PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

CRIMINAL JUSTICE AND COURTS BILL

Fourth Sitting

Thursday 13 March 2014

(Afternoon)

CONTENTS

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Monday 17 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

Nigel Lithman QC, Chairman, Criminal Law Bar Association

Martin Westgate QC, Constitutional and Administrative Law Bar Association

Professor Cheryl Thomas, Professor of Judicial Studies, University College London

Nick Armstrong, Matrix Chambers

Nicola Mackintosh, Principal, Mackintosh Law

Adam Wagner, One Crown Office Row

Michael Fordham QC, Blackstone Chambers

Angus Walker, Partner, Bircham Dyson Bell

Keith George, Head of Planning, Taylor Wimpey

Neil Sinden, Policy and Campaigns Director, Campaign to Protect Rural England

Public Bill Committee

Thursday 13 March 2014

(Afternoon)

[Mr David Crausby *in the Chair*]

Criminal Justice and Courts Bill

2 pm

The Committee deliberated in private

Examination of Witnesses

2.4 pm

Nigel Lithman QC and Martin Westgate QC gave evidence.

The Chair: Could the witnesses please introduce themselves for the record?

Nigel Lithman: I am Nigel Lithman QC, chairman of the Criminal Bar Association. On my left is Emma Stuart-Smith, also of the CBA.

Martin Westgate: I am Martin Westgate of the Administrative Law Bar Association.

Q255 Mr Andy Slaughter (Hammersmith) (Lab): I shall ask Mr Westgate a question, and if there is time at the end, I have a question for Mr Lithman. Mr Westgate, you provided a very helpful note dealing with part 4 of the Bill clause by clause. It has been suggested to previous witnesses dealing with this part that the changes in part 4 will not have, individually or cumulatively, a substantive or, rather, a substantial effect on the way that judicial review currently operates. Do you agree with that? That is either because the main changes initially proposed, such as that on standing can be withdrawn, or because those that have a substantial effect, such as the changes in relation to legal aid availability are without the Bill. Do you think the clauses in the Bill will change the character of the way that judicial review actions are pursued?

Martin Westgate: I do not agree that they will not have a substantial effect or, indeed, a substantive effect. For the most part, leaving aside the "any difference" point, the provisions about financial resources, interveners and cost capping are directed fairly specifically against a particular kind or application for judicial review, which tends to be ones that are brought in the public interest, often by bodies that are charities or have no personal stake in the outcome and who are then in a position to need the protection of cost capping. They are also the kind of cases where interveners become involved because they have a great deal to add to assist the court. It will have a significant chilling effect on people bringing those kind of applications or on interveners intervening. The result will be that challenges that are brought in the public interest, which many people might think ought to be the business of the courts, simply will not be brought.

The "any difference" provision in clause 50 will lead to a larger number of cases being rejected on procedural grounds at a premature stage. One of my main concerns on that is a practical one. It will clog up the courts at the permission stage. There is every incentive to public authorities to take the opportunity if they can to knock it out on those grounds.

Q256 Mr Slaughter: Reasons for pursuing the course of action in part 4 have been given variously as that judicial review is used in a partisan political way at the moment to support particular political causes rather than to remedy defects, that it is a remedy that is out of control because of an explosion in numbers and that it is perfectly proper to adopt these steps when the Government are looking to control public spending. Do you have any comment on those arguments?

Martin Westgate: The figures simply do not support the suggestion that judicial review is out of control. There are a significant number of judicial reviews. Many of those are immigration cases, although I do not subscribe to the idea that immigration cases are a problem. The reality is that those are now being dealt with differently and so one is left with around 4,000 cases. Given the number of administrative law decisions, the surprising thing is that there are so few applications, not that there are so many.

The objection that cases are brought as an extension of some kind of political debate is misguided. The appropriate control for that is that the courts have to give permission. There has to be an arguable point. If the point is simply being taken forward as some political argument from someone who is, frankly, a bad loser, then the courts will refuse permission. They can deal with it in that way. These are cases that are brought forward because they raise serious issues for determination by the court. It is a matter that is best left to the courts rather than blunt measures like this. The reality is that, overall, although they are significant cases, the number of cases that are caught by cost capping is very small compared with the overall total. So there is no significant cost saving either.

Q257 Mr Slaughter: But is it too easy to bring a judicial review at present? You say it can be caught at the permission stage. While it is possible to get legal aid for the permission stage, clearly there are changes to be made to that regime as well. Something else said by the Government is that it is simply too easy to start, even if it may not get to a full review, either to introduce delaying tactics or simply to make a point. Is that your experience?

Martin Westgate: Anyone who thinks it is too easy to get permission to apply for judicial review has not made an application. Although the threshold ought to be arguability, in practice the courts apply a much higher standard than that most of the time.

Q258 Robert Neill (Bromley and Chislehurst) (Con): I understand the point that you are making. Equally, I am sure you can see that, even in coming to the permission stage, the fact of launching the application to intervene is potentially going to put the other parties to some costs. Is it unreasonable to say, "Even at the stage that you think of bringing an intervention, you should think

about the potential financial implications for the public purse of doing that."? It may be done for good reasons, but you should have that in your mind.

Martin Westgate: I take it the focus of your question is on interventions rather than applications more generally.

Robert Neill: Yes.

Martin Westgate: The procedure for applying to intervene is initially to write a letter to the court. It has a pretty low impact at that stage. Interveners, when they seek permission to intervene, are required in effect to outline what they will bring to the case and how they will add value to the arguments that are already being advanced by the parties.

Q259 Robert Neill: If the intervention fails, is there much prospect of the public authority—say a small district council—getting their costs back?

Martin Westgate: It depends on the facts. One concern I have about clause 53 is that is expressed in such mandatory terms. Any party can apply, and if they apply, the court must order the intervener to pay costs.

Q260 Robert Neill: Save for exceptional circumstances.

Martin Westgate: Indeed, but the way that it is worded must contemplate that exceptional circumstances are not that that party lost. So you could have the rather bizarre situation where you could have an intervener who has come and provided great assistance to the court, a party has lost because it was running bad arguments and yet still it can ask the intervener to pay its costs. That is an extraordinary position.

Q261 Robert Neill: That would depend on the interpretation of other people.

Martin Westgate: It may depend on interpretation, but that seems to be what the clause is getting at.

Q262 Robert Neill: In the same way that it is important that there should be a discipline on decision makers to get things right, surely there should always be under any circumstances a discipline upon any potential litigator, whatever their cause or reason, to bear in mind the financial consequences of bringing litigation.

Martin Westgate: The premise behind your observation is that interveners just throw in interventions for any purpose. That is simply not the case in my experience of acting for interveners and in cases where interveners come in. A great deal of thought is given to deciding what arguments to put and whether they are really going to assist the court. The court can be very critical of an intervener who comes along and does not add to the arguments. That, in itself, is a very firm discipline on people intervening. Interveners have to meet their own costs, either directly if they have to pay, or by using up the capital of good will of people who are acting for them for no fee.

To suggest that it is in some way a cost-free way for interveners to get involved in a case does not reflect reality. The existing powers of the court are there, if an intervener comes in and wastes the court's time, or if an intervener unnecessarily runs up costs. Courts can already order them to pay costs. It simply does not require the kind of blanket provision set out in clause 53, which is basically skewed against interventions and intended to discourage them from taking place.

In recent years, the courts have been greatly assisted by interventions from all sorts of areas. Sometimes, the Government or Government Departments intervene. Very often, the Equality and Human Rights Commission intervenes. All those are bodies that bring a great deal of expertise and experience to the court, and it is quite wrong to make them pay.

As I pointed out in my written note, it would have the extraordinarily strange result that the more help that the intervener provided to the court, the more that they would have to pay out. By definition, if they have got a lot to bring to the court, the other parties are going to have read it and think about it. If they then want to bill the intervener for the time taken to read and think, it means that a helpful intervener ends up paying more than a non-helpful one, and that cannot be right.

Q263 Robert Neill: Is this really the most efficient way of clarifying issues of law around this sort of thing?

Martin Westgate: By definition, when an intervener becomes involved, it is because the point is one of difficulty. The adversarial system we have is one where the argument is simply left to claimant and defendant. It may be in their interests not to look at the wider ramifications of a particular construction or not to explore points that are not directly before the court. Very often, the interveners pose and ask the questions that the parties, for one reason or another, do not want to ask, and that can be of great help to the court.

Q264 Robert Neill: It can mean that—I will take the example again—a small local authority that has acted in good faith in its own particular circumstance is suddenly dragged into a much larger case because of an intervention. Should not there be some protection from that?

Martin Westgate: That can be a reason not to have an intervention. No one intervenes without all the other parties having a say about whether they should intervene.

Q265 Robert Neill: But they will not get their costs back in resisting it.

Martin Westgate: To take your example, you have a small local authority and they are concerned that the intervention widens the scope of the challenge. The reality is that that very often does not happen; all that happens is that some additional arguments are presented, but if it is the case, there is nothing stopping the authority saying, "Well, this is our point. Here's our point. We're presenting arguments on that point and we have nothing to say about all the interesting arguments the intervener wants to run with." There is no reason why they should not do that and it does not incur any extra costs. This is directed at a problem that largely does not exist. It is a very small number of cases and actually the additional costs are very small.

Q266 Robert Neill: Can I just ask Mr Lithman two very short questions? Nice to see you, Mr Lithman. I should have said, as I did yesterday, that I declare an interest as a non-practising member of the Bar. I want to get a sense of the CBA's point of view on trial by single justice. Is it a particular issue for the CBA? You and I can probably remember our very early days,

[Robert Neill]

reading out section 9 statements for a summary only, non-imprisonable case where nobody had turned up to a bench of three. That does not seem a very useful occupation of time. Does the CBA have a problem with that?

Nigel Lithman: No, none at all.

Q267 Robert Neill: It is just a matter of how we get it done.

Nigel Lithman: Absolutely.

Q268 Robert Neill: What are the CBA's main issues with the Bill?

Nigel Lithman: I think the CBA is concerned first of all about anything that smacks of or introduces elements of uncertainty or that has a tendency to put an inverse onus from the court or the prosecution on to the defendant. What I have in mind is that, while the further use of extended determinate sentencing is not in itself a bad thing, you will recall that the previous court's experience was that imprisonment for public protection was a fraught area of law and nobody actually liked it. To that extent, I think for EDS as well, there will be an instinct against it, clearly from the defendant's point of view, but also from the judiciary's point of view. Looking at it from the defendant's point of view, they will be in a position to say, "Well the worst thing that can happen is to be sentenced to some period in prison that has no finite period at the end of it, so that takes away light from the end of the tunnel."

As far as the judges are concerned, they will be pleaded to on the basis that it creates an inability for an offender to be able to demonstrate to the parole board that they are no longer a risk to the public, so judges prefer finite terms—determinate sentences—to indeterminate sentences. Ultimately, they have to be reserved for the most serious cases. We are used to working within the murder category with life terms and imposing tariffs that we know will keep the defendant locked up for either a very long time or the rest of his natural life, which ever comes sooner. That said, they prefer to restrict those sorts of sentences to those sorts of cases—the most serious cases in the calendar. To extend those sorts of sentences to sexual offences is all well and good, but some individuals will not see the light of day because they are unable to persuade a parole board that they are no longer a danger. In many cases, that will be right, but in some cases, it will be wrong.

Q269 Robert Neill: I get the sense that it is not so much the principle that in a very serious case it is appropriate, but where you go, as a matter of fact, and the degree of it.

Nigel Lithman: That is right. If you are looking at a sentence for an index offence that might be met with a sentence of, for instance, eight years, the judge may say to himself, "Okay. That is what I will impose, so I don't have to go down the line of an EDS." But, equally, there will be those who say, "Actually, I will weight it to 10 years, so it does catch the defendant." It becomes a bit arbitrary. From every point of view, we prefer to deal with finite sentencing when we can.

Q270 Robert Neill: I understand that. Equally, there is the problem that when Parliament sets the framework—judges also bear this in mind—it has to think about public confidence in the appropriate sentence, as well as what a judge might think professionally about the sentence.

Nigel Lithman: That is right. You don't want to trap yourselves into saying that you will introduce a principle such as extended determinate sentencing, which will impose life sentences, if you are simply replacing the old problem of imprisonment for public protection with a new concept, after having seen that the first concept does not work. That is a caution.

Q271 Stephen Metcalfe (South Basildon and East Thurrock) (Con): Good afternoon. I want to explore the criminal courts charge aspect of the Bill, if I may. The charge will be amended, depending on a number of factors, such as pleading guilty early or not. Do you think the criminal courts charge will deter offenders from pleading not guilty or pursuing an appeal?

Nigel Lithman: Are we talking about the payment that is now visited on every defendant who comes to court?

Stephen Metcalfe: Yes, as part of the Bill.

Nigel Lithman: If you could let me familiarise myself with it. I would like to counsel you to leave it behind, if you are able to. I will tell you why. I sit, not unusually, as a recorder. The prosecution and the defence are caught in a difficult balance about what the appropriate sentence is. Whether we are talking about imprisonment or suspended sentences of imprisonment, they should meet in with fines and non-custodial sentencing. Any sort of charge has a ring of fiction to it. When you deal with somebody in broad principles, you say, "Right, because I am sending you to prison for a year or two, there is no room for a financial penalty." The time-honoured phrase that the prosecution uses, as Mr Neill knows only too well, is, "If it is of relevance, the costs in the case will be such and such." If the criminal courts charge is added to that, it plays no orthodox part in sentencing and it will not be well met.

Q272 Stephen Metcalfe: Okay, so you would like to see it removed from the Bill?

Nigel Lithman: Personally, I would.

Q273 Stephen Metcalfe: You do not think it is right that people bear some of the cost?

Nigel Lithman: I think it is right that the sentence fits the case.

Q274 Stephen Metcalfe: And in non-custodial sentences?

Nigel Lithman: In non-custodial sentences, where costs and finance are available, then of course, in terms of compensation and confiscation and in terms of fine and court costs, they play their roles. But in terms of the surcharge, as if you have come into a restaurant and this is the price of your bread and olives, I do not think that should have any part in the administration of justice.

Q275 Stephen Metcalfe: Because it will change the way justice is administered or because you think it does not have a part?

Nigel Lithman: It has no part.

Q276 Stephen Metcalfe: Your concern is that it would distort the way people behave.

Nigel Lithman: It will not affect the way people behave. Whether they pay an extra £1 to go over the Queen Elizabeth bridge to get to the Crown court or whether they pay a cover charge for coming into the court, I think it is unwelcome, and it sends the wrong message to sentencing. For instance, at the judicial sentencing courses that one goes on, the question of a charge for the court user would never be considered.

Q277 Stephen Metcalfe: Is that your view as well, Mr Westgate?

Martin Westgate: Yes, it is. It is not something that I have a particular knowledge or expertise on, but I certainly endorse what has just been said.

Q278 Stephen Metcalfe: Why should it not be a part? If it does not change the way people behave, but could add a financial contribution to the cost of running the courts, why would that be a bad thing?

Nigel Lithman: Because, at the moment, there will be quite a rigorous examination of the defendant's means. It may not go down to the last shillings and pence, but through the inquiry of the judge of the defence, the presentation of the defence case and the submission from the probation service, there will be a good guidance as to means, and means will then be fed into the potential of a custodial or a non-custodial sentence, so it will play its part there.

If you are going down the community order line, you will think about the restriction on the defendant outside of custody, and you will be thinking of a restriction on his finances as well. That will be fed into either compensation and/or the costs. And there is, for sure, the will of the judge to punish the defendant, where appropriate, through his pocket. That is where finance should play its part in the judicial process, not, as I say, in imposing a cover charge on the defendant. It is inappropriate.

The Chair: A quick question from Andy Slaughter, if he can give me time to go to Angie Bray.

Q279 Mr Slaughter: Do you have any observations on the provisions in part 3 in relation to juries? We were told by the Law Commission that it had some concerns about the idea of prohibited conduct by jurors in relation to its being a specific criminal offence, but it is unspecified as to what it may involve. While you think about that, Mr Lithman, I have a question for Mr Westgate. It might be something that you need to write to us about.

You have given us a full account of most of the clauses. In relation to clause 56, where it appears that environmental cases are exempt from the new regimes—because, presumably, of Aarhus—it says in the explanatory notes to the Bill that this may not affect all environmental cases. I am not sure what that means, to be honest. I do not know whether you know what that means. You may want to think about it.

Martin Westgate: I probably would need to think about that. If I can, I will get back to you on that. If I speak to an environmental specialist in ALBA, I might get a more authoritative and swifter response, but I suspect it is to do with the definition of an environmental case in Aarhus.

Q280 Angie Bray (Ealing Central and Acton) (Con): What concerns do you or your colleagues have about the potential impact of the use of the internet and social media in court proceedings, particularly where jurors have perhaps been using them? There are measures in the Bill to deal with that. Do you have any views on that?

Martin Westgate: That is probably more a question for Mr Lithman.

Nigel Lithman: I have had a look at this proposed section. The contempt provisions available to the courts are wide, and there either has been or would be a suggestion that they may be wide enough, but I personally think that the proposal is appropriate. At the moment, what is happening is that juries are being told by the court in no uncertain terms at the beginning of the case just how serious this is.

The Chair: Order. I am afraid that that brings us to the end of the time allotted to ask questions of these witnesses. May I take this opportunity to thank them, on behalf of the Committee, for their evidence?

Robert Neill: On a point of order, Mr Crausby. Given that the witnesses may have further things to say, perhaps they might be reminded that they can submit written evidence if they want to elaborate on what they have said.

Nigel Lithman: We will be doing that in any event.

The Chair: Thank you very much.

Examination of Witnesses

Professor Cheryl Thomas gave evidence.

2.31 pm

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

Professor Thomas: I am Professor Cheryl Thomas, and I am professor of judicial studies at University College London law faculty.

Q281 Stephen Metcalfe: Good afternoon. One of the provisions in the Bill is to increase the upper age limit for jury service to 75. Can you tell us your views on that?

Professor Thomas: First of all, thank you very much for inviting me to give evidence. I provided a very short summary of my view of a number of the provisions, including clause 39, and I hope that you all have that. My personal view is that this is generally an uncontroversial provision, in the sense that I do not expect it to have a substantive effect on the composition of jury pools at each Crown court in England and Wales. We are talking about a very small number of people who will find that they are both eligible and able to serve.

I did quite a bit of analysis for the Ministry of Justice based on research that I had done previously involving everyone who was summoned and served for jury service in England and Wales. We traced them all the way through, and we were able to estimate what proportion

of each age group is excused for legitimate reasons. Our projection is that we are talking about a very small proportion of people.

Q282 Stephen Metcalfe: Do you think that 75 is the right level?

Professor Thomas: Either you have a specific age, or you do not have any age limit at all. That was considered, I understand, along with possibly the right of excusal either for those aged over 75, or for those aged between 70 and 75. We tried to do some projections about whether a different age limit would make a difference, and our conclusion was that it would not. I think that the main benefit of this is to provide those aged 70 to 75 who would like to do jury service, and who are capable of doing so, with the opportunity to do so. I believe that 1988 was the last time that the age limit was changed. A number of decades have passed, and the age profile of people in terms of their continued activity is increasing.

The only thing I would say is that if this is seen as a means of substantial cost savings for the jury system, because only a small proportion of people in that age group will serve, it is not likely to result in a large amount of cost savings. We cannot simply assume that everyone aged 70 to 75 is not in employment and therefore will not need to be paid loss of earnings.

Q283 Stephen Metcalfe: Could you explain why it will be such a small proportion?

Professor Thomas: Yes. First of all, those aged 70 to 75 make up a very small proportion of the total population. What I was able to provide for the Ministry of Justice was a projection based on the proportion of those aged 65 to 70 who are summoned and who are excused for legitimate reasons, and the basis for that. A quarter of all of those who are summoned in that age group currently do not serve. That is the highest proportion of all—twice as much as any other group—so it is quite clear that it increases incrementally by age group. The overwhelming majority of those aged 65 to 70 who do not serve currently are excused for medical reasons.

Q284 Sarah Champion (Rotherham) (Lab): You mentioned that you have concerns about jurors and electronic devices. Could you expand a little on those?

Professor Thomas: I think I highlighted that in relation to a number of clauses, but specifically in relation to clause 40, I suppose. My concern is that this introduces a system in court that is done on an individual, jury-by-jury, judge-by-judge basis, so it is up to the judge to decide whether the jurors should have their electronic devices removed—if I am reading clause 40 correctly. My view is that it is not the most effective or the most practical approach. What is needed is a standard court procedure that operates in every court and deals with jurors' possession of electronic devices. I can explain to you what currently happens in court if that is helpful.

Most jurors arrive in the jury lounge and they come with all their belongings. Currently in most Crown courts, facilities for jurors to store their personal belongings are insufficient or non-existent. Many jurors will come to court with their laptops, their tablets and their mobile phones. They are encouraged to do so because all jury lounges have access to wi-fi so that jurors are not bored while they are sitting around waiting to be put on a trial. Because there are insufficient storage facilities at court, when jurors are empanelled to go down into court to be sworn on a jury they often have to take all of their belongings with them. They will remain there and they will be carrying everything with them. This has given rise, on at least occasion to challenge on appeal for jurors consulting their mobile phones during closing speeches and so on. It did not turn out to be a juror inappropriately using an electronic device, but that simply would not arise if jurors were not allowed to have any electronic devices in the court. I am sure that the court would prefer that and so would the judges. This is just a practical issue of the courts currently not having sufficient facilities.

It gets even worse when it comes to the deliberating room. We would all imagine that jurors' laptops, tablets and mobile phones are taken off them when they go into the deliberating room. Mobile phones are usually, but not always, taken away from them in the deliberating room and this again is a facilities issue. Just to give you one example: some courts were very proactive in the past, perhaps four or five years ago, and installed in the deliberating room very small safes such as you might find in a hotel room. Jurors can put their phone in an envelope, write their name on it and it goes into the safe and they are given it back at the end. Those safes are no longer appropriate because they are not big enough to hold laptops, iPads and so on. Courts feel that they simply do not have the financial ability to purchase appropriate equipment so that electronic equipment is stored properly.

My concern about this is that you will have individual judges saying that jurors need to have their electronic devices taken away from them. A judge can make that order but if there is nowhere for them to be stored securely that creates a serious problem. It creates an even more serious problem if a juror who fails to do that commits a criminal offence, and that is what is going to happen here. That device which is improperly stored somewhere becomes evidence, and the way it is treated at court has a knock-on effect for the prosecution of that individual for a criminal offence. This is just a very practical issue.

Q285 Sarah Champion: It sounds like a practical issue that is not insurmountable. Do the risks associated with jurors using social media devices not outweigh finding the money to put in safes?

Professor Thomas: Yes.

Q286 Sarah Champion: Are your concerns strong enough that we ought to take this provision out of the Bill, or are there ways that we can make the Bill stronger to overcome those logistical problems?

Professor Thomas: If you are going to have that provision in the Bill, there needs to be some provision for the action to be carried out appropriately. At the moment, that does not exist. Unless there is a commitment to ensure that there is adequate storage facility for all jurors at court for their electronic devices, I am simply saying that the implementation of this provision is going to be rather difficult.

There is also the issue of judges becoming jury police. That is the other aspect of why I believe that this needs to be a court procedural rule, that we are not asking

judges to police their juries. The bond between the jury and the judge is important and judges work very hard to ensure that juries know that they are trying the case together. Provisions such as this introduce an aspect of judges having to police juries.

Q287 Angie Bray: Ultimately, the most important and sacrosanct principle must be the delivery of fair justice. We cannot allow an issue like the provision of a cupboard to get in the way of that, can we?

Professor Thomas: I would hope not, but sometimes these fundamental issues turn on very practical ones.

Q288 Angie Bray: I assume from what you said that, were we to get the lockable cupboard with the key provided, you would not have any further objections to the principle of what is proposed.

Professor Thomas: My objection is to the principle of it being an arbitrary decision on an individual judge-by-judge, case-by-case basis. There will be cases when there is no reason for the judge to believe that the jurors should have their electronic devices taken off them. That does not mean that an issue will not arise. If you have a standard court procedure that operates in every court that says that jurors will not go into court with electronic devices, and jurors will not have any electronic devices in the deliberating room, you simply eliminate the possibility of this arising, and the provision is not necessary.

Q289 Angie Bray: Can I ask you about the slightly wider issue of juror research during the period of a trial? There is a new measure in the Bill about that. What are your views on that? How seriously do you view the dangers of juror research during a trial?

Professor Thomas: It is a very serious issue. It does go to the heart of the fairness of the trial if a juror is exposed to information about the case that is not part of the evidence presented in court. It is a crucial part of the juror oath to try the case based on the evidence and the law. So, it is an important issue.

We have been conducting research about this over the past two to three years trying to assess, first, how widespread is the practice of jurors googling things they should not be or using social media in an inappropriate way.

Q290 Angie Bray: There have been one or two well-known cases that have found their way into the media.

Professor Thomas: Yes. The first was the Fraill case and then the Dowlers case, but we have had a few others. In the research we first identified that it is a small proportion of jurors who have admitted to using the internet to look for information about their case while the trial was going on. We followed that up with further research, actually identifying exactly how they are using the internet, and whether it is appropriate or inappropriate. That revealed that the types of things that you are proposing to prohibit here are done extremely rarely, by a small proportion of jurors. That does not mean that it is not serious; it is. We are talking about the fact that the overwhelming majority of jurors understand the rules and abide by them.

What is interesting now is that judges are obviously very concerned about this and have been working hard to change their directions to the jury at the outset to explain things more clearly. We have discovered as a consequence that now about three quarters of jurors completely understand what the rule is: when they can use the internet and how they can use it and so on. A quarter of jurors misunderstand the rule, and the overwhelming proportion of them now believe that they cannot even use the internet to check their personal e-mails while they are on jury service. There has been an overcompensation, and perhaps a little bit more threatening terminology used to jurors saying, "You will go to prison if you use the internet during trial." We are talking about the tiny 2% to 5% of jurors who either think that they can use the internet in any way that they want during the trial, or think that they can look for information about the case as long as they do not let that affect their judgment.

Q291 Angie Bray: 2% to 5% could be significant.

Professor Thomas: Absolutely, it can be. As I say in the note that I have provided to the Committee, if the intention of the provisions is to stop jurors inappropriately using the internet, they will not achieve that. We already have provisions that prevent jurors from using the internet. The proposed provisions make that a statutory offence, and there are some positive aspects to that if you are juror who happens to be accused of contempt. The provisions provide greater transparency in the legal process, mean that the charge will be tried on indictment in the Crown court, and not in the divisional court, and the Police and Criminal Evidence Act 1984 will be activated in terms of how an accused is dealt with. However, we already have this as a common law offence.

Q292 Angie Bray: So you do not think that the new offence is required.

Professor Thomas: No, I did not say that. I think that there are some positive things for someone who is accused of this offence, and I think that it is important that they are afforded greater legal protection. My concern is that if people believe that simply by making it a statutory offence that will eliminate any inappropriate use of the internet by jurors, they are mistaken.

Q293 Angie Bray: What further measures would help to eliminate the problem?

Professor Thomas: Thank you for asking that question. We are currently conducting research in which we are piloting a number of different new tools with jurors at court that are intended specifically to convey the rules more clearly and to achieve behavioural change. Just making something a statutory offence will not necessarily change the behaviour of that small proportion of jurors. We will be piloting things such as juror conduct cards and a variety of other measures in conjunction with judicial directions. We will have results fairly soon, this summer, that will indicate whether there are some better tools that can be used practically with jurors at court to ensure that people understand the rule correctly, know what to do if something goes wrong and know when to do it—to report things before the verdict comes in.

Q294 Mr Slaughter: Professor Thomas, you mentioned your concerns about clause 44, which you described as a catch-all. Do you think it is an unnecessary clause, or do you think that there is an issue that needs to be addressed, but that there is a better way of doing so?

Professor Thomas: That is a very good question, and I have been thinking quite a bit about that. It is easy to say that you think that something has a problem, but to find a solution is often not quite as simple. I have concerns that it is a very broadly drawn provision. Can you imagine how you would try to explain this to juries? Basically, the clause says, "Don't use the internet to do various things. It is a statutory criminal offence. Then there is this other statutory criminal offence of other prohibited conduct, but we can't really tell you what it is, and you will be guilty of it even if you didn't know that it was a criminal offence." If the clause is trying to address other issues, it should either attempt to be a little bit more specific about what it is covering, or simply leave these other possible contempts to the common law.

Q295 Mr Slaughter: Given that we are going to have a raft of new criminal offences, some of which are not completely clear, what sort of additional education or training would you like to see for jurors so that things are a little clearer for them? What research would you like to see that would show how well the provisions are being understood?

Professor Thomas: As I said, we are currently in the middle of some research that is testing out new educational devices with jurors. We will know, probably by June, which of the new devices or approaches is more effective.

The main approach to further research would be a simple monitoring exercise, very similar to what I already do and currently am doing with jurors. I would effectively repeat the same survey that I do with jurors who have completed a trial and are leaving court in order to estimate whether the introduction of changes has had a discernable effect on their understanding and behaviour.

Q296 Mr Slaughter: You have done extensive research with jurors over the years. Do you find that you are in any way hampered by the restrictions on discussions outside the jury room? If you are not, do you think that, in any event, there should be further extensions to allow that to take place?

Professor Thomas: Thank you for raising that—I did not mention it in my note. I have been doing research with juries for more than 10 years in England and Wales. The research I do is only with actual juries at court—we do not use mock or proxy juries, or anything like that. I have never been hampered by section 8 of the Contempt of Court Act 1981.

I do not believe that a provision allowing academic research with juries is necessary, because such research already exists—it is possible. The only thing that is prohibited is academic researchers or anyone else participating in deliberations with jurors or asking them about what was said, the votes cast and so on, in the deliberating room. I find it hard to find a question for which you would need that kind of access and for which the methodology of asking jurors or sitting and observing them would provide you with a reliable answer. So no, I do not think that any special provision is needed for research.

Q297 Mr Slaughter: That is very interesting, because from time to time—not necessarily in the context of the Bill—the fact that we do not know how jury decisions are made comes up, and it is suggested that we ought to know more. You think, however, that, in so far as it is a legitimate inquiry, it is currently possible.

Professor Thomas: It is, absolutely. Let me give you an example. I was asked by the Ministry of Justice quite a few years ago to determine whether racially mixed or all-white juries discriminated against ethnic minority defendants. That is a clear example of looking at what happens in the deliberating room and how decisions are made. We conducted very thorough research and it did not require any access to jury deliberations. In fact, being able to ask jurors about their deliberations afterwards would not have answered the question—it would have been very poor methodology. You can imagine that if I waited around at court until an all-white jury convicted a black defendant, interviewed them and asked them whether they had convicted the defendant because we was black, the answers would not be very helpful.

The Chair: If there are no further questions, will move on to the next panel of witnesses. Professor Thomas, thank you for your evidence.

Examination of Witnesses

Nick Armstrong, Nicola Mackintosh, Adam Wagner and Michael Fordham gave evidence.

2.55 pm

The Chair: We have until 4 pm for this panel. Could the witnesses please introduce themselves for the record?

Nick Armstrong: I am Nick Armstrong from Matrix Chambers.

Nicola Mackintosh: I am Nicola Mackintosh from Mackintosh Law.

Michael Fordham: I am Michael Fordham from Blackstone, but I do not speak for Blackstone; I will speak for myself.

Adam Wagner: I am Adam Wagner. I am from One Crown Office Row Chambers, and equally I do not speak for One Crown Office Row Chambers.

Q298 Valerie Vaz (Walsall South) (Lab): Thank you all for coming to give evidence today. I suppose what I would like to hear from each one of you is, briefly, your views on the judicial review aspects of the Bill. Shall we start with Mr Wagner?

Adam Wagner: By way of giving some background, I am a barrister specialising in public law. I act mostly for the Government in judicial review cases. I am a member of the Attorney-General's Panel of Counsel. As you probably know, it means that I act—in the most part—for the Government.

My general views on these proposals are that there are some quite significant problems in relation to them. I have written quite extensively on this area during the last couple of years, while the judicial review and legal aid changes have been put forward piece by piece. There seems to me a general issue and strategy, in that the problem that is being proposed as the reason for making the reforms—it is generally about costs and more recently it has been about left-wing campaigning and about people stymieing Government policy for illegitimate reason—is not borne out by the evidence, in my view. I have tried to be as thorough as I can be in looking for that evidence in the Government proposals, and also in academia and wherever judicial review research has been done.

There has been a significant rise in judicial review during the past couple of decades, and that can be explained entirely by the rise in immigration and asylum claims. There are a whole range of factors that might have led to that rise, which are not about just unmeritorious claims being brought that the system is simply not weeding out. For example, there has been a huge increase in immigration during the last couple of decades and that might be the entire explanation. Certainly, the research that has been done has pointed to that.

In relation to these particular changes, I prefer to go into more detail when we address the points in turn. However, there is a significant issue with the no difference principle, which sounds potentially good on paper and in any other area of law might be good in fact. However, in judicial review, which is all about the lawfulness of decision making as a whole—it is not just about outcomes but the actual manner in which a decision is taken—there is a real problem with focusing only on outcomes.

My second point is that these changes, and they reflect the changes overall, are focused entirely on claimants and on making it harder for claimants to bring claims. That might be perfectly fair enough if the problem was wholly about claimants. Now, I act almost entirely for the defendants in these scenarios and my experience is not that there is a whole cohort of unmeritorious, dastardly claimants who are bringing these claims to stymie Government decisions. There are faults on both sides and it seems to me that there is not the balance there in the changes. I will let the others speak to the particular changes in more detail.

Michael Fordham: Three things. First, I am all for streamlining judicial review. I have been doing it for more than 20 years and I am in the sixth edition of a practitioner textbook on it. I have done defendants, interveners and claimants. I just chaired a committee at the Bingham Centre. We produced a report and I hope you will let us send it to you. We have made a large number of recommendations on how judicial review could be streamlined in a way that is consistent with the rule of law. I have no problem with a number of changes on how judicial review is structured. The rules, the leapfrogging, the permission for planning and procedural rules for cost capping orders and so on are all very good.

Point two is that I have three major concerns on the judicial review section of the Bill. The first concern relates to clause 50, where it states:

"highly likely that the outcome for the applicant would not have been substantially different".

The second relates to interveners and the one-way street where interveners will not get any costs. I do not have a problem with that, but interveners are to be expected to pay costs, which means that they will not go and their voice will not be heard. The third concern is on costs capping and the recalibration in clause 54 that says you cannot get it put before permission. It then defines the particular circumstances and what it means to say that an order is needed in the public interest.

Point three is the reasons why I am concerned, which come to the same thing: these proposals seek to restrict judicial principles that the independent judiciary has identified as necessary in the interests of justice and the public, in an area that is all about effective governmental accountability under the rule of law. Those are not platitudes; that is what judicial review is. The principles that the provisions would change have been identified by courts that are fully informed. The Government go to court and make the argument as to why the line should be drawn in a different place, and those arguments have been rejected.

There are two good reasons why Parliament has not engaged in this sort of exercise previously. The first is that it has respected and recognised the separations of power, where the judiciary articulates those principles. The second is that Parliament has recognised that it could be an act of constitutional provocation to tie the hands of the courts on how governmental accountability under the rule of law should be approached.

Nicola Mackintosh: I am the only solicitor on the panel. I hope I can bring the solicitor's perspective, which might be of some assistance. I am a sole practitioner at Mackintosh Law. We are a small firm in south-east London. My client base is people with disabilities, people with autism, people with learning disabilities, elderly people, older people with dementia, and people with physical disabilities and their carers. The types of cases that I bring are public law judicial review cases. I also bring cases under the Mental Capacity Act 2005 on the abuse and neglect of disabled people.

Clients have included residents of Winterbourne View, residents of care homes and those living in their own homes who need services. I advise those clients about their legal rights to health and social care services. I also advise their carers and I am involved in court proceedings on the protection of those people. Judicial review is absolutely essential as a tool for those ordinary vulnerable people to obtain justice. In many of the cases that I deal with, the tool of judicial review can result in the client being given the services to which they are legally entitled. In many cases, that has saved their life.

I have a couple of examples of cases that I have dealt with. An elderly woman with dementia has been living in a care home for five years. She has suddenly been told by the local authority that next Tuesday she will be moved to a care home that is miles away from her family. I was contacted by the family, asking what can be done about that. From my perspective, I would advise about writing letters, including a pre-action protocol letter to the local authority asking about the decision-making process that led to that decision. If necessary and if the case cannot be resolved through other means, I would seek to issue proceedings to protect that person in the meantime.

Another example is a severely disabled client who is entirely dependent on daily care services for food, washing, laundry and changing incontinency pads. They have been told that their care package will be cut from provision of care daily to once a fortnight. I am sure you can all appreciate the serious ramifications for that disabled person.

I give those examples to set these proposals in context and to show what they will mean for ordinary, vulnerable people who are in need of some means of access to justice. In my view, the combination of all the proposals, including the legal aid proposals—the vast majority of my clients are without means and many have been disabled from birth so they have never been able to work—will provide an effective bar to access to justice for this client group and other vulnerable people.

Nick Armstrong: You have a paper from me, which is a short one and I will not repeat what is said in it. I am a barrister and a former solicitor. I am also a former academic specialising at that time in civil justice reform. I have seen civil justice reform attempts come and go over the last 20 years, and I genuinely believe that this one is different, and particularly dangerous. Interventions have already been touched on by others. It will stop interventions.

The possibility of a different outcome is my second very serious concern about this, and I want to make a point that I am not sure the Committee has yet heard. It seems that this is designed to be caught. I saw proceedings this morning and on Tuesday, and it is designed to look at cases where there is a procedural failing and you think you would have got the same outcome in any event, even if that person had had the document he says he hasn't got, or whatever it happens to be. The current drafting goes much further than that. If I bring a challenge on behalf of someone who challenges a system and who says that a piece of Government guidance does not reflect what the law is, or who says a procedural or any other sort of system in place is not consistent with the law, my client's problem goes away. So, for example, he is taken out of the system or he is given the resolution for his matter. He is no longer interested and the matter has become academic from his point of view, but it may not be academic for many other people because judicial review, as I say in my paper, is forward looking, not backward looking. It needs an outstanding area of interest and the courts will sometimes look at areas where there is an ongoing problem.

At the moment, that case will be stopped by clause 50 because it says that the outcome for the applicant has to be different. That means that the forward-looking, making sure it is fixed for the future stuff will stop, and all that will happen is that other people will have to bring future cases, so you will potentially end up with more litigation, not less, if you deny a remedy in those cases and stop the court looking at the wider problems.

In addition, however, I support entirely what was said to you this morning by Justice, PLP and others and what has just been said to you by Nicola Mackintosh. This will stop. This will take expert providers out of the area. It is the combination of this stuff that is in the Bill, particularly things such as clause 50, with the legal aid stuff, which is not before you but is part of the same package, that will stop judicial review very substantially in very vulnerable areas.

I know that lawyers say things when reform efforts come around, but I believe that this one is genuine. I have been going to meetings about these proposals and legal aid proposals for a year, and I see nothing but despair from the people who are trying to represent the vulnerable in these areas. I have been looking at this for a year, but even I cannot predict the consequences. It was not until Tuesday morning this week when I happened to have a copy of the draft regulations on legal aid on my desk, and I happened to have a phone call about a new case, so I was thinking about both at the same time. I want to tell you briefly about that because it was what is loosely known as a cuts case—a case in which a local authority wishes to close down a service for very vulnerable disabled individuals. Those cases are hard fought.

It seems to me that the merits of that particular case are, on the face of it, extremely strong. There was not a consultation and it appears that the service users may even have been actively misled about what was proposed, but the problem with those cases is, because they are looking at decisions about the closure of a service, or potentially stopping a project from going ahead or whatever, they can fail in the sense of not getting a remedy simply because, by the time they get to court, matters have moved on and the courts, in exercising their discretion, do not want to stop that process because it has moved on too far.

I advise at the outset that I think there are good prospects. Then, at the time that one comes to issue proceedings in relation to that, according to the legal aid proposals I now have to look again and do a whites of your eyes assessment and say, "Do I invest"—the word being used by Ministers—"in the prospects of that success?" I should, as a commercial operator, invest in the quality of my judgment that that case ought to be run.

As a sideline, it is important to say that you were told the other day that there was no payment at all in relation to pre-permission costs, but that is not the intention as I understand it. It is at the issue stage where the costs become important. Do you now, at the stage of considering issue proceedings, wish to go ahead with that case? Do I invest in the prospects of that case? The problem is that I cannot pull out at that stage. I have accepted instructions and the legal aid merits test continues to be met because it still has good prospects of success, but it is for me, as a commercial operator, to say, "Look, this is the fourth case that I have done. There are weeks of work involved in this case and I will have to do all of it at risk."

Because of other things that are going on, as a commercial operator, I may not be able to take that risk, but I cannot pull out. The Bar Council tells me that it is unethical for me to pull out from that case. I have phoned the Bar Council ethics line about that and they tell me that I cannot. I am afraid that the reality of that is that, unless I am to behave unethically, which means in a way that clients will not like and is not in vulnerable clients' interests, the only way I can avoid that problem is by not accepting instructions in the first place. That is how the chilling effect will work.

It becomes all the worse with things like clause 50, because that clause is saying that you will have to have regard to whether or not that makes any difference at the permission stage. So clause 50 says that, at the permission stage, I may not get permission in relation to that, and I will not get paid. It will have a chilling effect. Lots of people are saying that, if this goes through, they will not be able to continue doing that work. I am afraid, on the basis of the material that I have seen, I believe them.

Q299 Valerie Vaz: To follow up, may I go through the panel again? Mr Fordham, you touched on the effect on the rule of law and the administration of justice. In the opinion of each of you, what effect do you think the clauses will have on the rule of law and holding the Executive to account, bearing in mind that judges have to be independent of the Executive process? Also, will the clauses save any costs?

Adam Wagner: Taking them briefly, starting with the interveners clause, it may be that interveners are so put off that they do not ever intervene again in any cases.

I think it is more likely that they will intervene in fewer cases. What are interventions? Interventions are made by organisations that have a particular expertise or knowledge base that the parties to a case do not necessarily have. They are given permission by a judge and contribute only ever if given permission by a judge—they cannot just intervene in a case willy-nilly—so that happens only in cases in which the judge thinks it will be helpful.

Those organisations are often helping to provide the wider context. As you will know from your perspective, individual cases can have wider ramifications that might not even be apparent to one or other of the parties—certainly, they might not be apparent to the judge. The answer is to bring in Mind or Liberty or Justice or any other organisation, such as Age UK, to provide the wider perspective. If they have to say, "Actually, we cannot take the risk. We have already been stung with costs once this year and our board will not allow us to do it again," that is a clear example of where the public interest will be damaged, because even if a judge wants that wider expertise, it will be unavailable to the judge and the courts.

What does the clause provide on the other side of the coin—what is the benefit? It is said that it will prevent unmeritorious and time-wasting interventions, or interventions that should not have happened in the first place. The answer to that is in the response of the judiciary, who say that judges already have the discretion to order costs against an intervener in those situations. The clause does not add anything, but it will certainly take away from the court's ability to hear interveners and to make the right decisions for the public, rather than making the wrong decisions that will have those wider implications. That is the interveners point.

The other point—no substantial difference; what Nick says is absolutely correct—is that this has to be seen in the context of a raft of changes that make it harder and harder, and less and less appealing, to bring a claim, even if you have got a good claim. I agree with Michael that of course there is nothing wrong with recalibrating the system so that the hurdle at the beginning is higher for those cases that should not be brought, but if you are preventing good cases from being brought, what is the public interest in that? It might save money in the very short term. In a particular Department's budget, or for a particular decision, you will save money because that decision will be taken quicker, with less delay, and you will not have to pay the legal costs of going to court.

What is the flipside of that? The flipside is that all these cases are about the legality of decisions, about the rule of law and about the rationality of public bodies in their decision making. Every time you prevent a good claim from proceeding, you have a decision maker who is left untouched even though they have made a bad decision, or at least made it on a poor basis. The next time they make a bad decision, that is bad for the public. That is the point of judicial review, and all that the provision will do is potentially reduce the number of good claims. That will have very significant effects on the rule of law. Those are the two main provisions that I wanted to focus on.

Michael Fordham: You asked whether these provisions would save costs. To some extent, they would. They would save costs to the extent that there would be less scrutiny, because cases that would otherwise proceed will not proceed. They will not all save costs. For example, if you stop an intervener having a voice, the case will still happen and everyone will still incur their costs; it is just that that voice will not be heard and the court will not be informed.

Your question about the rule of law just comes to this: these provisions bite, and only bite, in a situation where the court would otherwise have allowed scrutiny, whether by granting permission, allowing the intervener a voice or granting a remedy. The court would have allowed scrutiny, having heard argument from Government, because it judged that it was necessary to do so in the interests of justice and the public interest. These provisions bite in that situation. They tell the court, "No. Even though that would be your conclusion, you should not allow scrutiny." In my view that is plainly challenging the rule of law, given the function of judicial review.

Nicola Mackintosh: As far as the rule of law is concerned, for the types of clients that I have been talking about it will act as a complete bar to access to justice, because it will not be possible for ordinary people to bring cases. The whole point of judicial review and public law is to hold those public bodies to account when they get things wrong, and I think that everybody acknowledges that from time to time, they do get things wrong.

In my area of work, I do not see that there is a problem. There are not hundreds of thousands of unmeritorious judicial review claims—in fact, the judicial review claims that are brought in in the area of law of my clients seem to be completely unproblematic. The numbers are tiny. There are only just over 120 contracts in England and Wales to deliver even legal advice in community care law. According to the last figures, which I got this morning, on the number of legal help cases, which is the initial type of legal aid, there were only 2,300 people who have been assisted this financial year, and that is in the whole of England and Wales. Only a very tiny proportion of those cases will actually turn up in court. If these proposals go through, none of them will.

As for the savings from these proposals as originally proposed, I recall that the Government's own estimate, rounded up to the nearest million, was £1 million. In my view, and in my experience, the cost to the state of effectively implementing a bar to access to justice is going to be much more. There will be knock-on effects on the health service and on social services and so forth.

Finally, and perhaps most important, I think there will be a significant cost to the health of society if the actions and omissions of public bodies go unchallenged.

The Chair: If you do not mind, Ms Vaz, I think we should move on. If there is time, we will come back round.

Valerie Vaz: Could we just let Mr Armstrong deal with the point?

Nick Armstrong: I will deal with it briefly. I cannot remember the name of the judge, but it was said recently, and I think rightly, that good decisions cost less. That is the first point.

Secondly, particularly on the legal aid side, but it applies more widely, the total amount of money that was intended to be saved by these proposals was £6 million.

It was put to the Justice Secretary in a number of papers—I was the author of one of them—that said that this is going to cost you significantly more, because if you prevent challenges to things like prison decisions, for example, people will simply stay in prison longer, and that is a very large amount of money when multiplied by the number of prisoners who will be affected.

This stuff is not about money. If it was about money, one would do things like test out what the Bingham Centre has said about saving money before going down this dangerous line. Also, if it was about money, when it was put to the Justice Secretary in the Select Committee and then in the Joint Committee on Human Rights, he would have said, "No, I disagree with those numbers," but what in fact he said was that it was about ideology. That is what is driving very large chunks of this, and that is a very real danger. If it turns out the money is not to be saved, as we say, and it turns out that all the quality providers are driven from the field, as we say they will be, what is the review mechanism, because once they are gone, they are gone?

Q300 Robert Neill: Is there not a problem fundamental to your argument? You talk about a constitutional provocation, but ignore the fact that, in reality, there can be no such thing in this country. The arbiter of the rule of law is not the courts and not the Government; it is Parliament. If Parliament decides that the balance should be different, that is the rule of law, surely.

Michael Fordham: I do not expect to persuade you with what I am about to say, but I do not believe the courts agree with that. The courts speak of dual sovereignty, and the courts have to deal with what Parliament enacts. Parliament has been introducing measures for centuries. Parliament used to say, "No certiorari"—"certiorari" is the Latin term for judicial review—and the courts used to disregard those provisions because of the importance of holding public authorities to account. Courts have said in recent times that there are limits to primary legislation, and in particular, if you abrogate judicial review, you will find the British Marbury and Madison just around the corner.

I am not sitting here trying to persuade you that a course to be taken would lead to that position, but I do believe that that is not only plausible, but correct. The courts would have to deal with how Parliament has chosen to purport to abrogate the constitutional function of judicial review. The last time we got close to this, there was going to be a clause that restricted judicial review in immigration cases, and it was withdrawn. Many people went into print saying that it would be unconstitutional and the courts would depart from it. When Parliament sought to insulate the upper tribunal from judicial review, the Supreme Court was not having it. I am not looking for a collision course. I simply want you to be aware, please, that if Parliament were to promote curtailing what judges have carefully designed, a constitutional collision course is what you are on.

Q301 Robert Neill: Is not the danger of that precisely that the judges thereby arrogate to themselves decisions which ought ultimately to be accountable to the electorate?

Michael Fordham: That is your premise. That is your value judgment. You have to start by asking what is the rule of law and what is accountability to the law? To turn it round: if Parliament enacts legislation that says that public authorities can only act within their limits, that is primary legislation. Why is it not then appropriate that there be a constitutional guarantee which holds that public authority to the limits that Parliament has imposed? I have not made that up: a divisional court made exactly that point when it explained why judicial review was a constitutional fundamental that could not be abrogated.

Q302 Robert Neill: I get the sense, as I said to Mr Lavender, that this is a case of "Get your tanks of our lawn."

Michael Fordham: No, it is not.

Robert Neill: This is a political point by political activists.

Michael Fordham: I do not accept that at all. I am not here to defend lawyers. I am perfectly happy for you to judge the value of what lawyers do. What I am asking you to do, please, is to recognise that the courts have grappled with all of these questions and they have identified principles for good reasons and that is what these provisions stand to interfere with. I am not here to defend my profession, but I am here to remind the Committee, if I may, that all of these areas are areas of interference with carefully, judicially designed principle.

Q303 Robert Neill: So let me make this final point. Parliament must ultimately be the guardian of the public purse and there is a cost to all of these proceedings. Is it not legitimate therefore to say, for example, not that you cannot intervene in a case, but that if you do so you should have regard to the potential risk that you, as an intervener, whatever your motives, run of bearing the financial responsibility of that intervention?

Michael Fordham: I fully accept the relevance of cost considerations. I believe that any judicial review court would also accept the legitimacy of cost considerations, but every time they consider protective costs orders, interveners, whether it would make a difference and whether they really have to send it back and grant a remedy, courts are fully aware of those considerations.

I repeat what I said at the very start: I am all for streamlining judicial review and there are many ways that it could be done, but let us not pretend that this is about costs. This is about deterring interveners from intervening. This is about deterring claimants who cannot bring a case without a protective costs order at the beginning. This is about deterring cases because the courts are expected to speculate as to whether the result is likely to have been different. That is what the consequences of these provisions will be.

Q304 Robert Neill: Miss Mackintosh, you talked about some of the instances of your cases. I understand that. Then again, forgive my saying so, but I get the sense that, whatever the individual circumstance—and there will always be circumstances where there must be some protection against the outworking of any policy or decision on individuals—often what underpins the bringing in of these challenges, although it is not party political, it has a political motivation. When somebody is opposed to cuts in local authority provision it is very

convenient sometimes to use that as a vehicle to make that political point. That is not a proper use of the courts, is it?

Nicola Mackintosh: I represent individual clients. If I have a client with learning disabilities and challenging behaviour whose care package will be cut or somebody who is physically disabled and cannot get out of their flat, cannot change their incontinence pad, cannot wash their sheets and so on, that is nothing to do with politics.

Robert Neill: It certainly should not be, no.

Nicola Mackintosh: That case is not about any political basis. That case is about the needs of that person and the right of that vulnerable person to a dignified quality of life.

Q305 Robert Neill: We can think of cases where someone objects to a major issue of public policy—they might not like High Speed 2, nuclear power, fracking, or something of that kind. Judicial reviews may be brought in the name of individuals, who might be involved, but essentially underpinning that is the backing of campaign organisations. Would that not therefore be a political argument, rather than a legal one?

Nicola Mackintosh: Can I give one example of a case with which you might be familiar? The Coughlan case was determined 15 years ago now. It was about whether the health service was legally responsible for paying for people in nursing homes. In that case, the Royal College of Nursing made a very helpful intervention, because one of the pieces of expert evidence and input that they gave to the court—it assisted not only the court, but the parties, in developing the legal arguments and putting their totality before the court—was about the nature of nursing care and whether there was in truth a difference between general nursing care, which the Secretary of State at the time considered should fall within the remit of social services and be means-tested, and specialist nursing care, which was deemed to be free of charge under the NHS.

Following the judgment, that intervention by the Royal College of Nursing proved to have been extremely helpful. It did not cost a lot, but it was absolutely necessary, and it assisted the court and the parties in reaching the right decision. That was an example of a case where the Secretary of State for Health had been unlawfully charging ordinary people for health care services that should have been free of charge at the point of delivery. That was not a political case with a capital p—it engaged matters of policy, but to denote it as a capital p "Political case" would be incorrect.

Q306 Robert Neill: Perhaps it is with a small p. I am just wondering whether the danger of judicial actions is that the courts are brought into what are essentially small p political decisions.

Nick Armstrong: If I can answer as well, all I can say is: come and meet my clients. Some of their cases take place in political contexts. If they are austerity or cuts cases, there is a political context, but the vast majority of them do not care. They want their support to continue, they want accommodation, or they want the service not to close. They are vulnerable, they are trafficking victims, they are disabled people, they are old, they are ill—whatever it happens to be, that is what they care about. I suspect that it is much more rare than you anticipate that there is any kind of campaigning element going on in the vast bulk of public law work.

Q307 Robert Neill: I would simply suggest to you that perhaps out of strong feeling for your clients, you overstate the potential effects of the reforms. Is it not just a redressing of the balance, essentially?

Nick Armstrong: It is about balance, and as Mr Fordham has told you more eloquently than I can, the rule of law is about balance. It is about the majority on the one hand, and what they need—the public purse and all that—but it is also about the minority, whom the majority does not always look after as well as it might and sometimes needs to be reminded of their existence and needs. That balance is struck by having Parliament and the courts. That is what it is about.

The likes of Nicola and I are here to tell you that these reforms go too far, because the people we stand in front of whose voice is not heard need the existing provision in order, frankly, to keep public authorities doing what you have asked them to do by framing the legislation as you have, in order to ensure that local authorities do what they are supposed to do under section 17 or 20 of the Children Act 1989, or under the National Assistance Act 1948, or whatever else.

Q308 Robert Neill: It seems to me that, ultimately, you are setting up the courts as the policemen of the behaviour of public authorities. Is that really their role? I agree with your proposition, Mr Armstrong, that the best and cheapest decision is the right one, but is it not better to invest at the front line rather than accruing the costs of going through lengthy judicial processes to achieve the same result?

Nick Armstrong: You need to have the enforcement mechanism. I have 20 years of doing this job—you need to have the enforcement mechanism to get the local authorities to do what they are supposed to. You have to be able to say, "Look, you are not listening to us. You need a letter before action." If you cannot do that, you will not be able to get them to do that which Parliament has entrusted them to do.

Robert Neill: That is a jaundiced view of public servants, but I will leave it there.

Nick Armstrong: It is based on long experience.

Q309 Mr Slaughter: It would be very useful if you sent us the Bingham Centre report. I will not ask you to address it now; it is perhaps better if we simply read it.

Taking Mr Armstrong's point, as some of us may have done, on the forward looking aspect of judicial review, which will be hobbled by clause 50, could I question Miss Macintosh? You said that this would have a prohibitive effect on your clients, but you were talking from the perspective of the individual client. Were you principally thinking of what is not in the Bill—the restrictions on legal aid availability—and if not, how would you say the provisions in the Bill are going to make your job more difficult, or your clients' receiving justice more difficult?

Nicola Mackintosh: It is the combination of clause 50 and the legal aid proposals. It may help to talk briefly about what happens when a client comes to see me or when I visit a client in a care home or hospital.

I first get a call, a letter or an e-mail, or, rarely, the client or a relative might turn up at the office. I then take instructions. I read the documents. I write to the opponent. I explore what the issues are. I try to resolve the matter without going to court, clearly. I am a qualified mediator and I recognise the importance of alternative dispute resolution. If necessary, I proceed to write a pre-action protocol letter, which threatens judicial review. Only if all those steps are exhausted and the client still urgently needs a service and a remedy will I consider issuing judicial review proceedings.

Judicial reviews are unlike other types of cases or litigation. All the work has to be done at the beginning. When we are preparing cases for the issue of proceedings, we have to provide a comprehensive picture of the legal grounds for challenge and also all the evidence. In other cases, you can simply start proceedings through a very simple form and then as the case progresses, particularly up to a final hearing—if it is not settled before then—the case is built up that way. Not so judicial review: all the work is done at the very beginning, as you are preparing to explore whether it is necessary for you to litigate at all.

Judicial reviews are unpredictable in terms of outcome. Under clause 50, I am going through an exercise right at the beginning, when the client has come to me, to predict the outcome of the case at the very moment I am deciding whether to take it on. I would not even have taken any details about the case, because to do that, I have to take the case on. Clause 50 is a real problem for me, coupled with the legal aid provisions. In my experience, the vast majority of cases that are issued, and most cases settle before issue, settle pre-permission. I do not have faith in the discretion of the Legal Aid Agency to exercise its discretion in my favour to fund that case. That, coupled with clause 50, will act as a total bar.

Q310 Mr Slaughter: I do not want to put words into your mouth, but your description of how judicial review works at the moment suggests that it has evolved over time and been crafted by the senior judiciary to suit a particular purpose, but the comments you have heard from Government Members make it clear that there is unhappiness with that and a belief, rightly or wrongly, that there are politically motivated cases. Other than in relation to the clauses in the Bill, which I think you have already dealt with, can you think of changes that could be made to the way judicial review operates, either to ensure that there is no political ambit to it or, taking Mr Wagner's point, to look at the conduct of defendants as well as applicants?

Adam Wagner: Can I just make one point about the conduct of defendants? One proposal, which has not been picked up, that was put by a number of organisations during the consultation is recalibrating the cost consequences for defendants of resisting permission when permission is then granted. For example, if it is highly likely that permission would have been granted or it was very strong case, if the judge certifies it—in some way saying, "This was an obvious permission grant case"—then the defendant would be penalised in costs, in the same way that now, with the most recent changes, the claimants will be penalised for carrying on with a case that is then refused permission.

From my perspective, one of the most obvious points that arises from all these changes is that they are entirely focused on claimants, and it is a very odd dynamic that presupposes that the problem is the claimants, without any particular basis. There is no research basis for that; it is simply assumed. I put this from almost a psychological perspective, but perhaps being on one side of the cases in every single case has in some way skewed the Government's perspective on judicial review. It is just a question that I put out there: is it possible that being constantly on one side makes you think that the other side are the dastardly ones and the unmeritorious ones?

From the perspective of the Bar, the Bar is not entirely divided but it is quite divided as to which barristers take on the defendant cases and which barristers take on the claimant cases. If you speak to barristers, they will say exactly that—"Well, the claimants are all this," or, "The defendants are all that"—and it is just the way that the human mind works. However, there is a problem if you then give responsibility for recalibrating the system to only one side and not the other, and to me it is quite clear in this entire raft of reforms that there is that element to it.

Q311 Mr Slaughter: Perhaps I did not explain before that I am not supporting this. In fact, I think that it is nonsense that there is a political element here, but since the Government rely quite strongly on that rather than on the evidence base, either they are being mischievous—they are saying that knowing it not to be true—or they genuinely believe that a substantive part of judicial reviews are motivated by political motives rather than genuine motives. Is there any way that you can reassure them on that, or respond to that?

Michael Fordham: May I make two points? The first is that none of these provisions are a function of party politics or abuse at all. You can bring a case under these provisions. If there is a likelihood that the outcome would be different, you can bring a case with a PCO, if you can meet the relevant tests; you can bring a case without a PCO if you are rich enough; and you can intervene if you are prepared to take the costs risk. None of that—those dividing lines that these provisions involve—is about party politics.

How do you deal with abuse of judicial review, because that is what the Lord Chancellor starts with? He starts by saying he believes in judicial review as a check on unlawful executive action. That is the starting point about accepting what it is all about. He says judicial review should not be abused.

The gatekeeper—first of all, you do not get legal aid for a case that is about party politics; you get legal aid for a case that is a viable case, raising a question of law. Secondly, you will not get permission for judicial review if you are a busybody who does not have a sufficient interest or if you do not have a legitimate, arguable question of law. Thirdly, you will not get to be heard as an intervener if you are applying to intervene for some showboating reason. The courts stand at the gate in relation to all of those things, and the Government are fully protected—as are other public authorities—because they argue before the courts, "This intervener should not be heard. This is showboating, or this is being done for some ulterior purpose. This case should not have permission. It is not a proper case raising a question of law." And as I say, if you do not pass the thresholds for funding, you would not get legal aid funding. I am afraid to say it is a red herring.

Nick Armstrong: I have to say that I think Mr Slaughter's question is an interesting one and I would like to think some more about how to answer the way of reassuring people in this room and MPs, and the public more widely, that that is not what the vast majority of judicial review is doing.

Judicial review is difficult to do and is focused on legality. You will not be able to bring a judicial review unless it affects the individuals who are in the litigation or, in the slightly rarer case, individuals who may be in future litigation because they are affected by it.

The big cases—not the sort that I do much—such as HS2 or the Richard III case mentioned this morning are rare. Those are not the clients that I represent or that Nicola represents. They are people who are in minorities, are vulnerable, are potentially unpopular, were once popular and were in the majority but due to a life-event that took them by surprise found themselves in a minority being arrested, having dementia or getting a service that was closing and they need their story to be heard. My concern is that the proposals contained here, when looking at the package, is driving all of them out, too. I would like to find a way of reassuring you that that is what it is about.

Q312 Stephen Metcalfe: Can I just pick up on that? Help me to understand why it will drive all those people out. I know you have said that already and expressed it, but just for me again, explain why it is that, where someone has what you would deem to be a legitimate case for judicial review, you would not then take it forward on their behalf. That is why I am struggling. Why would these proposals change that test for you?

Nick Armstrong: There are other aspects of the package, including the prisoners and residence tests for legal aid, which directly cuts them out. In relation to the judicial review proposals, the biggest problem is that we—whether individual barristers or small firms—are not big enough economic operators to be able to undertake the risk that is being required. That is the short point.

Q313 Stephen Metcalfe: Ms Mackintosh talked about how this comes up front. Could you explain that to me? I am not from a legal background and I need to understand more of this.

Nicola Mackintosh: If I can help. Some of the cases that I have dealt with for individuals, for example, will involve spending time with the client initially, reading documents, perhaps obtaining files to look for relevant evidence, corresponding with the proposed opponent to see whether we can reach a resolution.

As I have said, the next stage may well be, if I think the client has a sufficiently strong case, to present a formal pre-action protocol letter to the opponent. I will have to set out in that letter what I think they have got wrong in law. This is not about politics, it is about law. I will invite them to take a certain course of action and will probably—particularly in an urgent case—set a deadline for them to respond. If they do not respond, which does happen, or they respond with a no or only in part, not addressing everything I have asked, so that I need to take action quickly to protect the client, I will have to prepare the case and undertake considerable work to get it into court. Unlike other types of casework in litigation, that involves front-loading everything at the beginning of the case.

At that stage I will prepare the comprehensive legal grounds with counsel. I will instruct a barrister to advise and draft the legal grounds. I will draft statements of evidence as well. Everything has to be before the court at the first opportunity, unlike other types of litigation, where you can start proceedings on a non-paper-heavy basis. That has an impact on costs. Every hour that I spend on a case will mount up and that is time that I have to be funded for to pay for the gas, electricity and my staff.

Q314 Stephen Metcalfe: I understand and no one objects to that. I am still failing to see how the changes to the judicial review arrangements affect you doing that. Presumably you are doing that at the moment, preparing all that work.

Nicola Mackintosh: I am doing that but it is funded; that is the difference.

Q315 Stephen Metcalfe: But that is a different piece of legislation, is it not? That is to do with the legal aid legislation. I can see the link.

Nicola Mackintosh: It overlaps, partly because clause 50 introduces a new test, which is an obligation to refuse permission in certain circumstances. Where permission is refused, that is when the case will not be funded.

Q316 Stephen Metcalfe: But at some point, you have to do some up-front work, because you have to assess whether there is a case. You have to ascertain whether you genuinely think that that local authority has made the wrong decision, and therefore you have to do some work before you can advise your client as to whether they have a case.

Nicola Mackintosh: Absolutely.

Q317 Stephen Metcalfe: So how does this change that? Is it just that the threshold moves to the point where you have to be more confident than you do now that you are going to make some progress and that the case is worth testing? Perhaps you would have taken a case that you did not have 100% confidence in to test it through the courts, but the changes will make you think a little more carefully about how much progress you are going to make.

Nicola Mackintosh: No, because I am already careful. I do not litigate when there are insufficient grounds, but that is not to say that permission will be granted in every single one of those strong cases. That is the issue. Judicial review is unpredictable. If I could predict at the beginning of my preparation, having done the initial investigation, that a case is going to win, there would be a different answer. Unfortunately, however, it is unpredictable, because permission might be refused or, more likely, as I have said, cases settle because of some supervening event outside my and my client's control that results either in the case becoming academic, or in the client being given the relief that we are seeking in the proceedings. In such circumstances, I have no guarantee that the case will be funded.

Nick Armstrong: Can I briefly add to that? I want to emphasise—I say it slightly in my paper—that judicial review is more unpredictable than private law proceedings, because it is forward looking, which means you are making a forward bet. In order to assess the prospects,

you have to assess whether there will be real issue when it comes forward in the court. That just makes it more unpredictable and much more risky. Clause 50 makes that more risky and then the legal aid changes say, "You've got to invest in it on that basis."

Q318 Stephen Metcalfe: But were this to remain unchanged and go through, do you not think that you would get used to that sense of what is accepted by the courts and what is not, in terms of whether the outcome would have been different? Is it not just a question of getting used to the new framework?

Nicola Mackintosh: In 22 years of undertaking community care cases, I cannot predict what any particular judge on any particular day is going to say on the particular facts and legal grounds of my case. I can give a rough-and-ready prediction, but one judge or another might come up with a completely different outcome. That is the reality.

The other thing is that, as I have said, I do not litigate every case. It is a very careful, considered process. We have to go over massive hurdles and through several filter mechanisms even to get a case issued—from making an application to the Legal Aid Agency, which undertakes its own very stringent test as to whether a case is meritorious enough for legal aid, right up to the judicial consideration of whether permission should be granted. It really is a David and Goliath situation, with an uphill struggle.

Q319 Stephen Metcalfe: In cases that you wanted to pursue to JR, how many times have you been denied taking them further by the courts?

Nicola Mackintosh: Are you asking all of us?

Stephen Metcalfe: Well, you specifically, because we are having a conversation. Is it a 50:50 chance? When you think there is case, do you get them accepted 50% of the time and 50% not, or is the threshold much higher?

Nicola Mackintosh: The difficulty is with the breadth of cases with which we deal. Community care covers a whole plethora of different types of cases: from individual clients who need services, as I have described, to small care home closures, to challenges to eligibility criteria of local authorities or health agencies. It is not possible to give a percentage likelihood of success, because it depends entirely on the factual and legal matrix of every single individual case. I would help you if I could.

Q320 Stephen Metcalfe: I suppose what I mean is, in every 100 cases that you take on, how many of those actually get to judicial review?

Nicola Mackintosh: Of 100 cases that I will issue—start court proceedings because we cannot resolve the case otherwise—I estimate that about 95 to 98 will settle between the issue of proceedings and consideration of permission. That is the vast majority of cases. These proposals mean that I have no guarantee of being able to fund the vast majority of cases.

Q321 Stephen Metcalfe: Do you think that the percentage of cases settling before—some 95%—would change because of the proposals?

Nicola Mackintosh: At the moment we are being funded. That is the difference.

Nick Armstrong: I think part of the answer to that is that we do not know. One thing that is very difficult to check is how incentives will change. At the moment, defendants in a meritorious case will settle, because they do not want to fight it, lose and take a costs risk. If they are in a position where they can say, "This is a small firm. They are good, but let us just push them to the wire," we suspect that more cases will fight and go through in that way. We think that the number of meritorious cases that are settling at the earlier stage will decrease, and we will be pushed to take the risk because defendants will take advantage of this scheme. We do not yet know, but that is what we think will happen.

Q322 Stephen Metcalfe: Okay. Final question: if you were advising us, bearing in mind that we want to streamline the system, what would you advise us to do? What would you like? Would you leave the existing law unchanged, or are there some positive suggestions that you can put forward?

Nicola Mackintosh: Things have changed anyway. First of all, I cannot see that there is a problem with the type of casework that we undertake. There are not hundreds of thousands of unmeritorious judicial reviews. Perhaps I would say that, but there is actually no evidence. That is the first point that I would make.

The second point is that there already have been changes. For example, in judicial reviews, even though we have jumped through the quality hoops as being legal aid practitioners, and we have contracts with the Legal Aid Agency that contain quality standards, our ability in very urgent cases to exercise delegated functions to grant emergency legal aid has been removed from us. All decisions about whether a case merits legal aid are now made by the Legal Aid Agency. There are already changes, even if there were to have been a problem.

Q323 Valerie Vaz: Some of these questions require just yes or no answers. If you were trying to persuade us to remove some clauses, which clauses would you remove?

Nick Armstrong: Very high on my shopping list would be clauses 50 and 53. I have problems with the others, but those are my big concerns.

Michael Fordham: Clauses 54(3) and 54(6) as well.

Adam Wagner: I agree.

Q324 Valerie Vaz: Given the clauses we have been talking about—50 to 56—are we binding our judges?

Michael Fordham: By not doing it?

Valerie Vaz: If these clauses went through, would we be binding our judges?

Michael Fordham: Judges are like dinosaurs in "Jurassic Park". The rule of law will find a way. The provisions will purport to dictate to independent judges that they should say no in situations where they would, at the moment, carefully, conscientiously and informed by Government submissions, be saying yes in the interests of justice. Is that a good idea?

Q325 Valerie Vaz: Quickly, yes or no: Parliament sometimes gets legislation wrong, does it not?

Nicola Mackintosh: Yes.

Nick Armstrong: There are sometimes unforeseen consequences. I think that is how I would put it.

Q326 Valerie Vaz: So is judicial review a means of correcting that, in your view?

Nick Armstrong: Yes, absolutely. I have a case on at the moment about exactly that.

Q327 Mr Slaughter: Do you have any objections to clause 51? I think we have dealt with Mr Fordham's main concerns.

Michael Fordham: I have difficulty with the wisdom of a general provision about disclosure of financial resources. I have no problem with the idea that in a cost-capping context, where you are asking for a special order to protect you, because you could not otherwise bring the case, you should be candid—

The Chair: Order. I am afraid that that brings us to the end of the time allotted for the Committee to ask these witnesses questions. I thank them on behalf of the Committee for their evidence. We move on to the next set of witnesses.

Examination of Witnesses

Angus Walker, Keith George and Neil Sinden gave evidence.

4 pm

The Chair: Will the witnesses please introduce themselves for the record?

Neil Sinden: I am Neil Sinden, policy and campaigns director at the Campaign to Protect Rural England.

Keith George: My name is Keith George, and I am head of planning for Taylor Wimpey UK.

Angus Walker: My name is Angus Walker. I am a partner at Bircham Dyson Bell, specialising in planning law and, in particular, infrastructure projects.

Q328 Robert Neill: I wonder if you might give us a sense to start with of your views on the impact of judicial review on major infrastructure and development projects. As I recall, there have been about 15 cases that the administrative court flagged as major infrastructure projects for 2012-13. There has been an issue as to whether the current arrangements on judicial review can cause delay costs on development and infrastructure. What is your experience on those matters?

Neil Sinden: The first thing that the CPRE would like to say is that we see JR as an essential safeguard against unlawful decision making and a vital check on abuses of public power. On the major infrastructure projects point, the figures that have just been quoted demonstrate that this is not perhaps as big a problem as is suggested by the way the Government have defined it or by some of the proposals brought forward, such as the Bill. The CPRE opposes any delay to good decision making, but we believe that JR provides an essential mechanism whereby the lawfulness and the processes and procedures followed in decision making are properly scrutinised. In the very rare cases—you quoted 15 cases, and there are many fewer cases where unnecessary delays have been caused—I do not see anything in the Bill that will necessarily change that situation. Some of the legal changes being proposed could backfire and lengthen procedures early on in the process, and I am thinking specifically of clause 50 in that regard.

Q329 Robert Neill: It is surely legitimate to have regard not just to the cost to the public purse, but to the commercial damage done to investment in major projects by delay.

Neil Sinden: Absolutely. If I can come back to that point later, the other basic comment that we would make on the justification for the proposals in the Bill is that the evidence base on the economic benefits of reducing delays is barely credible. The regulatory impact assessment, which we have looked at closely, mentions a few figures, but it does not in any way interrogate those figures or present a robust case for why the proposed changes will deliver wider economic benefits, let alone for the benefits that they might bring in cost to the public purse.

Keith George: With regard to national infrastructure projects, my company has no direct experience. With regard to the delay in implementing major projects, we do have direct experience. Planning consents create a transient value and we can be judicially reviewed on outline consent, reserve matters, full application or conditions. If we have purchased a site on an outline consent and we are subsequently judicially reviewed on reserve matters we really need a timely determination of the application. If outline consent is for implementation within three years, you are judicially reviewed on submission of reserve matters, and then it takes two years, which is the evidence we have provided to earlier consultation papers on this subject. It takes 101 weeks to be able to get it determined through the courts, so we are out of time on the main outline consent. So we roll backwards. The issue for us, in addition to the need for timely consents and a full and fair process, is that you cannot deal with the delays which we have experienced. We know that the reforms in 2013 are designed to accelerate the determination of claims, but we have not any direct evidence to date that it is improving the situation, albeit we have no criticisms of the reforms made.

Q330 Robert Neill: But so far the improvement is not there?

Keith George: It is unproven.

Q331 Robert Neill: But there is need for improvement?

Keith George: We believe so, yes. Taylor Wimpey is a company that has only been running for seven years, having been formed by a merger. Our experience is only on 12 schemes. If you take a view on 350 planning applications per year and the size of our business, statistically it seems small. Inevitably when delays occur, they occur on major projects with high capital lock-up. The opportunity cost of capital becomes expensive. The secondary costs of defence are expensive. But a point I need to make in fairness is that in those instances we can either initiate a claim, which we have done in about 33% of our cases, or we are defending. But we are not the main defender, we are the first interested party

because we have elected to defend. It is the decision maker, who could be the Secretary of State or the local authority, who leads the defence.

Q332 Robert Neill: Mr Walker, what is your take on this? Your firm does a lot of infrastructure work.

Angus Walker: Yes, that is right. I concern myself with nationally significant infrastructure projects above thresholds in the Planning Act 2008. There have been 16 decisions under that regime so far. Four of them have been judicially reviewed, so that is a quarter. I am not sure where the figure of 15 comes from. That must be some lower threshold that the Ministry of Justice has come up with.

Q333 Robert Neill: I will take yours as the practitioner.

Angus Walker: I think the points made by both gentlemen on my left are to do with delay rather than discouraging claims being made altogether. The Bill does not deal with delay and questions of timeliness. The number of planning judicial reviews is very small—planning generally, not just major projects. I had a look at the MOJ statistics and for 2012, 12,434 judicial review claims were lodged and only 188 are classified as town and country planning, so that is 1.5%. I found it surprising when this Bill was introduced and the response to the recent consultation said that planning cases were clogging up the courts. It seemed rather that they were the victims of clogging up by other types of cases, like immigration cases, rather than the cause of clogging. They are the cloggees rather than the cloggers.

Q334 Robert Neill: But 25% of the infrastructure ones seems quite a lot, does it not?

Angus Walker: It is quite a lot but they are the largest by definition. They are most significant projects in the country and likely to have a large degree of interest.

Q335 Robert Neill: And therefore have the most economic importance riding upon them.

Angus Walker: Yes, indeed. While there is a small number of planning cases relative to other judicial reviews, they have greater impacts on a larger number of people. A lot of judicial reviews are only concerned with one person, for example, whereas the Hinkley Point C nuclear power station could power 5 million homes. That has quite a significant impact. But it is the delay, rather than the fact of judicial review, that it is important. The Planning Act regime was introduced to make decisions quickly and it does that in a year and a quarter or so. But then the Hinkley Point judicial review by the Irish National Trust is delaying it by a further year so that is nearly doubling the time it has taken.

Q336 Robert Neill: Do you have thoughts on the operation of the planning court so far and the idea of that separate planning?

Angus Walker: The planning court has not been established yet. It has just been proposed, but there is a planning fast track. Evidence from discussions with colleagues is that it is having an effect and speeding things up, which is why I find it strange that these further reforms are being proposed before the planning fast track has had a chance to be assessed on whether it is working. Also, in November, immigration and asylum cases were removed from the High Court altogether to go to the upper chamber, a separate tribunal, and the impact of that is yet to be felt.

Neil Sinden: Absolutely. Perhaps I could come in on that. According to figures I have seen from the administrative court, in October 2013 it took seven weeks to reach permission stage, compared with 21 weeks in October 2012, so that is hard evidence that the planning fast track is already making an impact. The question remains: to what extent, if at all, will the provisions in the Bill do anything to improve the problems there undoubtedly are with delay?

Q337 Robert Neill: Given that we want to speed things up, perhaps it is legitimate to think, "Okay, we are making some progress, so let's build on that and reinforce it in the provisions in the Bill.

Neil Sinden: I would argue, reflecting comments that have already been made, that there is nothing specific in the Bill that is designed necessarily to achieve that.

Keith George: Speed is important and consistency of decision making is important, so I would focus on the specialist judges coming through. At the moment, they are drawn from administrative law. Some may have planning expertise and some may not. We would welcome the development of a body of expertise.

Q338 Robert Neill: That makes sense. The proper court proposal is going in the right direction.

Keith George: Yes.

Q339 Robert Neill: On a separate point, perhaps I might move away from judicial review—it has been interesting to have your thoughts on that—to clause 57 of the Bill, which specifically covers the planning and deals with leave and so on. The Planning and Environmental Bar Association has suggested that it would be appropriate to give the ability to seek leave from the Court of Appeal as well as from the High Court on the basis that quite often the High Court may refuse leave and when you go to the Court of Appeal leave is given and the case is successful. That will be a potential streamlining of the system. What are your thoughts on that, or would you like to think about it?

Angus Walker: I have not thought about that in advance. On clause 57, it seems a good idea to introduce the permission stage for those sorts of claims, but there are still other planning judicial reviews that do not have a permission stage. Surely it would be sensible to introduce it across the board because sometimes a case may involve more than one type of appeal.

Q340 Robert Neill: Exactly right. That is what I was thinking of. I do not know whether you have seen it, but some amendments that have been tabled in my name after discussion with the Planning and Environmental Bar Association seek to standardise the permission regime and time frame. Does that seem an appropriate thing to be doing?

Angus Walker: I confess I have not seen your amendments but the concept sounds eminently sensible.

Q341 Robert Neill: We are in a situation at the moment with different regimes for things like listed building proceedings, hazardous substances applications, section 287 applications, section 113 applications against development plans, and so on, and sometimes there are different times limits because the six weeks run from different points in the decision process.

Neil Sinden: Absolutely, and the clause we are considering here—clause 57—is one that CPRE would support as well as any amendments in the line that we have just been discussing. There is a need for greater consistency both in introducing the permission stage, as Angus has said, and also in making the time limits similar.

Keith George: I have only had sight of the Bill. I have been dealing with the consultation paper and I am attending at late notice, but if we are going to bring section 288 challenges into the same filtering process that you would get for judicial review, that seems very sensible.

Q342 Robert Neill: That is very helpful.

Q343 Mr Slaughter: A point that was made by Mr Walker in the notes he sent us is that changes have already been made to try to speed up the process but have not yet bedded in, although they seem to be having an effect. There is also the issue of the planning court, which has not started yet, but the whole aim of it is to increase the speed and efficiency of the process. Mr George, I understand that your intent is that the process is not delayed unduly. If those changes are made, why do you think we need the changes in the Bill?

Keith George: The first point is that with the reforms, which we support in principle, we have not seen an improvement in the case management work load that we have. We believe it will improve. The point is that with regard to the need to determine, I use the phrase that planning consents have a limited life. I can give examples where a full reflection on the facts is important, but with regard to development there is always something in the marketplace that will change. Your contract may end; contracts do not run on in perpetuity.

With the planning framework, let us take a set of circumstances where your planning consent—granted by the Secretary of State—has been subject to claim and it has been dismissed. If it takes two and a half years before you can go back for redetermination, which we have evidence of, you find that the London plan has been adopted; the London plan has altered the space standards, building specification standards and affordable housing. You cannot then go back into redetermination, because it is not possible to win the case. So, while accepting that there is a need for a full process, the full process for development and consent cannot allow for a period of drift of, say, three years, because then you are out of contract, the planning framework has changed and you have basically been timed out. Our objection to the ability of claimants winning the case is that they know that they can time you out under certain circumstances.

Q344 Mr Slaughter: That is an argument; I do not think you answered my question. That is an argument in favour of doing things expeditiously, but still fairly, and we have talked about the planning court as being a major course of action. I am asking you specifically about the provisions in this Bill—the changes that this Bill makes to the availability of judicial review as a remedy. Why do you need those?

Keith George: I feel that basically it is creating a judiciary wholly experienced in the subject matter and I believe that that would provide for greater consistency.

Q345 Mr Slaughter: Let me help you. The main provisions here are for changing the test whereby permission is granted, for discouraging intervention by giving cost penalties and for removing protection of claimants in relation to costs. Now, it seems to me that none of those, of themselves, are going to speed matters up, which seems to be your principal objection. So what is your view on this Bill, which we are discussing today?

Keith George: Generally, we are in support of it.

Q346 Mr Slaughter: Why? The question is why?

Keith George: Because it is trying to provide a shape and a focus to enable decisions to be reached in a timely manner. That would be my first point.

Q347 Mr Slaughter: With respect, it is not, is it? It is trying to restrict the availability of judicial review as a remedy, in tandem with the proposals on legal aid, particularly to those who may not be of means in bringing an action for judicial review, meritorious or not.

Keith George: With regard to the schemes that my company participates in—I would say I am representing the house building industry—all our cases are environmental-led cases, by definition, and the Aarhus convention provides protection. It is noted that the Government are protecting their position with regard to subsequent European decisions to come back and revisit this point, but at the moment the protective costs order regime still applies to environmental cases. So I think that our position would be that there is no change.

Q348 Mr Slaughter: That is helpful. I will ask Mr Walker about this in a moment, but in relation to the sort of cases that you, as a developer, would be involved in, you believe that they will still be covered by the Aarhus restrictions?

Keith George: The document that I have read, which is the proposals for further reform, makes that point quite explicitly.

Q349 Mr Slaughter: Do you have any specific support for the provisions on interveners or on the "highly likely" test?

Keith George: With regard to the "highly likely" test, our view is that it is basically seeking to provide a tighter definition. With regard to the absolute test, we think there is a law of diminishing returns. On balance, bringing down the test to "highly likely" is acceptable to us.

Q350 Mr Slaughter: That is because it tilts the balance more in favour of developers and away from local communities that might object to development.

Keith George: I would say that it is a mutual provision. I do not think it sits on one side of the table or the other.

Neil Sinden: On that clause, I think we would agree that it is neutral in its impact on different claimants. We would argue that it is potentially unconstitutional in the terms that you have heard already this afternoon. It is shifting the barrier between the judiciary and the Executive by putting judges into the shoes of decision makers and requiring them to make what can sometimes be quite difficult judgments, when balancing different considerations around a particular case in order to apply the "highly likely" test. That is not the case at the moment, with the provision of inevitability meaning that a claim cannot proceed. We think there is a constitutional issue to look at in relation to clause 50. It is not so much about the extent to which it would advantage one type of claimant over another; it is about the correct division between Parliament and judges in terms of making decisions on key cases.

Q351 Mr Slaughter: Can I ask you this, Mr Sinden? Mr George seemed to say that the system is unfair on developers at the moment, that they are the victims in this. In your written paper you pointed out, as we all know, that there is no third-party right of appeal here. Judicial review is often the only recourse that someone unhappy with a planning consent made may have in order to challenge that. Do you think the situation at the moment is too easy for prospective applicants who want to bring a judicial review on planning matters?

Neil Sinden: Too easy for third parties, are you suggesting?

Mr Slaughter: Yes.

Neil Sinden: Not at all, absolutely not. There is a tenor around this debate that campaign groups, potentially even campaign groups associated with CPRE, are seeking to use JR as a way of delaying decisions or stopping decisions on essential infrastructure. That is far from the truth and completely unsubstantiated by the evidence that the Government have brought forward supposedly to support the provisions in the Bill.

I consulted our branches up and down the country to see what their experience is of this. We undertake it very rarely; I am aware of fewer than half a dozen cases in the past 10 years. They are cases entered into not at all lightly by our local groups, and with a great sense of foreboding about the complexity and the costs within the current arrangements that they are likely to be exposed to. It is certainly not an easy route. It is, as you are suggesting, the only route where there is a legitimate grievance or concern about the lawfulness of a planning decision for third parties.

You may not be aware, but CPRE and many other organisations have been very supportive of the principle of a limited carefully defined community right of appeal to match the right of appeal that developers have against the refusal of planning consent. That would be a way to balance the system and make available to third parties some kind of recourse where decisions should be legitimately questioned in terms of the procedures and processes that have been gone through, to have that decision-making process scrutinised to ensure that their interests and the public interest are properly safeguarded in the planning process. We think it would be a far more sensible approach for the Government to adopt to look seriously at the case for a carefully defined community right of appeal as a way to reduce the recourse—limited though it is—by third parties to JR.

Q352 Mr Slaughter: Do you then think that the provisions in part 4 are just about expediting and speeding things up, or do you think they will make it more difficult for your members or those who consult you to bring actions?

Neil Sinden: I do not see them in any way as measures that are designed or likely to deliver more timely decisions. I do not think that is what they are about. They are about potentially frustrating the limited ability of third parties to bring legitimate claims against what is perceived to be unlawful decision making, which is a potentially worrying direction to take.

Q353 Mr Slaughter: How far do you agree with what Mr George said about being saved from the diminution of relying on PCOs in most planning cases by clause 56 and Aarhus? Are you concerned about that or do you think that, in reality, there will still be cost protection for planning and environmental cases?

Neil Sinden: We strongly support Aarhus and would be concerned about any changes that might reduce the availability of capping in environmental cases. It is important to note that not all planning cases can be considered as environmental cases. Certain change-of-use planning decisions may not fall within the Aarhus convention, but we are concerned about the capping clauses in the Bill, in that they might well reduce the potential cover that third parties have for excessive costs awards.

When local groups that we are aware of consider the possibility of entering into judicial review proceedings, they are very mindful of the risk of costs. They are not necessarily always seeking to take out protective cost orders in order to protect them from excessive costs awards. They are more often motivated by legitimate concerns over the lawfulness of decision making, rather than frustrations about the outcome. They want to see good decisions being taken and poor decisions being challenged.

Q354 Mr Slaughter: Mr Walker, you specifically raised this point in your submission, in which you mentioned an ECJ case. If you do not want to go into the detail of that now, it might be helpful if you sent us the details. I share your concern that clause 56 may not cover everything that it purports to in terms of environmental cases. Can you say a little more about that?

Angus Walker: Well, just so Members are aware, the Aarhus—however you pronounce it—convention is all about public access to environmental decision making. One of its provisions is that participation in decision making cannot be prohibitively expensive and that a party launching judicial review proceedings cannot be exposed to a huge amount of the other side's costs, which could put them off making the judicial review in the first place. As hinted at by clause 56, it seems that many of the Bill's provisions—in fact, clauses 51 to 55—may not have any effect in relation to environmental cases, because they are all about financially disincentivising bringing claims and the whole essence of the convention is that you cannot do that. Whether or not the Bill is enacted, it may turn out later—planning cases are usually environmental ones, although not always, and some environmental cases are not planning cases—through decisions of the courts and of the ECJ that the provisions do not apply to planning cases.

On clause 50, which is the one about "highly likely", it was mentioned in the previous session that to decide whether something is "highly likely" will in many cases involve a virtual hearing of the whole case. All it will do is bring that into an earlier part of proceedings. I am not sure whether saving any time would be the consequence of its introduction. You may not be aware that it is not just about lowering the threshold; it has removed the court's discretion, because if it is "highly likely", it must refuse to grant relief. There is no discretion anymore. That is an additional provision, and you might want to consider whether it should stay in there.

I have slightly changed my view on the two financial resources clauses—51 and 52—from that in my submission. Imagine that permission has just been granted for a wind farm next to a small town in the country, and the residents' association wants to bring judicial review proceedings. It has a whip round to cover the cost of the proceedings because the residents think the decision is disgraceful. Would they raise as much money if someone pointed out that, due to these provisions, all the people handing in their money might be liable for thousands of pounds of the other side's additional costs? I suspect that that might discourage them. Undoubtedly, that is the purpose of the clause, but perhaps its drafters were not thinking of those sorts of situations.

Q355 Mr Slaughter: You are not the first witness who has tried to find some merit in part 4 but been unsuccessful. Thank you for dealing with that.

The point you made about the ECJ, which I did not quite pick up on at first, is significant. You are saying that you would perhaps anticipate satellite litigation if part 4 is enacted as currently drafted—that the caveat in clause 56 will not be sufficient to satisfy Aarhus.

Angus Walker: I think it may be insufficient on two grounds. First, it applies only to clauses 54 and 55, whereas clauses 51, 52 and 53 are also about financial disincentives. The extent of clause 56 is only to disapply those clauses, not to introduce any alternative that protects claimants from costs awards.

Q356 Mr Slaughter: Mr George, would you accept, partly in relation to what you heard there, that part 4 will be a financial disincentive to prospective applicants in these cases? You might think that that is a good idea, but part 4 is not really about speeding up the process; it is about disfranchising applicants from bringing claims against developers.

Keith George: We do not wish to see people being disfranchised. The point we would develop is that, in some of the cases in which we are involved, we see a discredited argument that has been run in earlier cases being recycled. Because judges rotate, the same argument can be presented. We feel that the financial system should not support a weak case that has been dealt with previously and see the argument re-presented. We have no objection to the basic principle of the Aarhus convention—that there should be access to environmental law for all. We fully understand that, but it has to be part of a balanced system. We do not wish to see discredited arguments bouncing around, recycled, and lengthening the process.

Q357 Mr Slaughter: If I understand the scenario you are painting, a challenge has been made and you have won the case, but you have to go back and get a decision again because something has moved on—perhaps in terms of planning policy. If a further challenge is made, you would have the right to attend at the permission stage and say that the matter had already been adjudicated on.

Keith George: That is correct, but to return to the point I made, unless we are leading the claim as the claimant—in 70% of the schemes we participate in, we are the first or second interested party, or even the third, sitting behind the decision maker—we have to rely on the decision maker to deal with matters. With regard to costs and other points, because we are first interested party, we are legally entitled to seek relief, but where there is a protective costs order, the local authority will inevitably have first claim if the case is determined on their basis. So it makes no difference to us financially, and we are not looking for that.

Q358 Mr Slaughter: That is a fair point. But you are talking about a scenario in which on the one hand you have counsel representing, quite possibly, an impecunious applicant—whether they are legally aided or have scraped together the money from the local community—and on the other hand, you have three or four silks representing you, other parts of the development, the local authority and possibly the Department for Communities and Local Government as well. Is that not sufficient inequality of arms for you without loading the dice against the applicants?

Keith George: We are not looking to load the dice against the claimants; we just benchmark where an argument has been legally discredited. It is that point that we take exception to, no more.

Q359 Mr Slaughter: This is a sledgehammer to crack a nut, in that case. You have the right and the means to bring before the court the idea that this is an unmeritorious claim because it has already been decided in substance or because there is not sufficient merit. The applicant has to jump through hurdles, perhaps in obtaining funding and permission and getting a lawyer to act, and you can come in at any stage and object to that. Are you really saying that the way to cure that evil is to completely change the way that judicial review works, which is what part 4 of the Bill does?

Keith George: With regard to the financial incentives?

Q360 Mr Slaughter: Yes. I am saying that if we assume that that is a problem and there are some opportunist or malicious applicants out there, you can deal with that in a number of ways. They have to jump through a number of hurdles. Judicial review is not an easy remedy for an applicant to bring. Why do you need the provisions in part 4 of the Bill to deal with that?

Keith George: I think our experience has been that there have been sincere claims and there have been claims that have simply bounced along for tactical reasons. We basically favour an approach that tries to take out the legally weak claim but not deny people access. There is a focal point on sifting it out and dealing with it as it goes forward.

The other point is that, because you go in with skeleton arguments and various remedies are made available with regard to strike-out applications and the like, you find that a case, when finally pleaded, bears very little

[Mr Slaughter]

relationship to the opening case. They migrate as you go through and that seems to lengthen the process. It is never, "Here is my case," and that is the case that is determined. It will change quite radically, in our experience. I am not an expert on the financial provisions—I would have to take advice from our solicitors.

Q361 Mr Slaughter: Is that not what judges are for? Is that not exactly the point that your counsel would put to the judge: that the case has migrated and those are not the arguments that were put forward at permission stage or on skeleton or what have you? It seems to me that you are saying "That might cost us money and that might cost us some time," and it would be much better to have sufficient financial disincentives or administrative barriers to prevent those cases—whether they are good or bad cases—getting to court in the first place.

Keith George: We believe that it is appropriate to have a filtering system in place, but that should be independent of what I would describe as commercial interest. It should be dealt with on legal merit.

Neil Sinden: Can I come in on clause 51? We take the view that this measure is designed to intimidate groups who we think would have a legitimate case to pursue in relation to judicial review of a decision-making process. Arguably, a result of that prejudicial impact could be more unlawful and irrational decisions being taken and allowed.

We would support striking out the clause altogether on the basis that it is unfair in those terms, but it is also of concern to us—one of our local groups has raised this particular point—that it opens the door to further intimidation by developers of a community that may be considering this course of action. There is a live case at the moment where developers have been exceedingly intimidating of a local community with a legitimate case to be heard. We fear that, with clause 51, that kind of activity would be even more common and local communities would feel even more intimidated as a result of that provision.

If the deletion of clause 51 is not achievable, there is a detailed matter to look into in terms of the scope of the financial disclosure provisions, which include, currently in clause 51, those likely or able to contribute financially to a campaign. We have questions about the workability of applying that definition legally. How on earth can you identify groups or individuals who are likely or able to contribute to a campaign, but who have not yet done so? If the clause remains, I think it needs to be amended in relation to reducing the scope of that provision, so that only those people who actually have donated need to be made public. But as I say, we would prefer the clause not to be there at all.

Q362 Mr Slaughter: Are you saying that rather than being about transparency—I do not want to put words in your mouth—you think clause 51 is about intimidation, or is another way of discouraging claims being brought?

Neil Sinden: Absolutely, and those are the kinds of words that we have heard from our local groups who have already been subject to considerable intimidation by developers who are seeking to frustrate, we would argue, the proper course of law.

Q363 Mr Slaughter: In relation to the effect of clause 56—I guess this question is for Mr Walker, really—our explanatory notes to the Bill state:

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

I have yet to work out what that means, other than perhaps we need to wait for regulations. If you are unable to deal with that now, I would value your thoughts on it in writing. It seems the clause is designed to deal with all matters under Aarhus, rather than with all environmental cases, and therefore the note is somewhat worrying. It is at the bottom of page 64 of the explanatory notes.

Angus Walker: I had not focused on that section.

Mr Slaughter: Yes, I'm sorry.

Angus Walker: Perhaps this is a sort of dress rehearsal question about bringing arguments earlier in the proceedings. Is something environmental or is it not? To decide that, you have to investigate quite a lot about the case. It may be that simply claiming a case is environmental does not mean it will be covered by clause 56, until proceedings have gone a bit further and established whether it is or not. That is all I can suggest off the top of my head.

Mr Slaughter: Right, okay.

The Chair: As there are no further questions, I thank the witnesses for their evidence. We have now come to the end of today's proceedings. We will meet again on Tuesday to begin line by line consideration of the Bill.

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

4.43 pm

Adjourned till Tuesday 18 March at five minutes to Nine o'clock.

Written evidence reported to the House

CJC 10 Rehman Chishti MP

CJC 11 Public and Commercial Services Union

CJC 12 Professor Clare McGlynn and Professor Erika Rackley

CJC 13 Sex and Censorship campaign

CJC 14 The Law Society

CJC 15 Rape and Sexual Abuse Support Centre

CJC 16 Asda