: Obviously, trade unions, in trying to represent the interests of their members, will campaign for or against certain things. We will engage fully in consultation processes and parliamentary processes. We will try to raise awareness of issues more broadly in the media and work with our members to ensure that we are properly representing their interests and raising their concerns.

Trade unions would not take a legal challenge if there were not, in their opinion, some strong legal arguments to be made, because it is potentially very costly for trade unions to run judicial review cases. Trade unions have been campaigning about the introduction of very high fees for employment tribunal users, because we fear that they will harm not only those victims of abuses of employment rights who are unable to get justice and resolution of their claims, but also workplaces more generally, which will see a negative impact where employers feel that they can now get away with violating employment rights because they are unlikely to face a legal challenge. Obviously, we have campaigned against that.

We also feel that the decision to impose those employment tribunal fees may not have been lawfully taken, because of the impact that that has on particular groups. The Unison challenge's particular concern is about the impact it has on women employees with potential discrimination claims. There was also a legal argument that it did not comply with EU law in providing an effective remedy for individual European employment rights. It could be seen as an extension of the campaigning work, but it is not taken just for political ends and some media coverage; it is taken only where we do believe there is a strong legal challenge that can be run.

Alison Burtt: The other point is that it is one thing to try to say that it is campaigning, but we would suggest that some of the financial pressures on public bodies have meant that, wherever they think that they can get away with it, they may have tried to ignore the letter of the law if that saves them money. Without this procedure, people's rights are not protected. Important case law decisions arise from judicial reviews, and it is very important, particularly at this time, that public bodies can be held to account.

Q88 Mr Slaughter: People keep bringing up examples of judicial reviews that are against the Ministry of Justice. I am sure that is just a coincidence, but in view of the time, let me move on and ask Miss Burtt some questions about the Courts Service. You have said—I do not think anyone would disagree—that collection is hard. I got an answer from the Minister today saying that in the last calendar year, only 22.7% of distress warrants were collected in full. You have given—

Alison Burtt: Can I make a point about that?

Mr Slaughter: Certainly.

Alison Burtt: That is the work that is already privatised.

Q89 Mr Slaughter: I did not know that, but thank you for pointing it out.

The point that I was going to make is this. You touched on the difficulty of collecting more money if you impose additional charges, as this does—that is something we heard about from the Magistrates Association this morning—but in your submissions you also raised a query about whether having a single magistrate could make the situation worse in terms of knowing what financial penalties to impose. Can you say a bit more about that? Also, you make the point that if it is appropriate for fixed penalties, then we already have fixed penalties. What do you think about those changes to the magistracy?

Alison Burtt: We are very concerned about them. They are obviously designed to save money. Magistrates are lay people who sit after a relatively short amount of training, and they sit in threes—the basis of the magistrates

courts is that they sit in threes so you don't get rogue decisions. The decisions that they are being permitted to make under this single justice procedure include decisions about people's livelihood, the number of points on their driving licence and disqualification from driving.

We are also concerned about the speed that magistrates will be asked to work at. Because of the complexity of the financial penalty system—obviously, the charge will add to that—there is a tendency for magistrates to focus very much on the calculation. This is supposed to be justice: people write in and they are entitled to have their views listened to. The more pressure to just shift loads of this stuff fast is basically pressure to ignore the mitigation. A number of our members who work in magistrates courts will say that benches do vary, and the way that some of them just slap out the same penalty, however extreme the mitigation, shows that it is ignored. That is not true of all of them: some of them take note and vary the penalty according to what is being said to them. However, this measure is just a way of getting things through quickly.

As we have said, Parliament has already allowed literally hundreds of offences to be dealt with by fixed penalties, to the extent that for some of them it is not actually practical to use them. However, if a case needs to come to court—because somebody has got points on their licence or because of some other area of complexity—surely, it should be before a court of three magistrates.

Q90 Mr Slaughter: Finally, you have given some of your in-principle objections to outsourcing or privatising collection. Do you see any operational problems? Clearly, the actual methods of collection are changing all the time—we have a completely new compulsory charge in this Bill. At a time when that is happening, are your members—whether in the public sector or, in future, the private sector—finding operational difficulties in collection?

Alison Burtt: In terms of collection, the thing that changes bring is constant queries from the public, who do not understand. When you have got a fines notice that gives you seven different types of financial imposition that you can end up with, all in the same case, you are going to end up confused.

In relation to changes in collection—the technical stuff—really that is as good as the computers. We do not accept—this seems to be the mainstay of the Government's argument—that you actually need to privatise anything in order to get a better computer. All you end up with is more and more in the private sector and paying more and more for it as the years go by. We really do not accept that.

The other concern we have about all this information being in private companies is that even great institutions like the banks do not seem to play by the rules. This is going to be information relating to lots of citizens. If it happens to be useful for that private company to access that information for their own purposes—

The Chair: Order. We have come to end of the time allocated to ask questions of these witnesses. I thank them on behalf of the Committee for their evidence.

Examination of Witnesses

Juliet Lyon and Nina Champion gave evidence.

2.30 pm

Sitting suspended for Divisions in the House.

2.55 pm

On resuming—

The Chair: We will now hear evidence from the Prison Reform Trust and the Prisoners Education Trust. We have until 3.15 pm for this panel, so time is limited. Will the witnesses please introduce themselves for the record?

Juliet Lyon: I am Juliet Lyon, director of the Prison Reform Trust.

Nina Champion: I am Nina Champion, head of policy at the Prisoners Education Trust.

Q91 Dan Jarvis (Barnsley Central) (Lab): Ms Lyon, what impact will part 1 of the Bill have on the criminal justice system? I am thinking, in particular, of the impact it might have on the Parole Board.

Juliet Lyon: We are concerned about the Parole Board, particularly following the Osborn judgment, which people will know involved face-to-face hearings, so it is already under increased pressure. The chair of the Parole Board and the chief exec recently spoke to the all-party group on penal affairs, to which we provide the secretariat. They made it clear that the combination of the Osborn judgment and some of the proposed provisions is likely to have a significant impact, and will probably lead to more delays or more public cost, depending on which way the Government decide to go.

Q92 Dan Jarvis: Do you think, based on your experience, that £85 million is a realistic budget to deliver a 320-place secure college?

Juliet Lyon: No. I used to be head of an adolescent unit school in a psychiatric hospital, so I would naturally look more towards solutions that are very much smaller and more intensive than what is proposed. Are you saying that that would be the build cost as well as the running cost?

Q93 Dan Jarvis: It was just in more general terms: do you think the figure of £85 million is a realistic amount to deliver what is within the scope of the Bill?

Juliet Lyon: We would doubt it. What I am really trying to question is that within the Bill, as it is described, the secure college is an opportunity to do something new—to introduce more education, which the Prison Reform Trust would welcome—but it seems to miss the opportunity of doing something that is genuinely local and smaller scale. The age range is too wide, and it would be much better to look at things that were more intensive, smaller and better staffed, with a multidisciplinary team of staff, including people concerned with health issues. There is a good chance to do something new about children and young people, but this could be a lost opportunity if we do not see whether it can be amended constructively.

Q94 Dan Jarvis: We are short of time, so I just have one question for Ms Champion, which relates to some issues that we discussed earlier in terms of the provision of education. What do you think it would be realistic to achieve, given that on average a young person will spend 79 days in a young offenders institution? What can be achieved during that period of time?

Nina Champion: It must be borne in mind that for young people this is an interlude in their longer learning journey from their learning that has happened prior to

custody and, very importantly, the learning that happens afterwards. During the period of time in custody, what you are looking for is some sort of hook for change—some idea that they can achieve, that they have some support around them and that efforts are made from day one to look at what is going to happen prior to release, linking up with local education services, to ensure that the transition back into the community is as smooth as possible. Being local rather than being far away in the proposed secure college would help to make those local links better. Speaking to professionals working in youth offending, it is currently pot luck as to whether they get the papers to enable them to understand a young person's background—their special educational needs or their learning prior—and whether they have a contact with the local authority. They tell us that having that information right at the start would make it a lot easier to get a running start while the young person is in custody and to plan effectively for their release.

We also agree with the Prison Reform Trust around the idea of a broad education, and about education being about not only academic qualifications but personal development, life skills and diagnostics of special educational needs. There are certainly things that can be done within that time to inspire and to put those things into place, but it is a short interlude in a much longer learning journey. An individual learning plan that works with other agencies has got to be the way forward.

Q95 Sarah Champion (Rotherham) (Lab): Can I concentrate you on that transition? What requirements would you want to be in place? If, for example, a young person is in a secure unit, they breach their terms and they end up in this giant prison, in terms of continuity of care and how that is handled for the 79 days going in and coming out, what would you want to see put in place and who would be the right people to be putting that care package in place?

Nina Champion: It is very much about case management and ensuring that the individual learning plan is there for that individual, rather than a generic one fitting as many people as possible in a classroom, so I think that the contracts and how they are written up, looking at targets, are very important. It is not just about outputs of numbers of accreditations passed; it really is about meeting the individual learning needs of that young person and getting all those agencies together. Some of the transition back into the community is very difficult, because some work may be needed with schools and colleges in the local area to persuade them to have that young person back in that educational establishment.

Also, term times will not necessarily be when that young person is released. I spoke to a young person who was facing a long period of time before they could start a course. It is important to ensure that other things are in place, such as extracurricular activities, online learning and a variety of other things, so that they can have that transition and their learning journey can continue in the community.

Q96 Sarah Champion: Who could or should have that oversight to make sure that it happens and that it is accountable? We heard earlier that the Children's Commissioners were the only people who were going into prisons. Would it be them? Who would be responsible?

Nina Champion: Again, you would need to have some sort of oversight of learning and education and how that fits with health and other aspects. You would need some sort of case management approach looking over all the aspects of that young person's learning and development plan. I do not know who that person would be, but someone who has that broader perspective.

Q97 Sarah Champion: Looking at the skills and the qualifications of the day-to-day staff and the specialist staff, what skills and qualifications should they have?

Nina Champion: In terms of teaching staff, obviously young people in secure colleges or young offenders institutions will be some of the most challenging and vulnerable young people, so staff need to have specialist skills in working with young people who have complex needs. Teaching in such institutions is a different discipline from teaching outside, so some additional support—the Institute for Learning did some work interviewing teachers, who said that they would like more support in that area—and continuing professional development are really important. That is another barrier that could be addressed within the establishments as they are set up currently. It does not necessarily need a secure college to drive through those improvements in the quality and skills of the teaching staff, officers and the wider variety of staff. It is about understanding young people who have complex needs.

Q98 Angie Bray (Ealing Central and Acton) (Con): In the impact assessment, the Government predict that the changes introduced in clauses 1 to 5 could result in an increase of 1,000 prison places and an increase of 1,100 Parole Board hearings a year between implementation and 2030. Do you consider that those views are accurate and have you given consideration to what you think the implications for the prison service are of the predicted rise in population?

Juliet Lyon: We think it is an underestimate, or is likely to be, especially if you couple it with the likely impact of the Offender Rehabilitation Bill, which is just finishing its passage through Parliament. The impact assessment for that Bill talked of a further 13,000 offenders being recalled and perhaps committed to custody. If you add that together, we are looking at a serious level of expansion, and that is one of our concerns about the Bill overall, whether that is to do with expanding provision, reducing the arrangements on recall, or whether it is the secure colleges, which ironically could prove to be just the thing that the courts would find attractive and so make more use of, rather like how they made more use of the detention and training order under the Crime and Disorder Act 1998. In some instances, the new provisions as described here could have an impact and expand numbers.

Q99 Angie Bray: Have you made an assessment of what you think the numbers might be?

Juliet Lyon: I am very happy to try to do that, but we have not done that. We have a big question mark by the 1,000, rather like you. It looks like a gross underestimate to us, but we could go away and do our best to see whether we could come up with a closer estimate of the likely impact, if that would be helpful.

Angie Bray: Thank you.

Q100 Mr Slaughter: Ms Lyon, you have interesting figures on income levels and debt problems with offenders and ex-offenders in the context of additional charges being imposed by the criminal courts. I am not sure whether you are saying that you endorse the comments of the hon. Member for South Swindon in talking about means being properly investigated. Is your argument that these charges should not be imposed at all, or that it is reasonable to impose them, provided that a proper means assessment is done?

Juliet Lyon: Most offenders were already in a position where they are paying a victim surcharge, as you know. That is an additional charge and my understanding is that that particular process is working tolerably well. I do not know whether it could be done on a means-tested basis so that those who could afford to do so paid that additional amount.

Our primary worry was that people in the system were likely to be people with no or very low earnings. When we did the piece of research that we referred to in the briefing with Unlock, we found that people in prison were 10 times more likely to have borrowed from a loan shark, for example, than the average UK household. A third of people in prison did not have a bank account. We were just thinking that if you want to try to enable people to get out of difficulty and take responsibility for their lives, an additional charge of this kind might be counter-productive.

Q101 Mr Slaughter: I take the point. At the end of your briefing, you briefly mention judicial review and specifically mention clause 50. Is that something that your organisation has had experience of? What is your experience and why are you worried about clause 50 and the judicial review provisions in particular?

Juliet Lyon: We are not a law firm ourselves. Our chair is Lord Woolf, the former Lord Chief Justice. I know that he has concerns about this, which he will raise in the appropriate place. Our experience, when we work with penal affairs lawyers, is that we have an advice and information service that responds to some 5,000 prisoners and their families each year. If they want legal advice, we are likely to refer them on to the Prisoners Advice Service, which is a free legal advice service, or to other lawyers. We often hear from lawyers about the work they are undertaking. If they are conducting a JR, the outcome might be useful in relation, for example, to challenges that were made to the indeterminate sentence for public protection. Challenges have been made about people with learning disabilities not being able to comply with particular sentences. Where judicial reviews have been taken on those grounds, that has contributed to a process of reform that we would welcome.

Q102 Mr Slaughter: Is your organisation involved in the challenge to the changes to legal aid for prisoners at the moment?

Juliet Lyon: In the same way. As I said, we are not a law firm. We are very concerned about it. People have so little room for manoeuvre and choice, obviously: they have lost their liberty and are held in prison. If they are not able to challenge things—I am thinking of the use of segregation, for example—the whole experience of incarceration becomes even more restrictive and probably less useful. We are interested in people having, as far as possible, the opportunity to challenge where it is appropriate to do so.

The Chair: There are no further questions, so I thank the witnesses for their evidence. We will move on to the next panel of witnesses and hear evidence from the Victims' Services Alliance. We have until 3.45 pm for this panel.

Examination of Witness

Jeff Gardner gave evidence.

3.11 pm

The Chair: Will the witness please introduce himself for the record?

Jeff Gardner: My name is Jeff Gardner. I am co-chair of the Victims' Services Alliance and also a director of Victim Support.

Q103 Sarah Champion: Do you agree that the Bill puts victims first?

Jeff Gardner: I think it tries. There are elements of the Bill that could perhaps be strengthened to ensure that the victim is first. In the criminal justice system you do hear quite a lot of rhetoric about the victim coming first, and we are not there yet. Can I give you an example? Ending automatic release for sex offenders and terrorists is something that we would most certainly welcome. The point there is that the recommendation makes the sentencing quite complex.

Victims and witnesses do struggle to understand the complexities of the criminal justice system and sentencing. We would certainly recommend that you think about a possible way for the judiciary to report back to victims and witnesses what a sentence is made up of. There is a good reason to do that. If the criminal justice system engages properly with victims and witnesses, those people will engage back with them. I guess that would be my example of how it might be tightened to be focused for victims and witnesses.

Q104 Sarah Champion: You mentioned terrorists and sex offenders. Should the list be longer than that?

Jeff Gardner: I am not sure that that is something I am prepared to comment on, for a particular reason. Our focus is on the needs of victims and witnesses. Anything that makes a victim more confident within the system is something we would support. Deciding what sort of sentences should be included is a matter for Parliament.

Q105 Sarah Champion: Victims are very supportive of restorative justice. Do you think the Bill does enough to embed it, or are there things in the Bill that might challenge the use of restorative justice?

Jeff Gardner: No, we were very pleased to see that there was a chance, particularly for young people, to continue with their restorative justice work. We are very supportive of restorative justice. We think it is important that young people particularly—and adults—get a chance to engage in restorative justice. There are other Bills that are making it more available within the criminal justice system; so the element in this we were pleased about.

Q106 Stephen Metcalfe: Good afternoon. I want to talk a little about the criminal courts charge, but first, could you tell us how successful you think the victims surcharge has been?

Jeff Gardner: Not the collecting, because that is not something I can comment on. I can say that the victim surcharge has added significantly to the amount of money available within the helping environment for victims and witnesses to provide services to them. From that perspective, it has been very successful. I cannot comment on the collection.

Q107 Stephen Metcalfe: Why do you feel unable to comment on the collection?

Jeff Gardner: I do not have the detail.

Q108 Stephen Metcalfe: Okay, but from the tone of your voice, I would say that you were expressing some concern about the collection.

Jeff Gardner: The information that has been generally available in the media is that it has not been easy. However, the money that has come in has been good.

Q109 Stephen Metcalfe: To move on to the criminal courts charge, do you think that that would be a useful additional charge? Do you think it would have any effect on deterring reoffending or encouraging people to plead guilty at the point at which the case might go to court?

Jeff Gardner: I think that there is a good principle about getting people to pay for justice. I acknowledge what the previous witness said about the difficulty of making people pay when they do not have the facility to pay. Obviously, the concern then is that it ends up in people not paying. It ends up with warrants, and we then start to clog up the system.

One of my concerns about some of the recommendations in the Bill is that the practicality of doing something may not be supported by the principles in the Bill. It may clog things up in trying to deliver what is being said here.

Q110 Stephen Metcalfe: Okay. I suppose that, before we make a judgment on that, we would need to know the numbers involved and whether we are designing the system for the minority who do not pay because they cannot or do not have the means to, or whether it is for the majority. I think we should always bear that in mind.

Are there any other provisions that you would like to have seen included in the Bill from a victim's perspective?

Jeff Gardner: I do not think so. The Bill is quite comprehensive about where it aims to go. What we get all the time is that victims and witnesses do not get enough information about what is going on. They get confused about the processes, and any means of explanation to enable them to understand the system more successfully would be of real benefit. If you could strengthen the Bill around that, it would be worth while.

Q111 Stephen Metcalfe: Finally, I asked the previous panel about whether they thought the level of non-collection undermined the way in which victims saw non-custodial sentences. Leaving aside the collection aspect, if in principle fines and penalties are not collected, do you think that that undermines victims' faith in the system?

Jeff Gardner: If victims and witnesses had that knowledge, it might. I am not sure how general that knowledge is. I think the complexities of the criminal justice system—I know that I have said that a number of times—tend to confuse people. They will not get into the detail unless they are particularly interested in it. Where they read that that is the case, obviously, it will concern them.

Q112 Stephen Metcalfe: So if the levels of collection went up, you think that would improve confidence?

Jeff Gardner: If publicised, absolutely. All those things require publicity to enable people to understand what is going on.

Q113 Stephen Metcalfe: Do you mind how that is collected?

Jeff Gardner: That is a broad question. I think, provided that it is ethical, no, not at all.

Q114 Valerie Vaz: I want to ask your opinion of the current regime on simple cautions. Have you had a chance to look at the relevant clause in the Bill? What is your view on that?

Jeff Gardner: I go back an awfully long way in the criminal justice system, as you can probably tell by the visage before you—about 45 years, I think. I remember cautions coming in and how successful they were. They were simple. If I may quote Sir Bernard Hogan-Howe from a conversation I had with him not so long ago, 73% of people did not offend again.

Going back to a simpler way of caution would be good. I cannot see much value in repeat cautioning or in cautioning for serious offences. Again—I am going to bang the drum, if I may—it is important that when we caution, we explain to the victim or witness exactly what the issues are.

Q115 Mr Robert Buckland (South Swindon) (Con): May I develop the point that my hon. Friend the Member for South Basildon and East Thurrock was making about the way in which we assess the means of defendants? I have not yet declared an interest, but I refer Members to my entry in the Register of Members' Financial Interests. From my experience, the gathering of information relating to the means of defendants can be an entirely anecdotal test. In other words, we are not actually getting the information early enough or comprehensively and authoritatively enough to assess their means properly. That, I believe, is leading to poor enforcement. Can you, from your perspective and experience, share any thoughts with us about how we can better assess the means of defendants before we impose fines or charges on them?

Jeff Gardner: Financial investigations are complex issues. I have carried them out. In a previous life, I ran the porn and vice squad at West End Central, and I carried out financial investigations of people who embarked on this trade. They take time; they take application; and with that time and application, you do find the financial positions. So it requires investment to get that out, and I guess that comes back to an economic argument.

Q116 Mr Buckland: Yes. If we were to introduce a system whereby defendants were required to make a statutory declaration, with consequences for misdeclaring their incomes—for example, criminal sanction—do you think that that would help to incentivise people to tell the truth about their means?

Jeff Gardner: It would certainly be a motivation for someone to declare things. I come back to the point that I was making earlier on: whenever these decisions are

made, they have knock-on effects. I guess that in deciding whether that was the right way forward, you would have to look at the knock-on effect on the criminal justice system in upholding those decisions.

The Chair: As there are no further questions from Members, I thank the witness for his evidence.

3.23 pm

Sitting suspended.

Examination of Witnesses

Fay Maxted and John Gallagher gave evidence.

3.33 pm

The Chair: We have until 4.30 for this panel. Will the witnesses please introduce themselves for the record?

Fay Maxted: I am Fay Maxted, chief executive officer of The Survivors Trust.

John Gallagher: I am John Gallagher, principal solicitor at Shelter.

Q117 Sarah Champion: Could both of you tell us which bits of the Bill you welcome on behalf of your members, and which bits you are more concerned about?

Fay Maxted: The bits of the Bill that we particularly welcome are the change to the definition of extreme pornography to include depictions of rape or penetration. I think that that is particularly welcomed across the board. Another area that is particularly welcome is the ending of automatic release, which we are especially interested in. I have some concerns about that as well, in terms of how that might be managed, and I feel that currently the needs of victims and the impact on them are not sufficiently taken into account when parole boards consider early release.

John Gallagher: Our main concern is with part 4—the judicial review elements of the Bill. We have no strong views on clause 50, which is about changing the test to allow courts to refuse an application for judicial review on the basis that it would make no substantial difference to the outcome. We welcome the policy that there should be transparency of funding arrangements, so we welcome clauses 51 and 52.

We are particularly concerned about the clauses on interveners, and interveners having to pay the costs of other parties in dealing with the intervention, and the provisions on cost capping—what used to be called protective costs orders.

Q118 Sarah Champion: Has Shelter been an intervener?

John Gallagher: We have been an intervener in some five cases over 10 years or so. I could describe two cases which might be of interest to the Committee.

One was called TG *v.* Lambeth, and was about a 16-year-old young man who was homeless, having been thrown out of his parents' home. He came to the attention of a social worker who assessed him and sent him to the housing department of Lambeth council to be housed. The problem with that is that the law is clear that the responsibility for homeless 16 and 17-year-olds lies with the social services department of a unitary authority and that therefore the social worker should have assessed him as a child in need. One might wonder what difference it makes because he was housed by the authority, but it meant that he did not have what Baroness Hale in the Supreme Court called assistance with the transition to adulthood. He did not have the leaving care duties that the authority would have had if social services' children's services had accepted a duty towards him.

We intervened to bring information to the court about the lack of co-ordination between housing and social services authorities throughout the country. We were assisted by Freshfields, the City law firm, to write to all the authorities in the country and we drew up an account of the nature of the arrangements that apply between social services and housing, most of which were lacking in the ability to ensure that young people were referred to social services.

If I may trespass on the Committee's patience, I shall quote from one of the judges involved in the decision. Lord Justice Wilson said:

> "Shelter obtained permission to intervene in the appeal on the basis… that it could file evidence… and… submissions… in the form of a witness statement by Mr Robb, its chief executive, and its written submissions… have proved to be conspicuously helpful. My account of the facts of the present case will reveal a serious absence of co-ordination in relation to the appellant's case within Lambeth, including between… housing"

and social services. The court in that case welcomed our intervention.

Q119 Sarah Champion: What would the implications of the Bill be for Shelter specifically?

John Gallagher: The implications would be that, by intervening, we would have to pay the costs occasioned by our intervention to the other party in the case, which would probably be the local authority, and possibly the Treasury solicitor if the Secretary of State for Communities and Local Government was an interested party. Under clause 53, the court must award the costs occasioned by the intervention. On the face of it, that seems reasonable—I accept that—but interventions are very restricted in scope. They are often written submissions only. If oral submissions are accepted, they are usually limited in time to perhaps half an hour or one hour before the court, as happened in a recent case of ours. In so many cases, they do not really take up the time of the other parties to a much greater extent than the case ordinarily would in any event.

Our argument is that so many of the arguments that we raise in our interventions would be raised in other cases in any event, and it is more financially viable for them to be raised generally on an intervention than it may be on a later case on behalf of a particular client of ours who is bringing a judicial review with the benefit of legal aid.

Q120 Sarah Champion: In reality, could you afford to take the risk of making the interventions?

John Gallagher: Not as a general rule. We would have to have our costs underwritten—this of course relates to another part of the Bill about the funding of legal cases—by the generous law firms that support our children's legal service. The interventions are generally on the part of the two solicitors in our team who are

funded to represent the interests of children in homelessness cases. We would have to look very carefully before we intervened in future on the basis of that.

Q121 Stephen Metcalfe: I should like to pick up on something that I have asked other witnesses about, namely the criminal courts charge. Do you consider that the charge will deter offenders from reoffending, and encourage offenders to plead guilty at an earlier point in proceedings?

John Gallagher: I am sorry, sir, but I cannot speak to the criminal elements of the Bill, because it is not within our role.

Fay Maxted: I think that it is unlikely to deter sex offenders.

Q122 Stephen Metcalfe: Would you like to comment on any other aspect of the courts charge—perhaps on how successful the victim surcharge has been, and whether you think it has had any impact from the point of view of your organisation?

Fay Maxted: The victim surcharge has provided some stability for the sexual violence sector, and that has been incredibly welcomed. It has only been in recent years that a three-year funding programme has run for rape and sexual abuse services, and that is as a direct result of the victim surcharge. It has made a big difference to victims' services.

Q123 Stephen Metcalfe: Are there any other matters related to charges and penalties that you would like to see improved under the Bill, and which would have an impact on your organisation?

Fay Maxted: I am not sure of any that would affect us.

Q124 Mr Slaughter: I have a few questions for Mr Gallagher. May we go back to the case of TG and Lambeth? How was that case funded?

John Gallagher: The case on behalf of TG would have been funded by legal aid. TG was represented by a legal aid firm of solicitors. When the case was appealed to Court of Appeal level, we sought permission to intervene.

Q125 Mr Slaughter: Right. It went to the Court of Appeal and the Supreme Court.

John Gallagher: Not to the Supreme Court, no; it stayed at the Court of Appeal.

Q126 Mr Slaughter: You mentioned the role of Freshfields, which was in relation to it doing some research for you, was it? I think you said that it surveyed local authorities about the link-up between social services and housing.

John Gallagher: Freshfields both funds one of the solicitors in our children's legal services and does a lot of work for us in supporting our interventions. It also acted for us recently in relation to another intervention, in the judicial review of what is variously known as the under-occupation deduction, the bedroom tax or the spare-room subsidy. In that context, Freshfields did a huge amount of research with every local authority in the country on the effect of discretionary housing payments, and whether DHP would make up the shortfall in people's housing benefit, where justified by, for example, disability in the household.

Q127 Mr Slaughter: I was referring specifically to your costs in the intervention, your legal costs. I am assuming that under the current rules, you bore your own costs of the intervention.

John Gallagher: Yes, indeed.

Q128 Mr Slaughter: But you did not have to pay any other costs.

John Gallagher: Exactly. That is right.

Q129 Mr Slaughter: Was that also covered pro bono by Freshfields?

John Gallagher: Yes, indeed. All our own were pro bono. Obviously, we do not expect any one else to pay our costs of an intervention. Freshfields would act on our behalf, and do our research, and we had the assistance of a very committed QC, who drafted our arguments and appeared for us.

Q130 Mr Slaughter: If you were at risk of paying the costs of the other party on the intervention, presumably you would have to pay that yourself or prevail more on your benefactors.

John Gallagher: Yes, indeed. We would have to consider that very seriously.

Q131 Mr Slaughter: You said that you were going to mention two of your intervention cases. Was the other one the under-occupation case?

John Gallagher: The other one was a case called Limbuela from 2005-06. This was not, in fact, a children's legal services case; it was a case in which asylum seekers were rendered destitute because they had not applied for asylum at the port of entry. They had applied for asylum too late, in country. They were rendered destitute because of what was known as Section 55 of the then Act, which I should be able to remember. The challenge was on whether there were any sources of charitable assistance to those people, or whether they were literally on the streets. We produced evidence in our intervention that the source of charitable assistance amounted to two organisations in London, both of which were hopelessly oversubscribed.

Q132 Mr Slaughter: You mentioned the issue of financial transparency and said that you are happy with that. Do you think there would be any risk of your backers, as it were, then becoming liable for costs in those circumstances?

John Gallagher: That is a concern. I did say that I welcome it and I do welcome it in principle, because I do not think any of the law firms that provide us with assistance would in any way mind being identified as the source of funding. Having said that, I would worry indeed if it exposed them to any kind of penalty for assisting us in the action.

Q133 Mr Slaughter: Yes, and so do you normally have the benefit of protective costs orders when you go into these matters, or is it simply that you are assured under the current rules that you are only at risk in relation to your own intervention?

John Gallagher: We have not sought protective costs orders at all in our experience. The cases that we have been involved in are either relatively self-contained cases, in which we have not thought it appropriate to apply for a costs order, or they have been slightly more controversial cases, such as the under-occupation charge, in which case a protective costs order is probably not appropriate either.

Q134 Mr Slaughter: But you said none the less that you have concerns about that. On the intervention cases you have talked about, have there been cases in which Shelter has been an applicant itself?

John Gallagher: No, when I say I have concerns about the cost-capping protective costs orders, it is on the basis that there may be a time at which we, along with other charities and non-governmental organisations might well need to seek protective costs orders. At the moment, it is largely in the discretion of the court, but cases must be very much in the public interest before a cost-capping order would be justified. The way in which clauses 54 and 55 circumscribe the court's jurisdiction is not welcome at all.

Q135 Mr Slaughter: You are a representative of perhaps the best-known body in your field. Have you discussed Part 4 of the Bill with any other organisations in the housing field? Do you know if there is a general view about this? Are you expressing a general view of the charitable or housing sector or is this your own view?

John Gallagher: I cannot to be honest say that we have had much contact with other housing organisations about this. We are a member of a general consortium of non-governmental organisations, which contains some of the larger charities and organisations, such as Liberty, Mind and Child Poverty Action Group. Understandably, they are also concerned about these proposals.

Q136 Robert Neill (Bromley and Chislehurst) (Con): Ms Maxted, I understand your point that there will be certain types of offender who are not likely to be discouraged by a criminal courts charge. Equally, the victim surcharge worked well and I suppose the logic would be that, if it works in some cases, it is a useful tool to have in the box. Is that so?

Fay Maxted: Yes, I would say so.

Q137 Robert Neill: And it may well be that acquisitive crime and so on might be a different type of consideration.

Professor Gallagher, in judicial review, you accepted transparency in relation to the funders of intervention; would you agree that that must apply to all interveners, regardless of whether they are private or public sector, or whatever? You cannot have one law for one and not for another.

John Gallagher: Yes, I would accept that.

Q138 Robert Neill: That is where we are there. We discussed earlier concerns, which I know you share, about changes in the test for bringing judicial review. The point was made to us that this is to ensure proper procedure and proper decision-making processes. On the other hand, you make the point that frequently you and others will intervene because you think there is an issue of wider importance at stake, and sometimes the court agrees. Therefore, the issue becomes something of a test case.

John Gallagher: Yes.

Q139 Robert Neill: Against that background, if, for example, a small local authority is one of the parties to the case, is it fair that they should be put at risk of the costs of what may become a much larger case through no decision of their own?

John Gallagher: I take that point. If one is considering the public purse in general, it may actually be more beneficial to treat some cases as test cases because they create precedent for the future, and those issues would no doubt have to be taken on behalf of individuals in the long run in any case. We would only intervene in cases, first, where we think we have material of added value to give to the court—we would only get permission to intervene on that basis anyway—and secondly, where we think that the outcome of the case might be beneficial to other decision making in the future; in other words, it is a true test case. I appreciate that that may mean that the particular local authority has to bear the cost of that issue, and that is unfortunate, but in general, in terms of the cost to the public purse, it may be advantageous.

Q140 Robert Neill: There might not actually be an advantage. I imagine that your organisation—I know it does—exercises considerable care. There have been a number of instances, however, where others have intervened for essentially commercial purposes.

John Gallagher: That may be so.

Q141 Robert Neill: Or for political purposes. Is it not right that they should have to bear in mind the discipline and the constraint that they may be at risk of costs?

John Gallagher: Well, yes. I take that point, but if they are intervening for political purposes, then they would probably not get permission in the first instance and they would be sifted out. There will invariably be a legal argument of some kind which has passed the permission test, even if there is a sense that they are operating from a political angle. We all have ideological views; it would be facile to pretend otherwise. Nevertheless, we are lawyers, and we act in accordance with our legal principles.

Q142 Robert Neill: All of us as lawyers would say that, generally, if you commence litigation or become involved in litigation, there is a risk on costs. Why should you be exempt from that in the position of an intervener?

John Gallagher: First, partly because we are charities and because we are, to our mind at any rate, operating and arguing on behalf of, in most cases, vulnerable client groups—I know the word "vulnerable" is overused, but in terms of the homeless, I do not think it is overused—and secondly, because these are issues in the public interest which are going to be heard at one time or another, either on an individual judicial review or in the context of an intervention. It seems convenient to put all the arguments before the court at the same time.

Q143 Robert Neill: And if you happen to be the local authority concerned, that is tough luck?

John Gallagher: Well, it is unfortunate.

Q144 Valerie Vaz: I suppose judicial review and intervening is about the public interest and getting it right if Parliament has got legislation wrong and it needs to be corrected. Is that the purpose of judicial review in your view?

John Gallagher: Yes, and the purpose is to ensure that the decision-making processes are right and in accordance with legal principle. That is the one concern about clause 50, which is about whether or not the outcome would be substantially different. For example, in the case of temporary accommodation on review of a homelessness decision, the grounds for challenging those decisions are very limited indeed and if an authority can argue at the permission stage that no difference would have been made to the outcome, that is yet another disadvantage to the homeless person. In our view, that may be a valid consideration, but it should take place at the hearing of the full judicial review rather than during the permission stage.

Q145 Valerie Vaz: I think we have covered the fact that you think, as a solicitor who acts for Shelter, that judicial review is important for society as a whole. Is that the case?

John Gallagher: Yes, indeed. In the homelessness field, it is the only means of challenge. Many of the decisions that are made, such as whether an authority accepts a homelessness application and provides emergency accommodation to a street homeless family, can be challenged only by judicial review. More generally, though, judicial review obviously relates to the proper exercise by a public body of its decision-making functions and holds it to account. It also means that, when we challenge local authorities on their decisions, and they are wrong—obviously they are not always wrong—they will back down before the matter gets anywhere near judicial review, because they know that they can be held to account.

I know that the Committee is not directly concerned with the current legal aid proposals, but the problem with them is that providers will have to take the risk of judicial review proceedings being undertaken on behalf of claimants unless permission is given by the court, whereas many cases settle before the permission stage. I know that the Government have made a concession whereby the Legal Aid Agency will have discretion to pay us in those cases, but it is asking a lot of any legal provider to take the risk of court proceedings on the basis of reliance on LAA discretion.

Q146 Valerie Vaz: You mentioned some cases that you were involved in. Have there been any cases where, say, though interventions, public policy has changed as a result of your involvement?

John Gallagher: Yes. The 2010 case of Birmingham City Council *v.* Clue, which I will mention only very briefly, related to a family in which the parents had no recourse to public funds—they had overstayed their leave—but their children had been brought up in this country and we were intervening on the children's behalf. The family were destitute. They had applied for indefinite leave to remain, but Birmingham was saying that it was a valid consideration to take into account their chances of getting such leave. Birmingham was effectively pre-empting the immigration decision. We intervened in that case to present a dossier to the court of the kinds of thing that can happen in that situation. Obviously the tendency is to regard the parents as not having any rights because they are overstayers, but of course it is the children's rights that we are concerned with. Birmingham's saying that the family could go back to Jamaica was pre-empting an immigration decision—a decision that was eventually made in their favour.

I am sorry: you asked whether any changes have been made to public policy in such cases. At the end of that case, the Secretary of State for the Home Department, who was an interested party, agreed to review the decision-making processes in what was then the case resolution directorate, having regard to the need to safeguard and promote the welfare of children in the UK and to statutory guidance about achieving timely decisions for children.

Q147 Valerie Vaz: You have mentioned some of the clauses in the Bill. Could you give us your opinion on the changes relating to judicial review and whether and how they will affect the rule of law?

John Gallagher: I think that judicial review is vital to the rule of law; it is vital that public bodies are at least accountable to that ultimate power of the courts to supervise the decision-making process. It would lead to a loss of confidence in the decision-making exercises of public bodies in general if clients came to us and we had to say to them that we could not take their case, either because of funding restrictions—I am talking here more about the legal aid elements than about intervening or protective costs orders—or we could not take the risk of the potential consequent costs to the organisation as a result of challenging a particular case, even where we thought that the authority's decision was arguably unlawful.

Q148 Valerie Vaz: Given the case of Corner House and the strict tests that may be applied at the discretion of the court on protective costs orders, do you think there needs to be a change?

John Gallagher: I do not think there needs to be any change. It is not easy in any way to get a protective costs order. The arguments have to be put very strongly to the court, and the court will grant a protective costs order only under the Corner House principles if it is very much in the public interest to do so, as with Public Law Project being granted protective costs orders recently in the challenge to the residence test.

Q149 Valerie Vaz: One final question: I do not know if you were aware of Lord Pannick's address to the Bar conference. Do you recognise these quotations about judicial review from the Justice Secretary, who talked about hiring "teams of lawyers" who turn judicial review "into a lucrative industry"? He also said it was,

"a promotional tool for countless Left-wing campaigners. So that is why we are publishing our proposals for change".

Do you recognise that comment on judicial review?

John Gallagher: I do not recognise that at all as being within my experience or that of many organisations which do the type of work that we do. I speak for organisations in the housing world such as Crisis, and other organisations such as the Child Poverty Action

Group. The situation that we face is that we have homeless families in our office day after day. We have to decide whether or not their case is strong enough to grant ourselves legal aid—we have delegated powers to do that. In future, we will obviously have to look at that very carefully because of the risk in relation to costs. I am sorry, I am entering into the legal aid aspect again, but what the Justice Secretary described as the judicial review "industry" is something that I do not recognise.

Q150 Angie Bray: I want to seek clarification before I talk to you about what I wanted to ask about. The hon. Member for Walsall South asked whether you felt it was right and proper that decisions of Parliament should be judicially reviewed, and you said yes, that is absolutely right. Are you really suggesting that parliamentary decisions should be judicially reviewed at any stage, because that would be awkward, would it not, in terms of putting unelected judges above Parliament?

John Gallagher: No, madam, the judicial reviews that we have brought about are to regulations. Obviously, there is a difference between challenging legislation—

Q151 Angie Bray: I just wanted to be correct. The question was put to you about parliamentary decisions.

John Gallagher: I am sorry; I misunderstood.

Q152 Angie Bray: I wanted to ask about automatic release. First, you were speaking on behalf of the Survivors Trust when you said that that was one part of the Bill that you welcomed. Do you feel that the proposals in the Bill go far enough for what you want?

Fay Maxted: No, not really. Our main concern is that at the point when someone might apply for early release, usually the victim is not engaged any longer with victim support services, so they may go through that process without access to support. I notice that in the impact assessment there is no direct reference to victim support services, yet as part of the judicial process, that consideration for early release is something the victims need to be supported through. It can often be a trigger point for suicide or mental breakdowns, which is why we refer to the impact of sexual violence and sexual abuse on victims being not well understood by, I believe, parole boards, NOMS and probation. That is my experience from direct contact with those individuals and organisations.

It is essential that any consideration of early release truly has to reflect a really effective consideration of the impact that there might be on a victim. In the recently reported case of Sarah Wright, who died of an asthma attack, her family is convinced that it was because she heard that her father, who was a former chief police officer, was due to be released; he was sentenced to 10 years in 2008 and was due for release. Unfortunately, Sarah died. I can quite well believe that the sheer terror and panic of knowing that her father was going to be out and about on the streets and carrying on living his life, would create that effect in her. I cannot emphasise strongly enough the impact on victims of sexual violence and abuse. Research has identified links to mental health issues, such as depression and suicide, and physical complaints, such as asthma, heart disease and cancer. All those conditions are affected by traumatic experiences, particularly in childhood.

We do not feel that sentencing currently reflects the ongoing impact on victims, particularly when early releases happen. We say that the impact on victims is a life sentence: there is no early release for a victim; they live constantly with it, despite interventions. Complex post-traumatic stress is incredibly resistant to recovery processes. People do well to pick up and carry on with their lives, but they often have limitations.

We would like to see guidance on how the early release applications are managed and how the contact with victims works, so the victim personal statements can be updated. If the victim is likely to be re-traumatised by the release, their original victim personal statement must be taken into full consideration.

Q153 Angie Bray: So you are saying that there is a move in the right direction to control automatic releases, but the victim should have more input in the parole board's decision.

Fay Maxted: Yes, absolutely.

Q154 Angie Bray: But you welcome the fact that the parole board will have a more active role, and every prisoner who is going to be released will have to appear before a parole board. It is not automatic.

Fay Maxted: It is very welcome that the automatic consideration is removed, but I am not convinced that parole boards in general have an in-depth or well developed understanding of the impact on victims. The victim personal statement might not always reflect that.

Q155 Angie Bray: Do you have views on measures to end automatic release after 28 days for recalled prisoners, who are considered highly likely to breach their licence conditions? Do you think the new provision will help victims?

Fay Maxted: No, I am not sure that it will.

Q156 Angie Bray: For any particular reason?

Fay Maxted: I am not sure. I am concerned that if someone is released early it might not allow time for the victim to be in a place of safety or for other necessary things to take place.

Q157 Angie Bray: Do you want to say anything about any of these measures?

John Gallagher: No.

Q158 Dan Jarvis: I have one question for Ms Maxted. Earlier in your evidence, you said that you welcome the provision in the Bill to outlaw rape pornography. May I push you for a bit more detail? Is it your view that the clause in its current form is fit for purpose, or can it be improved in any way?

Fay Maxted: I have one concern, which is that the defence that consent was given might be used. I am not sure how consent might be evidenced or how it might be judged that consent was given to the acts that are depicted.

Q159 Sarah Champion: On that point, like you I welcome the inclusion of that provision in the Bill. I want to build on what my colleague just said. Do you

[Sarah Champion]

think that other aspects of violence against women should be included in the definition? Does current legislation adequately protect children from being abused and prevent images of child abuse, or should child abuse be a specific offence in the clause on the possession of extreme pornography?

Fay Maxted: I would welcome the inclusion of images of child abuse. I do not like the use of the word "pornography" in relation to images of child abuse. There is a risk that pornography is seen in another light. It is legal in some cases and it is used by people who are not committing offences. I do not like the use of the word "pornography" in relation to images of children, but I think children should be included in the Bill. With the barely legal type of images, as they are described, there is a risk that young people and children could be excluded.

Q160 Sarah Champion: You mentioned consent. Presumably, just as you cannot consent to rape or to child abuse, that would be your justification.

Fay Maxted: Yes, it would. I am just not sure how that defence of consent might be evidenced.

Q161 The Parliamentary Under-Secretary of State for Justice (Jeremy Wright): My colleague Angie Bray, my hon. Friend the Member for Ealing Central and Acton, asked you earlier about the provisions that changed the nature of a fixed-term recall and the circumstances in which that would be given. I wanted to clarify that for you and give you another chance to talk about it. I think you were slightly blindsided by it. Let me try to help you a bit.

The provision in the Bill would change the rules so that if there were a decision to be made about whether someone should be recalled to prison for a 28-day fixed term or indefinitely, one reason you could decide under our provisions to recall indefinitely, rather than for the shorter period, would be if you considered it highly likely that the individual was going to breach again if they were let out. In those circumstances, would you agree that would be welcome to victims because they would perceive that there would be additional reassurance over the recall decision?

Fay Maxted: I think it would. It strays into the area of victims of domestic violence, which sits alongside sexual violence. I think in those circumstances, yes, it would be very welcome.

Q162 Jeremy Wright: Thank you.

Fay Maxted: And thank you for that help.

Q163 Mr Slaughter: I would like to make a further point, if I may. I was slightly surprised at the beginning when you said that you did not have a particular view on clause 50. As you said later, the decision-making process in homelessness applications is sometimes central to the issue and one would want to encourage, as I am sure you would agree, good decision making by a local authority in that respect. There is also little option for any other route of appeal.

Others, who have not given evidence yet, such as the Campaign to Protect Rural England, have made the point that in areas such as planning, where there is not the opportunity to appeal adverse decisions, judicial review is a very useful tool—in fact sometimes the only tool for the citizen. I wonder whether you want to say anything more about clause 50.

John Gallagher: Yes; thank you for the opportunity. What I have said has been slightly contradictory on that aspect. Although I said I welcomed clause 50, welcome is too positive. I am afraid I was desperately looking for something to welcome in part 4, so I fixed on clause 50. Clause 50 is concerning for exactly that point. In addressing the way that local authorities make their decisions, the text of the decision letter is often quite crucial. It is difficult to know whether the outcome would have been substantially different or inevitable, as it is in the present test, without going back to the whole decision-making process and reopening it.

I suppose I was less forthright in my original remarks because on the face of it it is slightly difficult sometimes to put a line between the likelihood of a substantially different outcome and inevitability, and to relate that to actual examples. It occurred to me as we were talking that the homelessness review case is the example in which it is really difficult to know whether an outcome would have been substantially the same or inevitably the same. I am sorry; I appreciate the contradiction in the evidence that I have given. I would prefer to say that we are concerned about the implications of clause 50.

The Chair: If there are no further questions from Members, I thank the witnesses for their evidence. We will move on to the next panel from the Law Commission.

Examination of Witness

Professor David Ormerod gave evidence.

4.14 pm

Q164 The Chair: We have until 5 pm for the panel. Will the witness please introduce himself for the record?

Professor Ormerod: My name is David Ormerod. I am the Law Commissioner responsible for criminal law.

Q165 Stephen Metcalfe: I want to look at the provisions around contempt of court and misconduct by jurors. There have been lots of stories in the press about how social media have changed the way that jurors get information about particular court cases. Will you give a broad outline of your experience of this and say whether the Bill goes anywhere close to dealing with it?

Professor Ormerod: The provisions dealing with juror misconduct are based in large part upon the report No. 340 which we produced at the end of 2013. That was part of our 11th Programme project on contempt of court, which we expedited because the Attorney-General felt that there was a pressing problem with jurors discovering information from the internet. Our report deals not only with the problem of jurors searching for the information but also the availability of online publications —both sides of the same problem. Our reform recommendations were designed to strengthen the role of the jury by ensuring that we could maintain confidence in the jury's ability to try cases on the evidence and not

on information floating around on the internet. The clauses on juror misconduct are in large part based upon that report.

It is important to emphasise that it is already forbidden conduct. It is already criminal in all but name for jurors to search on the internet or to engage in these other forms of forbidden conduct. The difference is that under the common law contempt, the present law, the definition of the scope of that forbidden conduct turns on the judge's instruction at the beginning of each trial. So what the judge says in the homily at the beginning of the trial defines the scope of the common law contempt for that trial. There is no consistency from trial to trial. The trial process for a juror who breaches that prohibition is an anachronistic one. The trial is before the divisional court, according to the civil procedure rules rather than the criminal trial process normally. There is no bail necessarily, there is no automatic right of appeal to the Court of Appeal, there is no indictment, no charge sheet, no disclosure and so on. So it is a rather odd process by which these jurors who engage in forbidden conduct are tried.

Despite the best efforts of the judiciary to explain to jurors where the boundaries lie, there is confusion. In a research study published in 2013, 23% of jurors explained that they were confused about precisely what they were permitted to do on the internet and 7% of those jurors who responded to that survey admitted to having searched for something on the internet, in one form or another. That has led, as you said, to some high-profile cases. The aim of these clauses, based on our polity, is to provide greater clarity around the definition of what is forbidden and greater consistency, because it will apply in every case. Also, by making this forbidden conduct, as it already is, a criminal offence, they will be tried in the usual manner, in a criminal trial by judge and jury. That seems to us to be a better process. That proposal was supported widely when we consulted in 2012. Senior judges, the Criminal Bar Association, the Law Society and the Crown Prosecution Service all supported the introduction of a criminal offence in preference to the retention of the common law contempt.

I shall also discuss clauses 37 and 38 dealing with online publications, which also flow from our report No. 340. As I said, the flip side of the problem is, how do you limit what information might be available online throughout the trial?

The internet has created a new problem. Whereas the problem of jurors going off and searching for information is an age-old one—decades ago they might have sneaked off to look at the crime scene—the problem is a change to the magnitude of the risk. The ease with which jurors can go off and find information is so much greater with the internet.

With publications, there is a new problem. If information of a prejudicial nature is published online before proceedings are active, it remains available during the trial. In the days of print media, what was published before proceedings were active, perhaps of a prejudicial nature, was recycled. It was history and might exist only in some library or news archive. Now, it is available and accessible to a juror.

Therefore, the recommendations we made in our report, which have been included in clauses 37 and 38, seek to address that problem by providing a scheme whereby material that is published online before proceedings are active—archive material—is not caught by the contempt of court rule unless the Attorney-General has put the original publisher on notice that proceedings are now active and the material is potentially prejudicial.

Q166 Stephen Metcalfe: I have a couple of follow-up questions. First, you gave quite a high percentage for those who had looked for things on the internet and then might have breached the rules; I think you said 7%. Is there any evidence that, by doing that, they have changed the outcome of a particular set of proceedings?

Professor Ormerod: The trials of jurors who have engaged in that behaviour have been as a result of the individual juror—and usually the jury—being discharged, so they have not gone on to deliver a verdict. However, the matter is more important than whether there is an inaccuracy in the verdict. The destruction in the confidence of the jury is a risk. It is important that jurors are not only impartial and independent, but seen to be so. For the defendant to know that jurors are engaging in such conduct destroys that confidence.

Q167 Stephen Metcalfe: Does the provision differentiate between searching and looking for information, deliberately trying to access it, and stumbling across it by accident? I assume that that provision must have always existed, because you could turn over a newspaper and see a report about the case that you are sitting on. But with things like Twitter, where stuff is forced to your phone all the time, you might receive a comment that you had not gone looking for.

Professor Ormerod: Clause 42 is the provision that deals specifically with our primary recommendation, which is for the offence of intentionally searching for information.

Although our recommendation—we did not draft the Bill, in this instance—was for a narrow offence—searching intentionally for information related to the case—in the provision that implements that recommendation, the fault element is slightly wider. Other than that minor query we have about the potential width of the fault element, it implements our recommendation, so that it is restricted to intentionally searching for information.

Proposed new section 20A(6) provides a specific defence for someone who needs to look at information for reasons other than those related to the trial.

Q168 Stephen Metcalfe: So you are generally happy with the clause in the Bill as it stands?

Professor Ormerod: Yes. If we have minor queries about the drafting, I wonder whether it will be more appropriate for me to put those in writing.

Q169 Mr Slaughter: Professor Ormerod, feel free to put this matter in writing if that is easier. You made clear in your submitted note that some of the clauses in part 3 arise from the commission's reports and some do not. The ones that do include clauses 37, 38, 40 to 42 and 47. Sometimes when reports are translated into legislation, something gets lost in the translation. Have you any concerns that you want to raise in relation to those clauses, which are broadly your clauses, if I may put it that way? If you wish to put that in writing, so be it.

Professor Ormerod: I can run through them relatively quickly. We consider that clauses 37 to 38 do implement our policy recommendations. These are the powers in relation to the temporary removal of material that poses a risk of prejudice for online publications. Clause 38 provides a new route of appeal. Clauses 40 and 41 also stem from our recommendations. Presently, there are no clear statutory powers for judges to remove internet-enabled devices from jurors, so it is useful to have those powers set out in statute.

Clause 42—the primary recommendation from our report for an intentional searching offence—does implement our recommendation, subject, as I say, to this minor query about whether it should be restricted to somebody who intentionally searches for information, knowing or believing it will be relevant to the case.

Clause 43 was not a recommendation that formed part of our report. It is not inconsistent with our policy. This clause creates an offence for a juror who has already searched and committed the clause 42 offence. This clause then creates an additional offence if they share information with other jurors, so it is a contamination offence. It is quite limited, because it does not criminalise the recipient; it does not criminalise the juror to whom that revelation is made. It might be argued we were not sure that this was necessary, because it would be a factor aggravating the sentence of any juror who committed the clause 42 offence for searching for the information, but it is certainly not inconsistent in policy terms.

Clause 44 is, again, not an offence that we recommended explicitly. We recommended that consideration be given to an offence of this nature. It stems from a case before the divisional court in 2013 where a juror had posted on Facebook the fact that he was trying a defendant charged with a sexual offence on a child and his intention to not try that defendant fairly. The common law contempt, which deals with that kind of behaviour, was declared in the Davey case to be based upon an intentional interference with the administration of justice. By posting his attitude on Facebook in that way the defendant had intentionally interfered with the administration of justice, and that case was decided after our consultation, so we were not able to recommend formally that that offence be created. We recommended consideration be given to it, but we did recommend it in quite narrow terms. Our recommendation was that it should be an offence for a juror—or consideration be given to an offence for a juror—who did intend not to try the case on the evidence and demonstrated that intention.

The formula used in clause 44 is quite wide. It does seem to go beyond that, so that it might capture a defendant who engaged in any conduct that a reasonable person would perceive was intended. Of course, the safeguard here is that the Attorney-General's consent will be required before any prosecution for these offences takes place.

Clause 45, which is a rather long clause, also flows from our recommendations. Section 8 of the Contempt of Court Act 1981 presently creates an offence for a juror to disclose information that was considered during their deliberations, and it makes it an offence to solicit such information from a juror or to obtain that information. This clause replaces section 8. Our recommendation was that there should be opportunities for jurors to reveal miscarriages of justice that they feel may have occurred during deliberations, and that they should have the opportunity to do that by revealing them to the court or to the Criminal Cases Review Commission, which conducts these investigations, or to the police. If that new defence was created, as we recommended, it becomes necessary to relax section 8. So the intention of this provision is that it should not be an offence for a juror to disclose to a responsible body and it should not be an offence for a responsible body to then obtain or solicit information in order to conduct an investigation into alleged wrongdoing within the jury room. It is a rather dense and technically drafted provision, but that is not a matter that we drafted.

Q170 Mr Slaughter: Thank you. That is very helpful. In relation to clause 44 you alluded to the fact that it was a relatively widely drawn clause. Others have gone further and said that perhaps it is simply too broad and somewhat oppressive, in the sense that it appears to put quite an onus on jurors to envisage what conduct might be prohibited. Do you have any concerns specifically? I think the case you talked about would have been caught by your formulation, "intended not to try", and demonstrated that. That seems a rather clearer definition. Would you have preferred that to be the basis of this type of clause?

Professor Ormerod: It is certainly less ambiguous and closer to the present common law which, as the case of Davey makes clear, is based on intention. I think our recommendation has at its core that the juror intended not to try the case on the evidence or intended to prejudice the case.

Q171 Mr Slaughter: I do not want to press you further here, but would you prefer to see something phrased in those slightly narrower, slightly clearer terms?

Professor Ormerod: Drafting is a matter for the Committee. I see the advantages of following the definition based on intention.

Q172 Mr Slaughter: I have a couple of slightly more general points in relation to this. As you said, there are clearly advantages in putting this into the criminal law rather than allowing the current practice of each court setting its own rules, but that changes somewhat the relationship between the judge and jury and it puts at risk the idea of criminalising juries in a way that was previously not possible. Do you think there are any dangers of that?

Professor Ormerod: I think that this will improve the position of the judge-juror relationship. When we consulted on this project a number of judges described the present position where, in their first few minutes of meeting the recently sworn jury, they were obliged to describe the scope of a criminal offence in all but name. It was their obligation. It was entirely for the judge to spell out the nature of that offence. They felt that that destroyed the rapport that they were trying to build with the jury, whereas if the offences existed as normal criminal offences defined by Parliament, judges would be able to say, "This is not a matter for me. Parliament has decided that this should be criminal and it has already been explained to you." So they would be relieved of that specific obligation.

Q173 Mr Slaughter: That is right, but that then presents another problem, which is how the jury is then cognisant of its responsibilities. These are stick rather

than carrot clauses. Two areas deserve more investigation: one would be the education of jurors, so jurors are clearer about their responsibilities, and the other would be research into juries, which is very constrained. Would you think that that should be the other side of this? How, in other words, will the public know what jurors are doing, whether the law is working, and how will jurors know exactly what risk they are at?

Professor Ormerod: If I may deal with the education element of that first, one of our recommendations was that more is done in terms of education within the national curriculum to explain to everyone what the responsibilities of jurors might be. It is an important civic duty. We also made recommendations in our report that the ongoing research into how jurors are informed about their specific obligations, should focus on how the new offences, if they were created, might be best explained to jurors.

There is a fortunate coincidence in timing that the ongoing research should be able to identify the very best means of explaining these offences to jurors in the future. In terms of jury research, the present prohibition in the Contempt of Court Act remains in place. Our recommendations included a relaxation of that to allow for wider research into juries and their deliberations. That has not been taken forward into the Bill. Our recommendation was that we should find out the best information we can about the jury workings and the operation of the individual jurors and juries, so that we can ensure that our system works well.

Q174 Mr Slaughter: Certainly on both those points—the research point and the education point—you would like to see them taken forward, whether in the Bill or otherwise.

Professor Ormerod: Yes.

Q175 Mr Slaughter: Does that deal with the very precise point about how jurors will now be informed about these new offences? They have a right, do they not, to know what risk they are at? Presumably half the purpose of the offences is to make clearer to jurors exactly what is prohibited behaviour. How should that be done?

Professor Ormerod: Yes. We have made recommendations about how that might be done, but we think that that should really be based on the evidence from the ongoing research. If it is found from the ongoing research that the best method for communicating that is by DVD, poster or conduct card—all of those have been suggested—we would endorse that. It is important that jurors are informed well in advance of the trial that there will be these limitations and—going on from clauses 40 and 41, which deal with the taking away of internet-enabled devices—that provision is made for jurors to store their mobile phones, iPads, iPods and so on while they are in the court building. The jury are in a better position with this form of forbidden conduct being defined by Parliament than defined on a case-by-case basis by the judge. The judge is in a better position because there will be consistency in the scope of the forbidden conduct, which they will be reporting to the jury.

Q176 Mr Slaughter: They could be handed a copy of the Bill. The final point then is that there is not great disagreement and this is a step in the right direction, but it is changing the burden on the jury. It is somewhat more intrusive into what jurors do. Do you think it could discourage people from wanting to take part in jury service or the process? If you think as a prospective juror that you are going to have a raft of different criminal offences, often punishable by prison, will that have a deleterious effect?

Professor Ormerod: I hope not, because this places the jurors in a clearer position than at present, where they are probably less aware—23% of them are certainly confused about the fact that the form of conduct they might be engaging in could land them in prison for up to two years. I think it is better to have the boundaries set out clearly. This should not deter jurors. The explanation as to why they should not be searching on the internet can be made very clear. It is obvious that it would be unfair to try people on information that has not been scrutinised in the courtroom, has not been heard by all the jurors at the same time and has not been scrutinised by counsel, solicitors or the judge and so on. The message can be relayed, we think, very easily.

Q177 Mr Slaughter: There may be more recent research that you know about—this is from 2010—but Professor Cheryl Thomas, who I think is giving evidence to us on Thursday, found that a quarter of jurors sitting in high-profile cases admitted to looking for information on the internet. That is a lot of people. Is that something that troubles you and you think this will be the remedy for?

Professor Ormerod: There is more recent research. The most recent research from Professor Thomas suggests that that figure is now 7%. Again, by creating the criminal offences, the jurors are placed in a better position because it is made clear where the boundaries of forbidden conduct are.

Mr Slaughter: Thank you.

Q178 Angie Bray: May I turn your attention to the trial by single justice? As you know, the Bill would remove some summary non-imprisonable offences from the magistrates courts. The information we have been given so far is that that is offences like speeding, driving without insurance and TV licence evasion. Are you aware of other offences that might get caught up by this change?

Professor Ormerod: May I say that this does not form any part of the Law Commission's work, so I am not in a position to be able to answer those questions?

Q179 Angie Bray: Okay. You do not have a view?

Professor Ormerod: No.

Q180 Mike Kane (Wythenshawe and Sale East) (Lab): What about a judicial review?

Professor Ormerod: I am afraid that was not part of the Law Commission's work either.

Q181 Sarah Champion: My apologies if the introduction is a bit long, Professor. Can you clarify exactly what is meant by searching for information? For example, if I am a juror and the judge has given direction and the case is about female genital mutilation, I think I know

what it means, but I am not quite sure. I then go home or sit in the court on my smartphone and research female genital mutilation, which gives me a better understanding of the symptoms and causes so I am a more informed juror. Would that then mean that I am a criminal? Where are the distinctions?

Professor Ormerod: May I deal with that under the present law and then under the proposal? Under the present law, that would constitute contempt of court. One of the leading cases on this involved a juror who was unsure, she said, of the meaning of the word grievous, when the charge they were trying was one of grievous bodily harm. She looked at the internet for a definition of that term and that was held to constitute a contempt. By the same token, your research would also constitute a contempt. The reason is that, by discovering that information, although not maliciously motivated—your intention might have been to be a good, conscientious juror—nevertheless the information you are finding has not been validated by the court process. It has not been heard by all 12 jurors together; it has not been scrutinised by counsel, solicitors, or by the judge; it may be inaccurate or prejudicial. It may be evidence that the parties were aware of but chose, for some good reason, not to adduce at the trial. The danger is that if all 12 jurors go off and find their own favourite website describing whatever information it is, the pool of information is completely contrary to the evidence. The correct approach in that case is for the conscientious juror to ask the question, "I am unclear as to the meaning of this term. Please would you be able to provide us with some further explanation?"

Under the clause 42 offence, as it will become, the behaviour would also be caught, because the juror would be intentionally seeking information and when doing so had reason to know that the information was relevant to the case.

Q182 Sarah Champion: How does a judge know the level of information that all the jurors are bringing to the case? We may both understand the word "grievous", but our understanding may be completely different. I am struggling with this.

Professor Ormerod: If it is a term of art, it ought to have been defined and explained to all the jurors together in one pool, or expert evidence might have been adduced to clarify that. If an individual juror or the jury has concern about the definition of a term, they are entitled—indeed encouraged—to ask questions to clarify that, so that the definition that they are then provided with is delivered to the whole, at once, after the judges have had discussion with the advocates.

Q183 Sarah Champion: So in specific cases, either a direction by a judge or an agreed piece of information could be very useful to the jury?

Professor Ormerod: Yes.

The Chair: If there are no further questions for Members, may I thank the witness for his evidence and move on to the next panel of witnesses?

Examination of Witnesses

Nicholas Fluck and Nicholas Lavender QC gave evidence.

The Chair: We have until 6pm. Could the witnesses please introduce themselves for the record?

Nicholas Lavender: My name is Nicholas Lavender QC, and I am the Chairman of the Bar Council.

Nicholas Fluck: My name is Nicholas Fluck, and I am the president of the Law Society of England and Wales.

Q184 Valerie Vaz: Thank you for coming to give evidence. I suppose that I am talking lawyer to lawyer, so I hope that we do not lose a few people. Clause 51 and clause 53(4) and 53(5) seem to affect the way in which judges will run their courts, and judges' discretion. Do you think that is important?

Nicholas Lavender: I am very grateful to you for asking that question, because it enables me to make two general points that I wanted to make anyway, which are to do with the approach of this part of the Bill. Obviously, an important part of the context is that we have reforms to judicial review procedure being proposed by the Government, and I stress that because, of course, in many judicial review cases, the Government are, or an organ of government is, a party. It is the lawfulness of action taken by the Government or an organ of government that is the very matter at issue in the case.

In an ordinary civil case, it would be unheard of for one of the parties to turn round and say, "I'd quite like to change the rules of procedure under which my case is proceeding", but that is in effect what is happening here. We have to bear it in mind that in proposing reforms to the rules of the game, the Government are, at the very least, in a conflict of interests situation. That point has been made very forcefully, particularly by Lord Pannick when he spoke about the Government's original proposals at the Bar conference in November last year, and more recently, when he wrote an article in *The Times* on clause 50.

Moving from that general point to something slightly more specific to your question, Ms Vaz, there are of course already procedures for dealing with procedure. There is the rules committee, which makes the civil procedure rules that govern judicial review procedure, and then there are the judges themselves, who are able to, and do, fashion procedures to meet the justice of particular cases. For examples, clauses 54 to 56 deal with cost-capping orders, which are something that the judges themselves produced to deal with particular cases where they felt that without a cost-capping order, a potentially valid claim to the legality of a Government action might not proceed. There are already ways of dealing with procedure, and it seems to me that an important question in relation to this part of the Bill is: is this really a matter that Parliament ought to be getting involved with at all, or should the procedure not be left to the judges and the rules committee? A number of our concerns about those clauses are very much that they are too hard and fast, whereas a decision by the rules committee, or by a judge who is dealing with a number of these cases, and is better informed, might be more sensitive to the nuances of a case.

Nicholas Fluck: I would largely agree with that. I would also say in relation to clauses 51 and 52 that the provisions allow a court effectively to make cost orders against third parties who are in effect concealed behind a straw man or a front person who is bringing the case. I am concerned about the wide scope of the drafting, and like Mr Lavender, I am concerned about the necessity for those clauses. If a clause of this nature needs to

come into being at all, there should at least be a discretion in the courts, so that they could waive the requirement to provide information in certain cases.

Looking at it externally, I think that this will be regarded as further financial hurdle to obtaining a remedy that, broadly speaking in line with the rule of law, Government and the courts believe is appropriate. I am just concerned with the unforeseen consequences of this sort of wide drafting. In particular, I was discussing earlier with colleagues what the position would be of, for example, a law firm that agreed to take pro bono a case on behalf of somebody with a very laudable case, but with no financial resources themselves, on behalf of the secretary of a charity or similar. In those circumstances, it is easily possible that a court might feel that with this enacted, it was necessary to go behind an arrangement where there was a clear purpose for a challenge—there was the essential nub of a legal problem that needed to be reviewed—and to say that there must be an automatic consequence in costs. I am very concerned about that, particularly at a time when there is very great pressure on legal aid and on the availability of funding to take important matters of law through the courts. If you add this, I think it is an additional—and, I would submit, unnecessary—financial hurdle that gets in the way of the delivery of justice.

Q185 Valerie Vaz: I have to say that I am a solicitor, but I am on the roll, rather than a practising solicitor, as we are mentioning interests. Is it your view, Mr Lavender, that with these judicial review proposals, it will become more difficult to hold the Government to account?

Nicholas Lavender: Yes, and of course what is in the Bill has also to be seen against the general context of what the Government are doing in relation to judicial review over the last year or so. They have already introduced some procedural reforms that, by shortening time scales, have made it more difficult. Perhaps the most important provision that the Government are proposing that would have a chilling effect on access to justice is in relation to legal aid.

There are at present arrangements that allow solicitors who do this kind of work to prepare and bring applications for permission to apply for judicial review on legal aid. The Government's proposal is that in those cases, the solicitor will not know at the outset whether he is going to get paid on legal aid at all. The only way he will get paid is either if the court grants permission to apply for judicial review, or if the Legal Aid Agency in its discretion agrees after the event to give legal aid. Obviously, that is bound to discourage people from bringing applications for judicial review. Although that provision is, of course, intended to deal with what are perceived to be unmeritorious applications, it curiously strikes at what, in many ways, are the most deserving cases.

These are the cases where the claimant has such a strong case that once the local authority, Government Department or whatever looks at the case, it does not contest it. People do not need to get to the stage of the court deciding whether or not to grant permission. That happens in many judicial review cases. The mere fact that a solicitor has considered the case to be worth bringing, has put the papers together and launched the application leads to relevant individuals within the defendant organisation having a proper look at the case and deciding to do something about it. The claimant gets his remedy.

Thinking about my own practice, which is principally civil disputes, if someone has a case where they get what they want simply by issuing the proceedings, my clients would mostly call that a very good result. It is surprising that in those cases, the right to legal aid is being taken away.

Q186 Valerie Vaz: Before Mr Fluck responds, are you saying that lawyers will not be paid for work they do under pre-action protocols and responses to those?

Nicholas Lavender: This applies to all work done before the grant of permission. In effect, that work in future will be done on a speculative basis.

Nicholas Fluck: Which is, I think, a further burden on an already tight system. Financially speaking, it is a very difficult position. I also think it is back to the same difficulty—that there is actually a financial impediment being imposed to prevent this sort of case being brought. Particularly with regard to clause 50, we are now looking at something that says, "If this, then that, then that", before reaching the stage where the actual issues are tested in court. My concern about clause 50 in particular is that there will be a requirement for somebody to consider what the result would have been if a procedure had been applied properly. The reality is that it does not work like that in the real world. The ability to test how it is going to work will almost certainly be at least as complex as the current process of saying, "Prima facie, this ought to be heard, so permission will be granted and we will proceed to hear the issues." It is an additional hurdle, and it does not make a great deal of sense. I do not think it is possible to say fairly in a preliminary hearing, "If this had been done differently, the result would have been that." A lot of the time, we look at this with 20:20 hindsight. The reality is that that would be much safer and more sensible, particularly given the fact that the volume of JR traffic is very low.

It is worrying that one would try to place another impediment to actually testing the case, rather than saying, "What would have happened up front if this had been dealt with separately?" Satellite litigation about what "highly likely" means is inevitable, and it will add costs and uncertainty. With my official hat on as president of the Law Society, anything that removes uncertainty, minimises costs and delivers true, just results gets my thumbs up.

Q187 Valerie Vaz: One of the cornerstones of the rule of law is uncertainty and certainty. How will the clauses on judicial review affect the perception of the rule of law?

Nicholas Lavender: Clause 50 is a good example. The clauses seek to tell the judges in advance, "This is the way you have got to decide it." The judges already take into account the factors that are in play. I repeat that clause 50 was dealt with in a good article by Lord Pannick in *The Times* last month—I can send you a copy of it. He recognises that in many cases judges take account of the fact that an unlawful act by the Government may have had no harmful effect, so a judicial review may not be appropriate. However, there may be cases in which it is right to look at whether the Government have acted unlawfully. For example, although their action may not have had an effect in one case, there may be other cases in which it will. A decision in one case acts

as a precedent for others. In general, the availability of judicial review is an incentive for Government Departments to get it right in the first place, which is much more desirable than waiting for judges to tell them that they have got it wrong.

You see the same with clause 53, for example. Costs payable by interveners is a matter already at the courts' discretion, and they take it into account. If somebody applies to intervene in proceedings, the judges ask themselves, "What is this person adding, and is it worth the additional effort involved to have this extra party there?" However, clause 53 seeks to say, "The rule will be that the court must order the intervener to pay costs, save in exceptional circumstances." It will remove the discretion from the judges, who are, of course, closer to the coal face and better able to deal with the justice of the individual case.

Nicholas Fluck: If I might comment briefly on clause 50. The Society agrees that it is desirable that we limit the number of hopeless JRs; one should not promote the taking of hopeless JRs. However, the reality is that, first, there is not a significant number anyway, and in any case, courts already have ample powers to deal with hopeless JRs at the permission stage. They simply do not grant permission for them to go any further. To bolster that power with an external statutory provision seems completely unnecessary. A lot of hurdles have to be cleared before a judicial review application is accepted, and an additional measure is just a work of supererogation.

On clause 53 and Nick's point about whether it is an appropriate additional control, my position is, first, that interventions are not frequent. There are not that many interventions. Secondly, they all require the permission of the court. If the court believes that an intervention is not appropriate or should not be taken, it does not give permission. I do not see a need for anything that implies an ex post facto obligation to consider the cost position, because the cost position would be part of what the court takes into account in deciding whether it should grant permission. As Nick said about the rules that apply, if necessary, judicial advice can be given. It might well be that judges could be invited to consider the costs position and consequences of intervention. My view is that interventions per se are usually valuable. It is something that should not be discouraged. The intervention of a third party is often on some significant point of public interest or a particular point of law. It might provide evidence or some legal process that is not otherwise available for the court to consider in that instant case. If we assume that the reason an intervention is permitted is that the judge looking at it at first hand decides that there is something that this intervention can bring, the decision of the judge trumps the argument about bearing the costs of other parties.

As the Law Society, we occasionally intervene. We almost always intervene on relevant points, or on points that are not being taken in the instant case which we think the case should consider coincident with other issues. For example, when we intervened in the QASA case, we raised a new point which was not in issue but that was of value and importance. I would not want there to be an impression that there is an automatic result that an intervener has to pick up other people's costs, because most of the time, if the judge does not feel that the intervention is relevant, there will be no permission. That would be a more sensible and pragmatic approach to this, rather than creating a tier which people are going to interpret. They are going to say, "There must be some implication that this is what is intended, or this provision would not be on the statue book."

Nicholas Lavender: May I add another concrete example? I appeared for the Bar Council about 18 months ago as an intervener in judicial review proceedings which were brought by the Crown Prosecution Service at the Crown Court in Bolton, which had made a costs order against the Crown Prosecution Service because it was repeatedly allowing hearings to come on and then be ineffective. The court wanted to show its disapproval of this. Unfortunately, the decision was that the court could not do that. There is currently no remedy for that situation and that is a matter of concern in a different forum. When that case first came to court, the judge said he wanted help from the profession on the wider implications of this individual case so we were invited to come along and take part. If you are invited to come along, that is a situation where it would not be right that you should then be asked to pay some costs for doing so.

Q188 Valerie Vaz: Turning to Corner House, do you think there is sufficient discretion in the court, and in the list and the tests, that we do not necessarily require the clauses on protective costs?

Nicholas Lavender: Absolutely.

Nicholas Fluck: I agree.

Q189 Valerie Vaz: In terms of perception of the legal system in the wider world, are you aware of the comment made by the Minister without Portfolio, the right hon. and learned Member for Rushcliffe (Mr Clarke), who said that Britain was the lawyer of the world? What do you think is the perception of our jurisdiction if these proposals go through?

Nicholas Lavender: I have in mind what Lord Faulks said in December in the House of Lords in the debate on the statutory instrument which introduced changes to legal aid for what are called very high cost cases. This is part of the Government's package of reforms to legal aid which, as I mentioned, also has a bearing on judicial review. Lord Faulks—who, shortly after that debate, of course, became a Minister—said that these proposals mean that our criminal justice system is under threat and that its reputation, including its international reputation, is now at risk. Again, stifling access to justice through judicial review is something that we see as part of that same picture.

Nicholas Fluck: First, I do not think that there is a need to deal with this in the way that is proposed. Protective costs orders are pretty new in England and Wales. Corner House established the principle and it was developed for a good reason, which was to make a level playing field for claimants and defendants in public law cases, to encourage people to be able to take those cases where there is public interest in the outcome. The aim, of course, was to give certainty to somebody as to what they would be facing in the event that they found themselves looking at costs after a case that needs to be taken is taken and lost. The honest answer is that it is almost a non-problem that is being addressed with a very heavy hand. On my information there are 17 judicial review cases involving PCOs, of which only three would

now be subject to these proposed new procedures; all the rest would have come under the Aarhus convention anyway, which I think is accepted as something that is intended to be preserved.

The reality is that it is largely damaging to the reputation of English justice to start putting external Executive hurdles, if you like, in the way of what is perceived by the judiciary as a public interest need. It is a very difficult line to judge, because I appreciate that Parliament, as the custodian of public money, always has this difficulty in treading the narrow path between what is appropriate for the public purse and what is appropriate for the public interest. In this case, I think this goes rather too far and is, in my submission, unnecessary.

Q190 Valerie Vaz: Do either of you know what the value of the legal sector work is? Do you know what people coming here and using our jurisdiction or our lawyers is worth to this country?

Nicholas Lavender: For the Bar alone, 2012—the last year for which I have figures—produced exports of £230 million. We are only a tenth of the size of the Law Society. I know that TheCityUK has published data on this. We can get you a copy of its report.

Nicholas Fluck: There is, very roughly, £4 billion in exports from the solicitor side of the profession.

Q191 Valerie Vaz: I want to take you to something specific and ask you about your concerns when there is a single magistrate sitting in private. What are your views on that? Proposed new section 16A of the Magistrates' Courts Act 1980, in clause 26, states:

"The court is not required to conduct any part of the proceedings in open court...The court may try the charge in the absence of the parties and, if a party appears, must proceed as if the party were absent."

Nicholas Lavender: Sorry, I did not come prepared to address that clause. Clearly, there will be some cases—a speeding offence or something like that—where there cannot be anything wrong with dealing with it in a fairly executive fashion. It is a question of where you draw the line.

Q192 Valerie Vaz: And in closed court? Do you have a view on that?

Nicholas Lavender: Again, our strong view is that the starting point is open justice. If it is a hearing where the defendant is not going to turn up anyway—for a speeding offence, let us say—I can see that in that situation there might be an argument for it, but it cannot be taken too far.

Nicholas Fluck: Like my friend Mr Lavender, I also have not come prepared to talk to you about that specific point, for which I apologise. I would be very happy to take it away and come back to you with a written answer. My immediate reaction is that I can understand why it is desirable to have a fast-track process in certain situations. I am concerned because one of the other things that I do with my hat on as president of the Law Society is act as ambassador for our legal profession overseas. Anything that looks as though it limits the openness, transparency and availability of our legal systems is always viewed with great suspicion abroad. Some of that may be self-interest, to be fair. In certain jurisdictions they are trying to protect their own legal jurisdiction.

Anything that looks as though it diminishes the openness of the right to have your case heard in open court is always problematic. I appreciate there is a great deal of pressure on the public purse, and to be able to deal with things that are largely simple offences in a swift and efficient, paper-based manner is probably understandable. Can I come back to you with a written response, with people who know more about it than I do?

Q193 Valerie Vaz: Yes, of course, thank you.

Mr Lavender, you mentioned Lord Pannick. Do you recognise this description of people who undertake judicial review?

"The professional campaigners of Britain…hire teams of lawyers who have turned such legal challenges into a lucrative industry…a promotional tool for countless left-wing campaigners. So that is why we are publishing our proposals for change."

Do you recognise that description of people who take judicial review cases?

Nicholas Lavender: No. I think you will find the best answer to that in Lord Pannick's speech at the Bar conference, where he dealt with that. He pointed out that that caricature of judicial review was masking the fact that what judicial review is actually about is dealing with the lawfulness or unlawfulness of Government action. Amazingly, some of the examples that were given by the Government in support of their proposals, were cases where the Government had been found to have acted unlawfully.

Nicholas Fluck: I am sure you would not want to limit in any way the ability of the courts to determine whether or not the Government have acted lawfully.

Valerie Vaz: Thank you both.

Q194 Robert Neill: I should say that I am a non-practising member of the Bar, Mr Crausby. Mr Lavender, you seemed to kick off with the proposition that you took objection to these proposals because they emanated from the Government. I assume therefore that if it were a private Member's Bill, it would all be all right, then?

Nicholas Lavender: I think it is right to bear in mind that they are being put forward by the Government.

Q195 Robert Neill: Not your best point, is it? Surely, as a matter of principle, you would concede that Parliament—and it is Parliament that will decide on this Bill—is entitled to place constraints on the discretion of the judiciary, as it is on anyone else?

Nicholas Lavender: Parliament is entitled to do exactly what it likes. Fifty years ago this year, in the case of Burmah Oil and the Lord Advocate, Parliament legislated to overturn a court decision. If Parliament wants to do that sort of thing, of course it can, but I would not advocate it.

Q196 Robert Neill: But let us put it into context. Ultimately, if Parliament wants to, it can. Can you help me with this? Why do you think—either of you—judicial review increased threefold between 2000 and 2012?

Nicholas Fluck: I would answer that by saying that if you look at the volume of legislation reaching the statute book, it was probably outstripping the rate at which judicial review was increasing.

Q197 Robert Neill: Do you think that decision making got worse?

Nicholas Fluck: Decision making in terms of what became law, or decision making in terms of decisions to launch judicial review?

Q198 Robert Neill: The sort of decisions that might be challenged by judicial review.

Nicholas Fluck: I think perhaps the honest answer to that is that it is always the case that the more law making that is done, the more people will seek to test the law making, to make sure that it is fit for purpose. You have to look, for example, at the recent record of the bonfire of red tape and so on. There would not need to be bonfires of red tape were it not for the fact that someone somewhere along the line generates it in the first place.

In reality, it is a sign of a healthy and sustainable legal process that the Government do allow challenge to the laws they write. It is appropriate that there should be challenge to the law that is written. It is appropriate that when those challenges are upheld, the law should be changed. It is very difficult, of course, because we have that uneasy tension between a common law-based jurisdiction where judges generate the law and Parliament wants to say, "No, you are not doing it in a prescriptive enough way. We think it should be more precise or accurate." There is a danger that that uneasy tension causes unintended consequences. I think that judicial review as a remedy is largely something that puts things right and acts as a check and a balance. Government is all about checks and balances.

Robert Neill: Nobody is talking about the abolition of judicial review. It is a question of where you put the checks and the balance. You think it should be in one place. Is it not legitimate that those who have some responsibility for the public purse should say that that check and balance should not be exercised without some concern as to the potential impacts on public costs?

Nicholas Lavender: That person—you say it is not my best point, but it is still a very good point—is in a conflict of interest situation, given that that they are a party to these proceedings, as well as being the one who put them forward, whereas there are mechanisms for dealing with procedure through the judges and the rules committee where you do not have that issue. The judges and the rules committee are not oblivious to the sort of concerns you mentioned about unmeritorious claims being brought forward; quite the contrary.

Q199 Robert Neill: Ultimately it is neither the Government's money nor yours or mine, but the taxpayer's, is it not? That is what Parliament is here to safeguard.

You made the point—it is a fair one—that sometimes the best result is that litigation should not have to go too far down the route. Do you not get the sense that sometimes bringing a judicial review is, for understandable reasons, a means for the aggrieved person or organisation to put pressure upon the decision maker to come to a settlement—in effect, to change their decision? That is a legitimate part of it: you hope that they might cave in.

Nicholas Fluck: With respect, I could argue that the other way round and say that if the decision was wrong then it should be challenged. If the decision was right and is challenged, then the challenge will be seen off. Your point about the checks and balances between the public interest in terms of the fiscal cost against the public interest in terms of the rule of law is an impossible one to draw. The answer ought to be, in a state that respects and has regard for the rule of law, that if there is any balance of doubt then you should err on the side of ensuring that you preserve the rule of law, even if there is an associated cost. I accept that is an extremely difficult line to draw.

Q200 Robert Neill: The point I was getting at was that precisely because there is that decision to bring an element of pressure, which may be for a good reason, it is legitimate that once that happens and costs start to run, who is funding the person who brings that pressure should be out in the open. That is the transparency provision. There has to be a right to know who it is who is bringing litigation against either a Government or a local authority or any other public body. Who is the person who is bringing this and putting the pressure on? Who is funding it? That is legitimate for the public to know, is it not?

Nicholas Lavender: I do not think that anyone suggests otherwise.

Robert Neill: There are objections to the transparency clause.

Nicholas Lavender: There are already powers that enable the courts to, and the courts do already, make costs orders against people who fund litigation. That is just part of the law already. What I find strange is that this Bill is coming forward in order to deal with matters that are matters of court procedure, and to do it by Act of Parliament, and to do it in a way which the tells the courts, "This is the way you have to decide particular cases." In particular, as we are talking about the provision of information, the provision of information, which is referred to in clause 51 would be a precondition to seeking judicial review. That is an absolute rule with no discretion. Unless you provide this information you just go nowhere with your application.

Q201 Robert Neill: I do not see what your objection is to that being put into statute.

Nicholas Lavender: As I say, in many cases it may be appropriate to make it an absolute rule, but we say that the absence of discretion, perhaps for reasons of time or urgency, is not practicable. Again those sort of procedural matters are better dealt with by the rules and the courts than by an Act of Parliament, but certainly if there is to be an Act it should preserve discretion for the courts to reach the right decision in individual cases.

Q202 Robert Neill: And in relation to the issue around costs, about which both of you expressed some concerns, it comes to this: the person who initiates the proceedings starts costs running. Is it unreasonable that they should have the discipline of thinking that they might be liable in costs, whatever their status, from day one?

Nicholas Lavender: I was not aware that any provision in the Act affected that position.

Q203 Robert Neill: Well, you seemed to object to what the Bill is proposing; you were talking about the presumption that interveners, for example, might not be able to recover their costs.

Nicholas Lavender: Forgive me, the intervener is not the person who starts the proceedings.

Q204 Robert Neill: Once they have brought their intervention, you know perfectly well, Mr Lavender, that frequently it is the intervention that will considerably lengthen the case, in certain cases and circumstances. Is it not right that, not only should who is funding the intervener be known, but that the intervener should have to think twice about the potential cost consequences of their intervention?

Nicholas Lavender: Here is a curious thing about clause 53. Clause 53(8)(c) tells you who is a relevant party and who is an intervener. If you are somebody who is directly affected by the proceedings and the application for judicial review has been served on you, you are not an intervener; if you are somebody who is directly affected by the proceedings but the application has not been served on you, but you want to do something about it, then you are an intervener. It is as fine a distinction as that as to whether you are intervening or not and this hard and fast rule that, save in exceptional circumstances, you become liable for costs suddenly applies to you, whereas if you are a person who is caught by clause 53(8)(c) you are within the court's discretion as to whether you bear costs, and you will do so if you should and you will not if you should not.

Q205 Robert Neill: I get a sense, to be blunt with you, that this is lawyers saying, "Keep your tanks off of my lawn." You do not like the fact that Parliament is seeking to constrain what has been, essentially, something that has grown through case law and, essentially, judge-made, lawyer-made law, rather than Parliament-made law. My sense is that that is the real, underlying distaste that both of you have for these proposals. Am I right?

Nicholas Lavender: Let us put it another way. It was not Parliament who devised cost-capping orders; they were devised by the judges to meet the justice of individual cases. We believe that the judges who devised the cost-capping orders are the right people to develop them and to deal with the procedures for handling cost-capping orders. We respect, of course, the right of Parliament to step in, as it did in Burmah Oil Co. *v*. Lord Advocate and simply reverse judicial decisions or tell the judges what to say; it has that right, but it does not mean that it ought to exercise it as often as it does.

Robert Neill: Thank you very much.

Q206 Mike Kane: My question is similar. A number years ago, my constituent, Patrick Connor, a fine man, a working class fellow who lives in Benchill and a hackney carriage driver for more than 30 years, took the local licensing authority to judicial review and won on an aspect of a 1985 deregulation Act about how the local council will implement new taxis without proper consultation. Here is an ordinary working class guy who beat a big government institution—his local council. The only way an individual like that can participate in the judicial system is through his own mediating institution, which in this case was the General, Municipal, Boilermakers and Allied Trades Union. He asked his union to helped and it helped. That was the only way he could get his grievance and his members' grievance redressed. There would have been no other way as an individual that he could ever have that expertise or that resource to go and do that. I suppose the question is, in your view, what impact would these changes to the judicial review application have on cases such as Pat's?

Nicholas Fluck: The short answer is that any additional burden, whether it be in costs or procedure, will make it less likely that someone can access a remedy. My concerns about prescriptive creation of statute law to deliver a specific outcome are that it does not allow the flexibility of dealing with the individual case or the individual merits of that case. That is why I would disagree over the question of whether there should be an automatic hurdle, as it were, if we intervene in a case. Were your constituent to have been intervening in somebody else's case, would he have been more or less likely to have been able to intervene as an individual if he had known that he might face a cost penalty for third parties? The reality is that anything like that, whether it be costs or procedure, acts as an additional hurdle to people being able to obtain justice. Justice is a concept that we readily understand. It is difficult when you start trying to quantify it or dole it out in certain proportions or value chunks.

I completely sympathise with a Government that has a financial difficulty in being able to run a system where it seeks to cut back on that, but I cannot agree, as the representative of solicitors, that any cutback is ever going to be appropriate if it actually damages the ability of people to use that system. It is a bit like saying we will have a new £20 minimum fare for using a bus. We would still run the buses, but they would all be empty. Where do you put that emphasis? Where do you find the right path between an economic imperative and a justice imperative? In each of these cases, in clauses 50 to 53, there is already a judicial discretion. If somebody intervenes inappropriately and runs up everybody else's costs, they will suffer a cost penalty. To say that they must suffer a cost penalty even though they may have been invited to intervene is, in my view, wrong.

Q207 Mr Buckland: It does not say that. It imposes a presumption unless there are exceptional circumstances. On Mr Lavender's point about somebody not being covered by clause 53(8)(c), which is where a clearly connected person has not been served with a document, perhaps through complete failure or inefficiency, surely you could argue that that would be an exceptional circumstance? These are presumptions, not hard and fast rules, and they still give discretion to judges.

The big argument about all this was standing and the concerns about the reduction to standing. The Lord Chancellor has listened to the consultation and thrown that out. We are having an argument about the extent of discretion that is still available in clauses 53 and 50. Is this not all shroud waving and should we not just accept the fact that some discretion is still available within these provisions and that we are really arguing now over mere detail, when the main thrust of the concerns of everybody out there have been addressed by the Lord Chancellor?

Nicholas Lavender: If you are saying that the answer to all this is in the discretion of the judges, my answer would be why on earth are we not leaving this to the discretion of the judges in the first place? Coming back to Mr Kane, I think the real issue for your constituent

under the Government's proposals would be not the Act but the legal aid reforms that I was talking about earlier. In order to get a solicitor to take his case on legal aid, your constituent would find that that solicitor was having to act on spec, and would be much more reluctant to do so than they have been hitherto.

Q208 Mr Buckland: But is not the other point that legal aid is still going to be available for meritorious applications that perhaps have not reached permission stage? The Lord Chancellor made that concession as well, so the idea that legal aid suddenly goes out of the picture just because you may not have got to the permission stage, because the defendant has seen sense, is not right, is it? He has made that concession, so the sort of case that the hon. Member for Wythenshawe and Sale East refers to—a meritorious case—will be covered either before or after the permission stage.

Nicholas Lavender: Forgive me, but the point I made—I thought I was clear—was that the solicitor is having to do it on a speculative basis. Yes, some cases would be paid. You will be paid if you have got permission—but many cases, you rightly recognise, do not get to the permission stage—or at the discretion of the Legal Aid Agency, and you would not know until the case was over whether you were going to get paid on either of those bases. That is why I say this is converting legal aid judicial review permission applications into a speculative enterprise for the solicitors concerned. Unsurprisingly, that is going to have a chilling effect on the commencement of legal aid proceedings.

The Chair: I called Robert Buckland because he wanted to intervene. I will now call Guy Opperman, who has been waiting for some time.

Q209 Guy Opperman (Hexham) (Con): Thank you, Mr Crausby. May I deal with clause 50 first of all? Are we clear that this provision is set out to deal with the procedural error that all of us who practice judicial review see on a regular basis but that palpably would not have fundamentally affected the ultimate result? That is the import of this clause quite clearly, is it not? The question is to Mr Lavender.

Nicholas Lavender: It is dealing with cases where the Government have acted unlawfully, but in the individual case the outcome for the applicant would not have been substantially different if they had acted lawfully.

Q210 Guy Opperman: A very good lawyer's answer. The point that I am trying to make to you is that it is fundamentally to a procedural point that this is being drawn.

Nicholas Lavender: No. If the Government had not acted unlawfully, you would not need clause 50. If you were dealing with a case where there was no argument that the Government had acted unlawfully, clause 50 would not come into it. It only comes into it where the Government have acted unlawfully. Then, what you call the procedural point is that, in the instant case, it can be said and it seems to be highly likely at the early stage that, in fact, the result for this individual would not have been different.

Q211 Guy Opperman: Exactly. And the point surely is that, in relation to judicial review, at the end of the case very frequently, those of us who practice judicial review, which you quite clearly have done, will come to a situation where we will have had what I have described as a procedural error—I accept that it is a technical breach of procedure by the Government or the quango, or whoever has done it—but the judge would quite clearly have said, "This is not a decision where I grant judicial review and overturn the decision." That happens on a regular basis, does it not?

Nicholas Lavender: It is already the case, as I say, that judges take account of not only whether there has been unlawful behaviour, but what remedy it is likely to be appropriate to give, if any, at the end of the day, in deciding whether to grant permission for judicial review and whether to grant judicial review. So all these factors are already being dealt with by judges, and that is why we question the need to step in and tell them what to do.

Q212 Guy Opperman: I think that that was an implicit yes in a long way round. Would you say that there is any difference with this sort of procedure and the same procedure that applies to a criminal appeal where a Court of Appeal very frequently looks at cases where a Crown court judge would have given a standard 50-page summing up to the jury and made one error with a single word or sentence, but the evidence is so overwhelming or the overriding thrust of that summing up was such that very regularly the Court of Appeal would say, "There was a procedural error, but in these circumstances, we find the case so overwhelming that there is no way we will overturn the decision." That is the situation that applies in the criminal court, is it not? If you cannot answer, say so.

Nicholas Lavender: Forgive me. I am taking my time because I am clearly not making my point clearly enough and I need to think again about how to put it more clearly. There is a distinction to be drawn between the question of lawfulness—has the Government Department, or whoever it is, acted lawfully?—and what is the appropriate remedy to give. Now, I can see that you might draw an analogy with proceedings in the Court of Appeal, or what have you, but in the context of judicial review, much more experienced practitioners than I am—I have already referred to Lord Pannick—are quite clear that there will be cases when clause 50 makes a difference in the sense of preventing even permission to apply for judicial review or judicial review being granted itself, but where in the instant case, it is right and proper that the court should, even if the only remedy, make a declaration that there has been unlawful conduct, so that it will not be done again.

Q213 Guy Opperman: I take your point, but I could give you other examples. I can give you a final one: the Schools Standards and Framework Act 1998 revolutionised education provision in this country and had a provision that was highly similar to this. In the case of an independent appeal panel for a child excluded from a school, if the headmaster had not adhered to the correct procedure of sending two letters—by sending only one—but the decision was absolutely overwhelming because the child had drugs or committed a violent assault, you would not be able to overturn the decision because manifestly that would still be the result that would have been obtained. That is what these particular provisions of the Bill appertain to. Do you agree that that is a similar example?

Nicholas Lavender: Another similar example is that courts do that sort of thing all the time in judicial review cases, but in other judicial review cases, they decide that permission to apply should be granted and a judicial review should be granted because there has been an error of law by a Government Department. It is right that that is marked out, even though the individual case, which may be a test case, for example, or one of a series, is one where it makes no practical difference. However, a declaration of unlawfulness makes sure that next time the right procedure is followed.

Q214 Guy Opperman: All of which one would understand, appreciate and want but, at the same stage, I suggest that on a permission assessment to address procedural matters, this is the appropriate thing.

Let us move on to clause 53 on interveners. Subsection (5) was drawn to your attention by Mr Buckland. You gave the Bar Council example where you were invited to intervene in a case of public importance by a judge who wanted you to intervene and provide your assistance. In such a circumstance, you would be an intervener and, as you have said, you would feel very upset if the Bar Council was then invited to pay for the costs. You sat as a High Court judge, so you would be perfectly entitled to do judicial review cases along the lines of an intervention under the clause. In those circumstances, would you have awarded costs against the Bar Council, or would you have availed yourself of the very helpful exceptional circumstances provision of subsection (5), which says:

"Subsection (4) does not require the court to make an order if it considers that there are exceptional circumstances that make it inappropriate to do so"?

Self-evidently you, sitting as the judge in the Bar Council case, would surely have said, "As I have invited this person to intervene, I am not going to ask them to pay costs."

Nicholas Lavender: Funnily enough, it is not exceptional for people such as the Bar Council to be invited to intervene.

Q215 Guy Opperman: Does it happen all the time? Of course it doesn't.

Nicholas Lavender: It happens frequently enough not to be exceptional.

Q216 Guy Opperman: But you are sitting as a High Court judge, so surely you can be the judge of the exceptionality of the situation. You have spent the whole time telling us that this is not for Parliament. I think you said, "Parliament should not be concerned with these matters; courts should decide." You are given an exceptional circumstances test whereby you, the court, can decide, so surely it is up to you, as the High Court judge sitting in this particular case.

Nicholas Lavender: It is entirely appropriate that the judges should decide these issues and that they should not be bound by provisions like this.

Q217 Guy Opperman: But you have been given discretion. How is clause 53(5) not giving the court discretion to determine what are exceptional circumstances?

Nicholas Fluck: Perhaps I can help. The measure does not require the court to make an order if it considers that there are exceptional circumstances. If there are not exceptional circumstances, there are circumstances short of exceptional, for example that the judge has invited an intervener to intervene on an important point, but there is an argument that that would be construed, and it would be difficult to come up with a sensible or logical response.

Q218 Guy Opperman: Where is the restriction? Is there any part of the provision that redefines exceptional circumstances? I can find it not.

Nicholas Lavender: The restriction is in the words "exceptional circumstances". If you had deleted from that subsection the words

"there are exceptional circumstances that make it"

and simply put in the words "it is", I would understand your point, but leaving in those words creates an additional hurdle that has to be jumped and that places a restraint on the judge's discretion.

Q219 Guy Opperman: Could we go to clause 51, given the time, which is on the provision of information about financial resources. If this is to be brought under legal aid, any person would be required to give their financial information. Why should there be a difference in this circumstance?

Nicholas Fluck: Perhaps I can start, if it helps. My view is that I think that clauses 51 and 52 are drawn too widely. I gave the example earlier of a firm of solicitors acting pro bono in a meritorious case. It might well be, in effect, funding. Should it be caught for doing something that it is doing for no benefit to itself financially in a circumstance when it would be ordered to pay costs? I think that that is a concern. With diminishing legal aid cover, and with diminishing availability of the law to people for reasons of finance only, that is a concern.

Guy Opperman: I will not go any further, Mr Crausby. I will pause there, although I may come back in later, if there is any time.

Q220 Mr Slaughter: I am somewhat confused by the Government's position, but perhaps you can assist me, Mr Lavender. I am not sure whether, given your earlier answers to Mr Neill, the clauses in part 4 are elephant traps that will constrain out-of-control judicial review, which is being used either as a delaying tactic without merit, or as a political tool, or whether the proposals are nugatory changes on which the Lord Chancellor has already conceded the main point, which seemed to be what Mr Opperman and Mr Buckland were saying. What is your view? Do you think that judicial review is too easy at the moment, and that it needs these restrictions, or do you think that the clauses are nugatory and will not change the position very much?

Nicholas Fluck: I do not think it is necessary to constrain a remedy of JR. If JRs are being increasingly used wrongfully, which I do not believe that there is any evidence of, I can understand why there might be a desire to constrain their use. If you were to say that hopeless JRs were allowed to run simply because they served someone's purpose of delaying something, that would probably be the case; however, they already have a permission hurdle to surmount. Largely, that hurdle is sensitively and intelligently applied by the judiciary to decide what are matters that should be heard and what

are not. I do not think that there is a significant number of cases in which JRs are being launched trivially, lightly, wantonly or for inappropriate reasons.

Q221 Mr Slaughter: To put it another way, you are saying that the remedy of judicial review has been developed by the judiciary over time. Is there any merit in the clauses, or is there any improvement that you would wish to see in how judicial review operates at present?

Nicholas Lavender: May I just go back to your first question? Forgive me for repeating myself, but it is important to understand that the thing that will have the biggest effect on judicial review in the Government's proposals is the legal aid changes. We are looking at what happens when somebody has applied for judicial review, and what happens in relation to costs and people who intervene. There will be no judicial review application to intervene in, and no judicial review to argue about the costs of, if solicitors are not bringing them because they are put in a position where they can only do so on a speculative basis. That will undoubtedly discourage solicitors from acting in these cases, and some no doubt will go out of the market. In our view, that will have the biggest effect on the availability of judicial review as a remedy.

I take your point, Mr Slaughter, that so far as some of the clauses are concerned, especially those in relation to costs, a few of the questions have suggested that they do not make that much of a difference. That is because we say that these are all factors that courts can already take into account, and do already take into account. That is why it is unnecessary for Parliament to complicate judicial review proceedings by adding in extra provisions that would have to be taken into account at every stage when a court was exercising its discretion as to whether an intervener should pay costs.

Q222 Mr Slaughter: I think that we have had a good discussion on clauses 50 to 55. For completeness, although they are perhaps less controversial overall, do you have anything you wish to say about clauses 56 to 58, although if they are detailed points, you may wish to write to us? Clause 56 appears to grant the exception in environmental cases, but I notice that the explanatory notes state:

"This clause does not require all cases which may be argued to relate to the environment to be excluded."

In other words, such cases will not necessarily receive cost protection. Clause 57 seems unexceptional to me, but you can guide me on that if you want. I notice that the Bar Council's written submission says that you have "concerns" about clause 58, but you do not say what those concerns are.

Nicholas Lavender: Clause 56 is simply an exception, as I understand it, to clauses 54 and 55. The thinking behind it is that clauses 54 and 55 should not really apply in Aarhus convention cases, and we agree with that. Clause 57 is a specific clause that deals with certain planning proceedings. Perhaps we can write to you on that one.

The concern with clause 58 is that it is a Henry VIII clause. Subsection (1) gives the Lord Chancellor power to make regulations, and subsection (2) says that those regulations may

"amend, repeal or revoke legislation."

That is a very broad power to give to the Minister.

Nicholas Fluck: I would certainly agree with Mr Lavender's comments on clauses 54 to 56. Clause 56 becomes unnecessary were it not for clauses 54 and 55. As I said before, I think it is a very small point in that I do not think there are very many relevant cases that would have been caught by that provision anyway. I think three cases would have been caught by the provision that would not have been saved otherwise. It is effectively a de minimis.

Q223 Mr Slaughter: So the remainder would be saved by clause 56?

Nicholas Fluck: I think clause 56 would have saved all bar three of the 17 cases.

Q224 Mr Slaughter: I would not speak too soon. Wait until we see what the regulations say.

Nicholas Fluck: I appreciate that. I think the other thing, more generically, about judicial review is that asylum and immigration matters form a great deal of JRs, and those now go to the tribunal, so in effect that disappears. I would also argue that in relation to judicial review as a remedy, for example, shortening the period within which one has to apply for judicial review may have a perverse result in that people would no longer have the luxury of saying, "Let's see if we can resolve this by another means." In order not to be out of time, we would have to launch JRs regardless.

Q225 Mr Slaughter: My only other questions go to Mr Fluck because they relate to the Law Society brief on other parts of the Bill, although if Mr Lavender wishes to chip in, we would be pleased to hear what he has to say. My questions are brief.

You say that you support the criminal courts charge but that you wish the money to be directed towards legal aid funds, rather than towards the cost of the Courts and Tribunals Service. I am sure that is not going to happen, but do you think it is slightly optimistic? How much do you think this is going to raise? Do you think there is a prospect of raising large sums of money from the charge?

Nicholas Fluck: The honest answer is that the realistic likelihood of the charge raising a lot of money is very small. I think that the Government could send a signal to show that they value legal aid by taking this from here, rather than dropping it into HMCTS.

Q226 Mr Slaughter: You say that you support the proposals in relation to leave for appeals, covered in clauses 32 to 35. That is clearly helpful as a time-saving measure, but do you see it as a problem in terms of the Supreme Court becoming clogged with cases that it would not otherwise have to deal with?

Nicholas Fluck: The short response is that it would require permission from the Supreme Court to exercise that process. Whether that would end up being a permission that is exercised to regulate a work flow, I hope not, but I think the situation is that there are cases that ought to go to the Supreme Court. Short-circuiting anything in the judicial process is worth doing.

Q227 Mr Slaughter: Can you help me? You say that you think clause 36 on wasted costs is unnecessary, but what do you think it actually says? It is not an absolute requirement. Do you think this is another case of

unnecessary or confusing legislation, or do you think it creates an extra burden or requirement in relation to reporting practitioners to professional bodies?

Nicholas Fluck: My concern is that it would be interpreted in some instances as being a requirement to report. The court already has discretion to make a lawyer personally liable to pay any litigation costs arising from their own improper or unreasonable conduct. I do not think it is necessary to have a separate sanction. I would argue that costs are for the court and that regulations are for the regulator.

Q228 Mr Slaughter: My final question—I do not think you deal with this, so if you are not prepared, that is fine—is whether either of you have any comment regarding the contempt proceedings and the new offences relating to jurors. The members of both your organisations will be engaged as advocates in the Crown court. Have you given any thought to that? Do you have any reflections on it? If not, just say no.

Nicholas Lavender: I certainly have nothing to add today.

Nicholas Fluck: I would prefer to respond in writing.

Q229 Sarah Champion: I want to thank both of you for taking the time to give us your skill, opinion and expertise. I want to return to judicial review. If I am hearing you right, it is not broken, so what do you think is the motivation behind all the changes?

Nicholas Fluck: My honest opinion is that most of this is to exercise greater financial control, and it is doing so in a way about which I have concerns. It is somewhere between the public interest in the fiscal cost and the public interest in justice being done. My real concern is that it is always very difficult to draw the line completely. I take the point that these are checks and balances.

I would urge you—I suppose I would, wouldn't I?—to say that the protection of this country's reputation for its adherence to the rule of law and its transparent judicial process is very important. It is something that I get asked about overseas a lot. There are always concerns. For example, there are concerns expressed about whether the Legal Services Board is now control of the legal profession by the Government. Of course it is not, but the reality is that there is a public perception, especially overseas, which is an important market. English law is a hugely exportable commodity and it is exported by English lawyers. Any perception of, "Perhaps it is financial constraints that are interfering with judicial process," is worrying and potentially damaging.

I look at what the measures seek to do and ask, "Is there enough evidence of discretions that are presently in place being exercised wantonly or inappropriately to say that it is necessary to legislate on this?" My honest opinion would be that, in five years' time, this would be in someone's red tape basket.

Nicholas Lavender: You asked the motivation behind the proposals. I do not think it would be right for me to speculate, but we can look at what the Government have said. Reference has already been made to the Secretary of State saying that judicial review, in his view, had become

"a promotional tool for countless Left-wing campaigners."

I am not aware of any rule that you have to be left wing to apply for judicial review, so I do not see that as a good ground for making any changes.

Guy Opperman: May I ask for your written submissions on subsections (2) and (3) of clause 54, specifically on whether the court can give a protective cost order or a cost capping order for an application for permission, and whether that would discourage potential applicants from making the application for permission, if they knew that they were going to be successful and get an application for a cost capping order at the end of the day? I would be interested in your views on that, especially in the light of Corner House and of Compton *v.* Wiltshire Primary Care Trust.

The Chair: If there are no further questions, I thank the witnesses for their evidence.

Ordered, That further consideration be now adjourned. *—(Mr Vara.)*

5.55 pm

Adjourned till Thursday 13 March at half-past Eleven o'clock.

Written evidence reported to the House

CJC 01 Nick Armstrong, Matrix Chambers

CJC 02 The Howard League for Penal Reform

CJC 03 UK Lawyers for Israel

CJC 04 End Violence Against Women Coalition

CJC 05 Prison Reform Trust

CJC 06 Professor Feona Attwood, Emeritus Professor Martin Barker and Professor Clarissa Smith

CJC 07 Bar Council

CJC 08 Backlash

CJC 09 Standing Committee for Youth Justice