

HOUSE OF COMMONS
ORAL EVIDENCE
TAKEN BEFORE THE
JUSTICE COMMITTEE

TRANSFORMING LEGAL AID

WEDNESDAY 16 OCTOBER 2013

RT HON CHRIS GRAYLING MP and HUGH BARRETT

Evidence heard in Public

Questions 1 - 63

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Oral Evidence

Taken before the Justice Committee

on Wednesday 16 October 2013

Members present:

Sir Alan Beith (Chair)

Steve Brine

Jeremy Corbyn

Nick de Bois

Gareth Johnson

Mr Elfyn Llwyd

Andy McDonald

Graham Stringer

Examination of Witnesses

Witnesses: **Rt Hon Chris Grayling MP**, Lord Chancellor and Secretary of State for Justice, and **Hugh Barrett**, Director of Legal Aid Commissioning and Strategy, Legal Aid Agency, gave evidence.

Chair: Can I welcome you back again, and Mr Barrett? I failed to welcome Ms Stimson in the previous session. Are there any declarations of interest that need to be made?

Gareth Johnson: Chair, I am employed as a criminal justice defence lawyer, as set out on the Register of Interests.

Steve Brine: Chair, my father-in-law sits at the Supreme Court.

Andy McDonald: I formerly practised as a criminal practitioner over 25 years ago and left a firm that did do criminal work some months ago.

Mr Llwyd: I practise publicly funded criminal law both as a solicitor and at the Bar, and I have prosecuted and defended.

Jeremy Corbyn: I have nothing to declare.

Nick de Bois: Neither do I.

Q1 Steve Brine: Lord Chancellor, I have a cockpit of paper here so I will do my best. Thank you for coming back to talk to us about this. An awful lot has gone under the bridge and a lot of changes have been made, which I know are welcomed by many people in the profession and in the Committee. First, in representations made to me about the previous consultation, the 16,000 responses that you had and the responses that people felt they did or did not get from the Department in response to that, I just wanted to give you the opportunity at this point to stress that the new consultation—No. 2—is a genuine consultation and you are genuinely open to listening to responses to that consultation and will make changes if necessary.

Chris Grayling: That is absolutely the case. It is a tighter consultation; it is looking at a more limited range of options. If you look back at the last six months, nobody could accuse me of not listening in consultation. Back at the start of April, we tabled a package that had its genesis 10 years ago in the Carter report. It was not absolutely identical but was based on many of the same principles. I listened very hard to all the representations that came through

during the consultation. I attended meetings with solicitors and barristers, and looked at what was coming in to us. We read all of the consultations very carefully. A lot of the 16,000 were a common petition or a commonly worded campaign. There were about 5,000 individual responses. My team of civil servants did a brilliant job of reading everything and feeding back reports, but also we just listened and talked, and came up with what I think was a sensible package.

I pay tribute to the Law Society, who engaged very constructively in discussions about that. It is not easy for them, because this is a tough package for everyone in the legal profession. It is not a package I would particularly wish to have to bring forward, but we face tough times financially, and therefore no change was not an option. We have tried to come up with a package that reflects the concerns that people have raised, which tried to plough a path that was the best balance. We have put forward some options in this second stage consultation and are genuinely open. For example, on advocacy we have proposed two packages. One is a variation of what we proposed initially; the other is something much more akin to the CPS system. I am genuinely open. I do not mind which of those routes we follow. I am entirely open to people saying that they prefer A or B, or B or A, or whatever.

Q2 Steve Brine: How then do the new proposals that you are putting forward fulfil the twin objectives that you have, which are meeting the financial targets that you have agreed with the Treasury and ensuring a sustainable structure of criminal legal aid provision down the line?

Chris Grayling: If you look at where we started, there are two objectives. I have to meet the budget framework that I have to work within. I have no option but to do that, and that means tough decisions right across the Department. There is no part of the Department that is immune from that change because of those financial challenges. At the same time I have to ensure that, if somebody is arrested and taken to a police station, they have access to a lawyer to defend them. Our judgment was that, in order to make sure that in a tougher financial climate we could guarantee the presence of legal support, we would need a contractual framework to work with, rather than having a market that might or might not be there but over which we had no contractual control really. That was the genesis of the package in April.

I listened very carefully to the various representations as I thought the issues through myself. We chewed over those issues and we had a discussion with the Law Society. It became apparent to me that there was a genuine issue around choice and own client work. A lot of small firms said, "If we have our clients, why can't we carry on working with them?" I accepted the logic of what they were saying but at the same time formed the view that, when it comes to police stations in particular, you cannot have a situation where there is no lawyer available. If all the local firms decide to opt out of legal aid and I have no contractual mechanism to make sure there is someone in place, then that is a problem.

The conclusion that we came to in our discussion with the Law Society and our internal discussions was that, if we focused the contractual framework on police station work, we could guarantee that there was always a lawyer available; we could contract with firms that had the critical mass so that we could have certainty that they would be there and would structure the contractual basis with independent advice on the basis that these contracts are sufficiently big to be sustainable. If we did that, and we pursued the reduction through fee capture rather than price competition, we would get to the same place. We would get to where we needed to be but we would not be saying to small firms who have a particular specialism, "You can't do your work any more. You will have to operate in a tighter financial climate but we are not saying you can't do that work any more." That was the rationale, and it is a sensible balance of all the challenges we have.

Q3 Steve Brine: It does meet your twin objectives, but are you open to other ways to meet those objectives? You won't be short of advice during this consultation period between now and 1 November. There are a lot of things put in front of me in terms of cutting wastage within the criminal justice system. Andrew Langdon QC, who I believe came to you yesterday on behalf of the Western Circuit, whom I heard speak on Radio 2 yesterday lunchtime, was talking about the use of restrained assets as set off against legal aid costs. There is a blizzard of packages that are coming down the line, and some of them coming before us, that suggest you can make the savings to meet your agreement with the Treasury without making these wider changes. There are fears about their impact and sustainability, which I will come on to later. Is the consultation open to that conversation?

Chris Grayling: If somebody came up with something that we had not thought of already, of course we would look at it, but the truth is that the things people are talking about we are already doing.

There is an assumption in the original consultation document that we will be able to increase the amount of money that we get from restrained assets. We have taken the power in the Crime and Courts Bill to do so. We are being pretty cautious about the amount of money that would be gained from that, because you have to bear in mind that restrained assets already go to police, victims and the CPS, so we are trying to add defence to the end of that list. With the best will in the world, my colleagues in the other Departments are not giving up what they are getting already. We are not convinced—and we have certainly not seen evidence to suggest—that there is a vast amount of money to be gained. There is a bit, and there may be a bit more than we had guessed, but I am not for a moment of the view there is a lot more.

Most people who end up in our courts have no means. They are on benefits; they have had pretty poor lives. There are a few who have lots of money, but we are taking quite a lot from them already and they can be quite ingenious in trying to stop us getting that as well. I am not opposed to that and we will try and do it, but it is not a panacea.

Likewise, if I look at the submissions, the Western Circuit produced a very interesting submission, which we looked at very carefully and which prompted me to set up a review group of legal process. What I have tried to do—

Q4 Steve Brine: Is that the Jeffrey review?

Chris Grayling: There are two. I will explain both of those. Effectively, there are a number of elements where we can help ease the challenge. I cannot avoid the overall financial challenge, but what I can do, for example, is improve cash flows. One of the most common complaints I get from lawyers is around cash flow. So by introducing intermediate payment systems, I can improve lawyers' cash flows and still achieve my savings targets.

There are also questions about process. The Western Circuit document said that, if you are smart, you can eliminate some of the intermediate hearings. That will be particularly possible with the digitalisation of the courts that we are now going to push ahead with very fast, which was included in the spending review in the summer. If we can now get some of those intermediate points that require a lawyer to get on a train, travel to court, appear in front of the judge for two minutes and go back again to be done by e-mail or video link or whatever, then that is clearly attractive. We have put together, with the judiciary, the Law Society and the Bar, a working group to look at process simplification. If I can ease the work load, if I can reduce the amount of work you have to do for the money you are being paid, that is at least a counterbalance to paying a bit less.

The Jeffrey review has a different goal. It is very clear to me that the problems that the Bar face at the moment are not simply down to me saying we are going to cut an amount of

money from the fees that we pay. If you look at the daily rates we pay, they are quite clearly less than we have paid in the past, but I do not think they are unreasonable. There is a genuine issue around the availability of work, the number of barristers looking for that work and being trained, around the competitive situation between solicitors and barristers, which are not of my making in the 12 months I have been in this job but have been building up over a long period of time. Privately many senior barristers say to me, “We recognise the Bar has problems but there is actually no clear route to deal with those.” What I agreed with the Bar Council and the Law Society is that we would set up the Jeffrey review to take a broad look at the way the advocacy system in this country works and to look at ways of addressing some of those issues.

Q5 Steve Brine: You are aware that they are asking you to suspend the cuts until the Jeffrey review has considered the provision of criminal advocacy across the whole criminal justice system.

Chris Grayling: I am, but these of course are very different issues. The Jeffrey review is not looking at what the fee rates that we pay are. The Jeffrey review is asking the question why it is that barristers are underused at the moment. We have a Bar that does not have enough work to go round. Of course there are other issues—bits which are not affected by my proposals at all. We have young barristers going to court, in the magistrates court, for very small amounts of money with big debts. I accept that that is a real challenge. It is not something that has been created by me in the package of proposals, but I hope Bill Jeffreys, working with the profession, will look at exactly how advocacy is working, about the pressures, and that we are training, arguably, too many potential young barristers, building up huge debts to get into the Bar. They are starting off doing relatively low-paid work in the magistrates courts.

One area I can help in that is to put into the new contracts for solicitors a requirement to pay within 28 days. I get regular stories of barristers not being paid. There are things I can do that can ease the pain of a necessary, unwelcome and difficult set of cutbacks to fees. I will be very open to doing that as far as possible.

Regulation is another case in point. We took a whole range of evidence across the summer about legal services regulation. We could do quite a lot and intend to do quite a lot on deregulation, again to ease the cost burdens on different parts of the legal profession. What I cannot escape from is the requirement to bring down the Department’s overall budgets in the way that I have to.

Q6 Chair: You made significant modifications to your proposals following detailed discussions with the Law Society. Do you think there was scope for more modifications to be made if you had had similar discussions with the Bar?

Chris Grayling: I have been talking to the Bar for six months. I had regular discussions with both the circuit leaders and the Bar Council. If you look at the proposals we have this time, the proposal of a CPS-type structure for fees rather than what we proposed before is something the circuit leaders specifically requested we have put in there. One of the messages I have been getting steadily from the Bar is around cash flow and cash flow problems. That is why I have put intermediate payments in there. What I cannot do for either side of the profession is escape the overall financial envelopes. I am trying very hard to find areas of easing the pressure, ways to ease the pain, but I cannot take it away, I am afraid.

Q7 Gareth Johnson: Lord Chancellor, you said earlier on that Britain has one of the best criminal justice systems in the world. I am certainly not arguing with that, but what do you say to those people like the Law Society who say that these measures actually threaten

that, particularly in relation to the cutbacks in fees and the two stages under which you are proposing that that happens? Have you given any thought to maybe delaying one of those stages at all, or is this something that has a timetable that has to go ahead, in your opinion?

Chris Grayling: In a sense we have already done that. I listened very carefully to the responses to the initial consultation meetings. I sat with two or three groups of local committee members from the Law Society around the country and I visited a number of colleagues' constituencies and talked to groups of local lawyers. One of the messages I got was, "Please do not compete on price. Please just cut our fees and give us a bit more time." We have tried to do, in the best way possible, all of that. On the fees issue, I have moved it both backwards and forwards, so we have extended the contracting period until the summer of 2015. We have delayed the full implementation of fee reductions until the summer of 2015, but we have had to make an earlier start to counterbalance that because, otherwise, I cannot meet the financial targets. In a sense I have tried to do that in response to what was said. If everybody came back now and said, "No; we want the whole lot next autumn," we would have to think again. I do not have the flexibility financially to delay it all until the summer of 2015, because then we end up with a major problem in the 2015-16 financial year.

Q8 Gareth Johnson: Can I ask a question particularly about police station coverage? You mentioned before that there is a duty upon you to ensure that anybody at a police station has access to legal assistance, and that is certainly the case. Do you not feel, with this fixed police station fee, that you will end up with solicitors who will receive information about a case that they have been asked to go and assist with? That person may need an appropriate adult or an interpreter; they may need all sorts of assistance. There may be ID parades and so on. There may be complexities about the case that mean it is just not financially worth that solicitor going down and dealing with it for that fixed fee. Should there not be a provision that enables, in those sorts of exceptional or unusual cases, there to be a bigger fee available for solicitors as an incentive to go to the police station and give that assistance?

Chris Grayling: I don't think we can go too far down that road, but I am very open to considering it in consultation. It is one of the areas we can take a serious look at. At the moment police station fees are haphazard all over the country; you get paid a different amount in different areas for no obvious reason. We are seeking to align those fees, but if the evidence coming back to us says, "You have missed this point and there is this issue you need to address," that is the kind of area we would look at. That is why it is a consultation, effectively. If somebody comes back with a valid concern about what we are proposing, we will look very carefully at it.

Q9 Gareth Johnson: One of the proposals is that you are content to see up to an hour-and-a-half travel time to a police station. If you are going to have a job that is going to take a few hours to deal with when you get there and you add on an hour and a half there and an hour and a half back for travel, my fear is that we will end up with a situation where people are unable to get the legal assistance that they need. It may not bother the general public generally about that kind of issue, but, when we end up with a situation where people cannot get advice, there are miscarriages of justice that are taking place as a result of that and the police cannot interview because they cannot comply with PACE and get access to solicitors, then that will concern the general public and will lead to a spiralling situation in the criminal justice system—and we will not have the best system in the world.

Chris Grayling: We have to be very careful about the contracting process. It was one of the reasons for doing this. At the moment we have parts of the country where coverage is pretty thin on the ground. I want to be sure that we have firms that are equipped to provide proper support and that have the ability to make sure the coverage is there for us. If they are

not able to do that, they should not be contracted to do it. What arrangements they put in place, whether it is having duty solicitors who are based close to police stations in a rural area, will be for them to choose when they come to do the contracting, but we will expect them to demonstrate that they can deliver a sustainable service.

Q10 Gareth Johnson: You mentioned about duty solicitors. Can I just ask one point? Are you anticipating having firms that are duty accredited, or are you still anticipating there being duty solicitors?

Chris Grayling: This will be done in a series of contracts with firms. You are not going to have an individual whose job it is to do this. There will be a firm whose job is to provide duty cover in the agreed final form in a particular area.

Q11 Mr Llwyd: In my 21 years in Parliament I have never heard such concern from senior judges. Remarkably, they are actually making their concerns public. You will be aware of the President of the Supreme Court very recently saying: “Cutting the cost of legal aid deprives the very people who most need the protection of the courts and the ability to get legal advice and representation. That is true whether one reduces the types of claim which qualify for legal aid or increases the stringency of the requirements of eligibility for legal aid. The recent changes have done both.” Have you no regard for experts in the field and their views?

Chris Grayling: I would be surprised if the President of the Supreme Court was saying legal aid cutbacks are a good thing. It would be a surprise if the Lord Chancellor was saying legal aid cutbacks are a good thing. I am not. I am saying that, unfortunately, given the nature of the public spending challenge we face and the fact that we have relatively the most expensive system of its kind in the world, it means it is inevitable that we will have to bring the cost down.

Q12 Mr Llwyd: You say that, but the surprising thing is that these senior judges actually stand up and they are being counted. It has never happened before. You should really have regard to the fact that they are breaking with tradition and they are speaking up. They are speaking up for good reason, because they think it is damaging to the public and it is damaging to the whole framework of law within the UK.

Chris Grayling: Mr Llwyd, the reality is that we cannot afford as a nation to spend as much as we have been spending on legal aid.

Q13 Mr Llwyd: It has been going down for three or four years. Don't mislead the Committee. Relatively, since 2009-10, it has been going down—not upwards. So don't mislead us on that.

Chris Grayling: I am not misleading you on it. In the past year we have spent around £2 billion on legal aid. That has fallen by about 10% so far since 2010. Over the period between 2010 and the end of the 2015-16 year we will have reduced the spend on legal aid roughly in line with the reduction in the budget of the Department as a whole, so I am not misleading anyone. I am telling you the truth. I am telling you that we face a huge financial challenge in this country and that no part of the public sector, with the obvious exceptions that you know about around the health service—and even the health service faces challenges—is going to be able to be immune from that. I cannot reduce the budget of my Department by a third without impacting on a budget that represents a substantial part of that.

Q14 Mr Llwyd: With regard to the changes that have been made since the initial proposals were tabled, as I understand it now, the duty solicitor scheme will change in that there will be price competitive tendering for that particular aspect. Is that correct?

Chris Grayling: It is not going to be price competitive. My focus is much more on capacity and quality for that, so, no, it will not be done on price.

Q15 Mr Llwyd: Then everybody else can carry on practising legal aid as they were, subject to the 17.5% cut.

Chris Grayling: Subject to meeting the conventional quality threshold. We expect firms to be able to deliver a quality service come what may.

Q16 Mr Llwyd: How do you answer this then? You expect people who are advised by a duty solicitor to stay with that duty solicitor throughout the process, unless the court finds special reasons for that to happen, so you are depriving the rest of the firms of any work, aren't you? That is obvious to everyone, isn't it?

Chris Grayling: A question was raised with me to do with firms that have a specialism. They might have a specialism in working with people from a particular minority group or a specialism in a particular area of accusation or offence such as, for example, animal rights. There are small firms that specialise in those areas, and one of the things that was put to me is that it is wrong to take away from those firms the ability to do that specialist work. I have listened to that, and I have come up with a package that allows them to carry on doing that specialist work and allows people to still use the solicitor of their choice. What I am also doing is making sure there is a contractual mechanism that guarantees that I have firms with sufficient sustainable critical mass to deliver a proper service to police stations and for those people who are charged who do not have a solicitor of their choice to turn to.

Q17 Mr Llwyd: But you take my point, surely, that, if an individual is expected to stay with the duty provider unless there are exceptional circumstances, doesn't it follow that the other firms who carry on will be deprived of that work? That is obvious, isn't it?

Chris Grayling: Certainly this will lead to a consolidation of the market. That is something that was expressly stated on the agreement we reached with the Law Society. We both accept this will lead to a consolidation of the market. Some firms will not continue in this area; other firms will choose to merge and adapt accordingly. One of the criticisms levelled at the original package was that people said it is too binary, that you either have a future or you don't, and if you don't make the cut and get a contract you cannot carry on working. What I have tried to do is to come up with a compromise package that means those firms can carry on working but also accepts that those people who arrive at a police station with no solicitor to turn to have one available to them.

Q18 Mr Llwyd: Concern has been expressed in particular with regard to rural areas. I know that we have all received submissions from various parts of the UK. In Dyfed-Powys, for example, there are large distances between court venues, and courts have been shut down to a minimum at the moment. It is not easy to travel from one place to another. What regard will you have of that kind of problem?

Chris Grayling: My expectation is that the intention of what we are doing is that we will have contracted firms in those areas that are committed to providing police station support. I expect we will see quite a lot of innovation in the way that those firms operate. We may see firms coming together; we may see partnerships across professional services. It is not for me to judge, but we will have a clear contractual mechanism in every part of the country that is designed to ensure that everyone has access to a lawyer when they need it.

Q19 Mr Llwyd: You have said that you want to avoid advice deserts. In certain parts of Wales, and I am sure rural England as well, it is already a problem. How can any procurement process be competitive in these cases? What will you do if the existing firms cannot meet the tendering requirements?

Chris Grayling: I will cross that bridge when it happens, but I don't believe that it is likely to happen.

Q20 Mr Llwyd: It would be nice if you could tell us now, because it is rather important.

Chris Grayling: If we structure the contracts correctly, the whole point is to make sure that there is cover available, and by having a contractual mechanism in place we can guarantee that we have a panel of firms available in each area. If one of them is not able to continue, we will have others who can step in and take the business. We are, Mr Llwyd, dealing with a £600 million business here. We are spending £600 million a year on legal aid. We have a large number of solicitors firms out there. I am confident that we will have contractors in each part of the country, and at the moment we are going to independent advice, jointly with the Law Society, to identify exactly what the size of those contracts should be to make sure they are deliverable.

Q21 Mr Llwyd: How can the Ministry ensure that there are sufficient firms for effective competition when the contracts come to be renewed?

Chris Grayling: The one thing that has not been suggested to me is that there are not enough law firms around. The question is about sustainability. What I hope and expect, and one of the benefits of giving them that extra six months as requested, is that it gives firms more time to adapt to the way they operate in a new world and to come together and form partnerships or consortia to bid. I should say, in terms of rural areas, we are not ruling out contracts being held by a consortia of firms—three or four firms coming together to bid for a contract. We are not setting tight rules. All I want to be sure of is that the people who get the contracts to do duty work have the ability to do it.

Q22 Mr Llwyd: One final question, if I may. What happens if senior and leading counsel, on 1 November, decide not to adopt your provisions for the very high-cost cases? What is your contingency?

Chris Grayling: If you will forgive me, Mr Llwyd, I will cross that bridge if it happens.

Q23 Mr Llwyd: This session is for giving evidence, not crossing bridges. We would like to know, actually; we are entitled to know.

Chris Grayling: Mr Llwyd, you are asking me about hypotheticals. We have of course given careful thought to what we would do in a number of eventualities, but I respect our legal profession and I expect it to behave in the way that one would expect it to behave in pursuing cases accordingly. If I could give you a statistic, in very high-cost cases, after we have made these changes, our projection is that in the shorter VHCC cases—the typical ones that are a little over 60 days, which require a shorter period of preparation—the typical payment to a QC will be around £135,000. I still think that is a fair reward for the job.

Q24 Chair: One argument they do have is that you are applying it to existing cases and people have entered into commitments to carry out existing cases. If they were to take the

step of refusing to return to a case that they are already engaged in, you would have some very difficult problems.

Chris Grayling: The challenge is that the length of time these cases take means that any difficult financial decisions will be deferred until way in the future. None of these things are easy. I wish they were, but we have had to try and take the best decisions we can, mindful of both the system we are working with but also the need to balance the books and the public purse.

Q25 Nick de Bois: I would like to follow up on the suggestion that there might be advice deserts. In your procurement process, when the tendering is really under way, will you not be seeking, first of all, expressions of interest so that you can make an assessment of what is happening? Is that part of a format for Government procurement before just issuing the tenders so that you can then make a judgment in response to expressions of interest?

Chris Grayling: It is likely that we will have a two-stage tender process, but we are waiting for the work that is being done by Otterburn, who are the consultants to the Law Society. One of the areas of debate in the first part of the consultation was whether we have the number of contracts right. I have no prejudged view about how many contracts there should be. I just simply want them to be sustainable, so I do not want to give contracts to people who are going to be unable to deliver because the numbers don't add up. So we asked Otterburn to make a recommendation to us, based on the sustainability of firms and the amount of money we spend on police stations, as to how many contracts there should be. That will give us some considerable comfort that there are businesses out there who are viable. They are looking at the existing marketplace and doing that as well, but I am certainly expecting us then to have a two-stage process so that we can get a sense of where we stand.

Q26 Chair: When you came before us in July we asked you to explain how consumers would have an input into the system. Since then, of course, you have restored the client choice element. Have you consulted with the Legal Services Consumer Panel or the Legal Ombudsman in order to develop other ways of involving consumer views?

Chris Grayling: The Legal Services Consumer Panel were involved in the discussions in the first consultation. Their main concern was around choice. They were one of the voices that persuaded me that it was best to find a different way around the choice issue, so their voice has definitely been involved.

Q27 Chair: Is the peer review process intended to be used once per firm during the four-year contractual term, or more frequently than that?

Chris Grayling: Hugh, do you want to say a bit about the peer review process since you are the expert on this?

Hugh Barrett: Sure. The answer to your question is that it will be done once in the contract period. If a firm fails to meet level three, which is the midpoint of a five-point scale, then they will give them a short period of a few months to get their quality back up to the acceptable level. If they do not, then we will potentially terminate their contract and re-tender it.

Q28 Chair: If, for example, a firm loses its status as a result of peer review, what happens then, because it started with a contractual right to take part in the duty solicitor scheme?

Hugh Barrett: Its contract will be terminated, and because it has failed for quality reasons—it is giving a poor quality service to defendants in either the police station or in the

magistrates or the Crown court—then it will be excluded from the future tender rounds for a number of years.

Q29 Chair: If I could come back to the issues with the Bar Council just for a moment, there was a proposal that came from them for the Advocates' Graduated Fees Scheme, which they reckon could produce significant administrative savings. They say that the Lord Chancellor had given his personal assurance that, if the Bar came up with alternative efficiency savings within the legal aid scheme, you would not simply bank them and impose the same level of cuts on top—you would take them into account. What actually happened?

Chris Grayling: They have made a number of suggestions in relation to replacing VHCC cases. The trouble is that the cost of administering VHCC cases is not actually all that great. It does not solve the problem they are trying to describe. We have looked at their alternative proposal. We don't believe that it actually saves money; in fact, arguably, it could cost more money. I have been open from the start to looking for different ways of doing things, but at the end of the day what I cannot do is move away from that overall envelope. Mr Brine made reference earlier to some of the suggestions that are around about process, and they are absolutely right that there are savings to be made in the courts. We are specifically committing something like £100 million to investment in digitalising the courts over the next three years or so, but we have within our plans savings that are generated by doing that.

If you look at where you have to save money across the Department, it is not that by not doing something in legal aid and doing something in the courts we can avoid the problems. Actually, that is not right. We have to do both, and this is one of the challenges I have been trying to get across to senior people in the Bar. It is not an either/or. I have to do the court stuff anyway.

Q30 Chair: Did you give that assurance that they have referred to?

Chris Grayling: I have given an assurance that, if people come up with good alternatives, then we will look at them and we have done that. If you look at the things that we have been asked for, the circuit leaders expressly asked us to look at the whole question of a CPS-type scheme. We have done that. We have put that in the consultation document. You will understand that we have done that within the cash envelope we have. It may be better or more streamlined for the lawyers to deal with. It makes a fractional saving in terms of administration but not one that makes a material difference to the plans. We have done that and put it in the proposals. Likewise, on cash flow I have put in proposals, but what I have not yet had sitting on my table is somebody coming up with an innovative change to the way our legal aid system works that enables me to say, "Right, I don't need to do that because I can do this."

Q31 Chair: Just for clarity, this remark was made not in the context of very high-cost cases but in the context of option 2 changes on the Advocates' Graduated Fee Scheme.

Chris Grayling: If you look at what we did then, there was a concern raised that the alignment of the trial fee and the alignment of early guilty pleas was not right. The reason we had done it like that was because it did, in fact, on the basis of the cases done last year, put more money rather than less into the pockets of the most junior barristers; but that was universally rejected by the profession. Their view was that they would simply lose that money to the solicitors and so therefore we have changed it and put back in place a differential between trial fees and guilty plea rates. In a number of these areas I have sat and talked to the Bar, I have listened to what they have said and we have made changes accordingly, but what nobody has come up with yet is any substantial saving within the legal aid area that will allow me to modify the core requirements. That is the difficulty. Simply saying, "If you did this in

the courts, we could save this money,” misses the point that they are having to do this in the courts anyway.

Q32 Andy McDonald: Can I address issues of criminal and legal aid eligibility in the Crown courts because the proposals introduce a financial eligibility threshold of disposable household income of £37,500? There has been a lot of concern expressed about this. This is potentially going to increase the number of litigants in person and that could be an issue in cross-examining vulnerable witnesses. There is an issue about access to a fair trial if somebody is representing themselves. Of course, somebody who is successfully acquitted faces the prospect of bankruptcy if they are only able to recover reasonable private rates from central funds. That could leave, on a significant trial, a considerable shortfall and put an innocent person in very considerable financial hardship or indeed bankruptcy. Is that fair?

Chris Grayling: If I can take that last point first, we are trying to find the right balance. The legal aid rates we pay and the prosecution rates are not exactly but broadly similar. One of the common points that is constantly made is about the need for parity of arms between the two sides. The difficulty you have is that, if somebody seeks to hire the best QC in the country at a vast amount of money and is successfully acquitted, then we the taxpayer will pay the bill for huge legal costs. I don't think it is realistic for us, in trying to manage the system fairly and properly, to give a wealthy defendant the freedom to hire whichever lawyer they want, knowing that if they are acquitted they will get the money back come what may. We have tried to find a balance. Clearly, it is important that people get their money back, but we are doing it at the same rate roughly as the prosecution will be getting it, to try and achieve equality of arms. If there is not equality of arms, then it is very much a matter for that individual, in my view.

On the £37,500 threshold, it is important to remind the Committee, of course, that it is £37,500 after tax, national insurance, mortgage and housing costs, council tax costs, childcare costs, and annual allowance for food and living expenses. In fact, it equates to a salary level that is much, much higher. There is an exception made in a situation where it is a conflict between two members of the same household, where the partner's income is disregarded in reaching that assessment. We have contingency funds available in a case where somebody is facing such a financial challenge that they would face financial ruin if they were to do it. So we have tried to find the right balance between ensuring that people who can afford to pay do, which is a principle that already exists in the magistrates courts, but also making sure there are stop-gaps where there need to be.

Q33 Andy McDonald: The range of private fees charged for Crown court cases is extremely wide. Is there any rationale behind differentiating on the types of cases that are before the Crown courts and, indeed, the length of trials—the trial timetables themselves?

Chris Grayling: It is quite difficult to do that, to be honest. We have to have a system that is simple and workable. As I say, we have that backstop. In a situation where somebody faces a case where clearly it is going to be beyond their financial means to pay for it, we have funds to do that.

Q34 Andy McDonald: You mentioned the disputes between households. The consultation paper I do not think says that. Are you able to undertake to the Committee that, on the issue of joint household incomes, the income of a spouse or a partner will be disregarded if they are a victim or a prosecution witness?

Chris Grayling: We can do that. Hugh might want to say something on this.

Hugh Barrett: Yes. If you are a victim of, let us say, domestic violence, then you would be excluded from the calculation of household income. I don't believe being a prosecution witness is an exemption at the moment.

Q35 Andy McDonald: Should it be?

Chris Grayling: If you are not involved as a contrary participant and, of course, there are some legal protections anyway for—

Q36 Andy McDonald: We could have the bizarre situation of a spouse being a prosecution witness and his or her income being taken into consideration in the calculation for the defendant's eligibility for legal aid. Is that what you are telling the Committee?

Chris Grayling: Where the partner has a contrary interest in the case, as the alleged victim their income is not taken into account, but I will certainly take that point away and look at it.

Q37 Chair: Would you like to give us a note on that?

Chris Grayling: Yes, that's fine.

Q38 Andy McDonald: Finally, if I may, the consultation considered the position of the defendant with a disposal income of over £37,500 who has been remanded in custody and therefore is unable to work. So the assessment that has been made is irrelevant if somebody is quickly running out of funds.

Chris Grayling: But if they don't have funds then they would get legal aid paid for.

Q39 Andy McDonald: There would be provision for further applications if somebody is remanded in custody down the track.

Chris Grayling: If I may say, if somebody reaches the point where they cannot afford to pay for their defence, then, clearly, the financial part kicks in. We are not going to leave anybody in a position in court where they cannot access a lawyer because they do not have any money to do so.

Q40 Jeremy Corbyn: Can I take you now to the question of the monitoring of the Legal Aid, Sentencing and Punishment of Offenders Act? What monitoring has been done by your Department on its effect?

Chris Grayling: We continue to look at the impacts. There are a number of areas where we have had concerns at which we are looking quite carefully. The use of mediation is a case in point, where there was a surge in mediation earlier in the year. There has been a dip in the use of mediation now. We expect that to change next spring when mediation becomes mandatory in family cases, but that is an area particularly where we are watching very carefully. Lord McNally, who is the Minister responsible, has been looking very carefully at what needs to be done in terms of promoting mediation. He is going to do a number of small steps in the short term, but, if necessary, we will do a much broader communication about the potential for mediation.

Q41 Jeremy Corbyn: Can I take you through a number of cases where there are concerns? One is the big increase in litigants in person. Is that what you expected or is it bigger than you expected?

Chris Grayling: I don't think enough time has passed for me to have access to detailed statistics on that. I don't know whether you have any.

Hugh Barrett: I don't, no.

Chris Grayling: It is something that has been raised as a concern. You have to bear in mind, Mr Corbyn, that there are already a significant number of litigants in person, and, before the changes, we looked at the impact of litigants in person on the court process and identified that. It does not actually have a material impact on trial length.

Hugh Barrett: Many of these cases will be of quite long duration and many of them that have fallen out of scope under the LASPO provisions will not yet have come to court. That is one of the reasons why we do not have the information to hand on the impact.

Q42 Jeremy Corbyn: Will you be monitoring it on the basis of new cases where there are litigants in person as opposed to outstanding cases where, pre-LASPO, there was already a litigant in person operation?

Hugh Barrett: Clearly.

Q43 Jeremy Corbyn: On exceptional funding, the LAA received 213 applications for non-inquest, 146 in family law and 63 in immigration. As of 1 July 2013, before the introduction of LASPO, only two grants were made.

Hugh Barrett: I have more up-to-date figures—

Jeremy Corbyn: What do they show?

Hugh Barrett: —which are 760 applications and 15 grants as of the end of September.

Q44 Jeremy Corbyn: That is 15—“one five”.

Hugh Barrett: “One five”, yes.

Q45 Jeremy Corbyn: That sounds a very low percentage.

Hugh Barrett: It is a low percentage of the applications, yes.

Q46 Jeremy Corbyn: In fact it is less than 2%.

Chris Grayling: That is an indication of the nature of the applications and, in the judgment of the teams assessing them, whether they are meritorious or not.

Q47 Jeremy Corbyn: We don’t have all the cases in front of us, but it seems that a 2% success rate suggests that either there is not enough money available for it or there are an awful lot of vexatious claims.

Chris Grayling: There are an awful lot of claims that do not meet the tests that are there to be entitled to exceptional funding, so we have a lot of people asking for the funds but very few who are genuinely entitled to receive them because their cases are exceptional.

Hugh Barrett: Just to be clear, there is no cap on the amount of money available for exceptional funding, so if cases meet the criteria then they would be funded.

Q48 Jeremy Corbyn: You will presumably be reporting on that to us or to Parliament. You mentioned a drop in family mediation. *The Guardian* reported a 47% drop in couples attending mediation following the introduction of LASPO. Are those your figures as well?

Chris Grayling: Yes; there has been a very significant drop. Next April it will become mandatory before they go to court in family law cases, but it is an area of concern and it is an area on which I have sought reassurance. I am also of the view that the measures in the Children and Families Bill will go a long way towards addressing the situation, but if they do not we will look at further steps to take.

Q49 Jeremy Corbyn: But that may cost more.

Chris Grayling: If it transpires that there are flaws in the system which means people do not go to mediation, we will have to look at how to resolve those. Whether they cost money is something we will only know at the time.

Q50 Jeremy Corbyn: There are just two other points from me, if I may, with regard to law centre closures and loss of advice services. We know that Birmingham law centre has closed. Shelter has closed nine of its advice offices. The Big Lottery has made some money available for transitional funding, but are you concerned that there are considerable areas where people who would have accessed free advice through a law centre or Shelter or somebody like that simply cannot get that advice at the moment and therefore have no access to justice?

Chris Grayling: I will ask Hugh to comment on that in a moment. In the case of Birmingham law centre, we were aware of historical problems there. Certainly, the information we received is that the closure of Birmingham law centre was not a consequence of LASPO. Its problems go back much further than that.

Q51 Jeremy Corbyn: Nevertheless it is a law centre that has closed and therefore a lot of people cannot get advice.

Hugh Barrett: In all areas, with one exception, which is Dorset, there is adequate provision of civil legal advice to people who are eligible for that advice. So in Birmingham, yes—

Q52 Jeremy Corbyn: You are saying in all areas except Dorset—

Hugh Barrett: In one particular area of law, which is debt, we have adequate coverage in every local authority area in England and Wales.

Q53 Jeremy Corbyn: You can stand by that decision.

Hugh Barrett: It is not a decision.

Q54 Jeremy Corbyn: It is a view, okay.

Hugh Barrett: It is a statement of fact. In Birmingham, sadly, the law centre closed, but there are other providers—third sector and solicitors firms—who offer an equivalent service to clients in that area.

Q55 Jeremy Corbyn: What about the increase in pro bono referrals that are becoming harder and harder to get? I talked to my own law centre and to local advice agencies. They spend an awful lot of time making applications for pro bono support and the cupboard is bare. The fact of your changes is that many people are not getting access to advice or justice. Do you accept that?

Chris Grayling: I accept that the difficult decisions that we have had to take in terms of funding means that people may in some cases have to use alternative routes other than going to court. That is one reason why we are focusing on mediation and one reason that I am very concerned to make sure that mediation is right. The truth is, Mr Corbyn, we cannot afford to do everything for everyone. In an ideal world it would be lovely to do everything for everyone, but we can't; we can't afford to do it.

Q56 Jeremy Corbyn: When you do a report on the effects of LASPO and you come back to Parliament to report on it, will you also be looking at the effects on the poorest and often most vulnerable people in our society apparently not getting access to justice and we are moving away from the point of universal access to justice because of your changes?

Chris Grayling: I don't accept that we are removing the point of universal access to justice. What we are saying is that it is not possible for the legal aid system in this country to provide a legal avenue for everyone in all eventualities. We have tried to find a sensible balance. My predecessor worked very hard to try and find that sensible balance. We are now looking at what the consequences of those changes are. We will obviously keep them under review. We will obviously try and make sure that we do not leave any part of our society genuinely disadvantaged to a point where it is a real problem for them, but we have to take difficult decisions. It is unavoidable, Mr Corbyn. We cannot afford to provide unlimited legal access to all our citizens, in all circumstances, for all things that they might choose to litigate over.

Q57 Jeremy Corbyn: Will you be providing a report on the effects of LASPO after, say, one year or two years of operation?

Chris Grayling: I cannot remember if there is a requirement in the Act to do so.

Hugh Barrett: There is a requirement for the Director of Legal Aid Casework to lay a report annually on volumes and decisions taken.

Q58 Jeremy Corbyn: When can we expect that report?

Hugh Barrett: The first anniversary will be April next year, so I would expect it will be laid before the summer recess.

Q59 Mr Llwyd: Last year Sir Nicholas Wall, the then President of the Family Division, gave evidence to us. He said that he foresaw the courts being inundated with litigants in person. You have said it is too early to judge what effect has happened since April of this year. Let me tell you directly. On Friday I was told by a senior family judge that, within his area, private family applications by litigants in person had risen by 32.5%. May I suggest that you ask the judges, and you will find out pretty quickly what the problem is?

Chris Grayling: Mr Llwyd, let me say that I am aware that the strategy of moving people to mediation has yet to take root. I am also clear, based on my own constituency experience and I suspect of many people here, that if we can keep people in those cases out of the courts it is much better for them. Therefore, that is why we have put into the Children and Families Bill the provision for mandatory mediation. If we can get these issues solved through mediation rather than the courts, when the court process often destroys family finances, then it is much better for everyone involved. That is what we are seeking to do.

Q60 Mr Llwyd: But mediation applications are going down—not upwards.

Chris Grayling: That is why we are making the use of mediation mandatory. Of course people have to be signposted to mediation. That is not happening the way I would wish at the moment. It is something that needs to be resolved, but it is being resolved in the Children and Families Bill, which will put in a mandatory mediation point. I will take other steps as necessary. It is, in my view, in the interests of everyone involved that we should try and keep as many of these cases out of the courts as possible.

Q61 Chair: Mr Brine would like to raise a point in a moment, but I don't think I should keep from you any longer the fact that the Supreme Court has dismissed the two prisoner voting appeals this morning.

Chris Grayling: Good; I am very pleased to hear that. It is a sensible decision.

Q62 Steve Brine: I thought you would say that. I am sorry to return to the Western Circuit, but you will appreciate it represents a large area and also the area that I represent. It

does represent a large area of opinion. I know you have read their initial response to you. I just wanted to ask you to return to the sustainability point. Research that they have shared with me and I know with you, within the geographical boundary of their circuit, shows that since 2008, out of 107 pupillages offered, only five have been exclusively or predominantly criminal pupillages. On average, that is less than one a year. Given that there are about 300 barristers practising in crime on the circuit, all but a handful of them have had less than six years' call. Their concern is—you can see where I am going with this—that the perception out there is that the future for barristers at the criminal Bar is not a bright one, with the impact that will have on the junior criminal Bar and then in time on the senior criminal Bar, and obviously, following that, the pool from which the judges of tomorrow are drawn. This is a concern that has been consistently raised during this process and I wonder whether you understand the concern being expressed by the criminal Bar for the future of the judges.

Chris Grayling: I think there are genuine issues around the way that lawyers are being trained in this country generally. Those issues were highlighted by the Law Society recently. They have been put to me privately by many members of the Bar. We have more people training for pupillages than there are pupillages available. They are doing so at great expense to themselves. We have a very large number of people training for the law. There is a very real issue about the fact that, for very young barristers starting out, they operate in a very difficult financial environment. This is one of the reasons for saying to Sir Bill Jeffrey, in the wake of the Law Society report and many of the issues that have been highlighted, let us take a proper look at this. We have young solicitors fighting tooth and nail for business with young barristers. We have, in many parts of the profession, an oversupply of lawyers. We have too many people being trained. I am, as people often remind me, not a lawyer in all of this and I do not think it is appropriate for me to tell the legal profession how to do this, but I do think it is appropriate to facilitate a serious dialogue about all these issues. That is the point of Sir Bill Jeffrey's report.

Q63 Chair: Lord Chancellor, thank you very much indeed.

Chris Grayling: You are very welcome.