House of Commons

Justice Committee

Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Eighth Report of Session 2014–15

Report, together with formal minutes

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Summary

Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was introduced as part of the Government's programme of spending cuts to achieve significant savings to the legal aid budget. In this Report we consider the impact of the reforms to civil legal aid, including the removal from scope of some areas of law and changes to the financial eligibility criteria.

The Ministry's four objectives for the reforms were to:

- discourage unnecessary and adversarial litigation at public expense;
- target legal aid to those who need it most;
- make significant savings in the cost of the scheme; and
- deliver better overall value for money for the taxpayer.

Our overall conclusion was that, while it had made significant savings in the cost of the scheme, the Ministry had harmed access to justice for some litigants and had not achieved the other three out of four of its stated objectives for the reforms.

Since the reforms came into effect there has been an underspend in the civil legal aid budget because the Ministry has not ensured that many people who are eligible for legal aid are able to access it. A lack of public information about the extent and availability of legal aid post-reforms, including about the Civil Legal Advice telephone gateway for debt advice, contributed to this and we recommend the Ministry take prompt steps to redress this.

Parliament intended the exceptional cases funding scheme to act as a safety net, protecting access to justice for the most vulnerable. We are very concerned that it has not achieved that aim. We heard of a number of cases where, to our surprise, exceptional case funding was not granted. The Ministry was too slow to respond to the lower than expected number of such grants; we now expect it to react rapidly to ensure that the system fulfils the purpose Parliament intended for it.

Private family law was removed from the scope of legal aid, but those who can provide evidence of domestic violence are still eligible. We welcome the Ministry's efforts to ensure that victims of domestic violence are provided with the necessary evidence by healthcare professionals and its assurance that the types of evidence required are under continual review. However we are concerned by evidence we received that a large proportion of victims of domestic violence do not have any of the types of evidence required. We are also troubled by the potentially detrimental effects of the strict requirement that the evidence be from no more than 24 months prior to the date of application, which we consider should be a matter of discretion for the Legal Aid Agency in appropriate cases.

We received evidence on the effects of the reforms on the legal aid market and providers of publicly-funded legal services. We were told by both the for-profit and not-for-profit sectors that the reforms have led to the cutting and significant downsizing of departments

and centres dealing with such work, leading to concerns about the sustainability of legal aid practice in future. We are troubled by National Audit Office findings which indicate that there may already be 'advice deserts', geographical areas where these services are not available, and think that work to assess and rectify this must be carried out immediately.

There has been a substantial increase in litigants in person as a result of the Government's reforms, but the precise magnitude of the increase is unclear. More significant has been the shift in the nature of litigants in person, who are increasingly people with no choice other than to represent themselves and who may therefore have some difficulty in effectively presenting their cases. The result is that the courts are having to expend more resources to assist litigants in person and require more funding to cope, alongside increased direct assistance by the Ministry for litigants in person.

Also indicative of the lack of evidence on the effects the reforms would have has been the sharp reduction in the use of mediation, despite the Ministry's estimates that it would increase. We found that this was because the Ministry did not appreciate what makes people seek mediation, with the end of compulsory mediation assessment, the removal of solicitors from the process, and the lack of clear advice from the Ministry all contributing. Unlike in other areas, however, the Ministry did act swiftly to remedy the problems.

The Ministry's significant savings are potentially undermined by its inability to show that it has achieved value for money for the taxpayer. The Ministry's efforts to target legal aid at those who most need it have suffered from the weakness that they have often been aimed at the point after a crisis has already developed, such as in housing repossession cases, rather than being preventive. There have therefore been a number of knock-on costs, with costs potentially merely being shifted from the legal aid budget to other public services, such as the courts or local authorities. This is another aspect of the reforms about which there is insufficient information; the Ministry must assess and quantify these knock-on costs if it is to be able to demonstrate it has met its objective of better value for the taxpayer.

It was clear to us that the urgency attached by the Government to the programme of savings militated against having a research-based and well-structured programme of change to the provision of civil legal aid. Many of the issues which we have identified and which have been identified to us could have been avoided by research and an evidence base to work from, as well as by the proper provision of public information about the reforms. It is therefore crucial that, in addition to the various remedial steps which we recommend in the short term, in the longer term the Ministry work to provide this information and undertake the requisite research so a review of the policy can be undertaken.

1 Introduction

The background and effect of LASPO

1. In 2010 the incoming Government developed plans to cut public spending significantly. The Ministry of Justice (MoJ) was required to find budget cuts of around £2billion from an overall budget of £9.8billion. Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was intended substantially to reduce the civil legal aid budget by removing whole areas of law from scope and changing the financial eligibility criteria. Schedule 1 contained the exceptions to the removal from scope. The LASPO scheme was introduced alongside other policy changes including a reduction in the fees paid to providers.[1] LASPO also made provision for the abolition of the Legal Services Commission, the arms-length body responsible for deciding legal aid applications, after its accounts were again qualified. The Legal Aid Agency, an executive agency of the MoJ, was created to carry out the former functions of the Commission.

Objectives of LASPO

2. In the final Equality Impact Assessment accompanying the Bill the MoJ set out that its objectives for the proposed legislation were to:

- discourage unnecessary and adversarial litigation at public expense;
- target legal aid to those who need it most;
- make significant savings in the cost of the scheme; and
- deliver better overall value for money for the taxpayer.[2]

3. In its submission to this inquiry the Ministry of Justice said that its decisions on changes to scope were guided by four factors which aimed to ensure that public funding remained available for those cases that most merited it. These factors were:

i. the importance of the issue: cases involving the individual's life, liberty, physical safety and homelessness were considered to be a high priority, as were cases where the individual faces intervention from the state, or seeks to hold the state to account;

ii. the litigant's ability to present their own case: considerations included the type of forum in which the proceedings are held, whether they are inquisitorial or adversarial, whether litigants bringing proceedings were likely to be from a predominantly physically or emotionally vulnerable group (for example, as a result of their age, disability or the traumatising circumstances in which the proceedings are being brought);

1 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014

2 Equality Impact Assessment, Legal Aid Sentencing and Punishment of Offenders Bill para. 15

iii. the availability of alternative sources of funding: where litigants are able to fund their case in other ways, for example through a Conditional Fee Agreement (CFA), legal insurance, or as a member of a trade union;

iv. the availability of other routes to resolution: in determining the priority for certain types of case, we considered whether people might be able to access other sources of advice to help resolve their problems, avoiding the need for court proceedings. Examples include, advice on welfare benefits, (housing and other benefits), or the availability of an ombudsman scheme, or complaints procedure.

Our inquiry

4. The changes contained in Part 1 of LASPO came into effect on 1 April 2013. We acknowledge that it is early to be assessing the impact of the reforms. The importance of legal aid for access to justice, however, requires that changes to public funding for legal advice must be closely monitored. The common law right to access a court is a cornerstone of our democracy. In his book, *The Rule of Law*, the late Lord Bingham said that one of the ingredients of the rule of law itself was that "means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties are unable themselves to resolve" and "denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law."[3] We agree. We have therefore undertaken this inquiry to examine the success of the legal aid reforms in protecting access to justice while addressing issues of cost, and to make recommendations where we believe access to justice has been compromised.

5. Our terms of reference for this inquiry were:

1) What have been the overall effects of the LASPO changes on access to justice? Are there any particular areas of law or categories of potential litigants which have seen particularly pronounced effects?

2) What are the identifiable trends in overall numbers of legally-aided civil law cases being brought since April 2013 in comparison with previous periods, and what are the reasons for those trends?

3) Have the LASPO changes led to the predicted reductions in the legal aid budget? Has any evidence come to light of cost-shifting or cost escalation as a result of the changes?

4) What effects have the LASPO changes had on (a) legal practitioners and (b) not-for-profit providers of legal advice and assistance?

5) What effects have the LASPO changes had on the number of cases involving litigants-in-person, and therefore on the operation of the courts? What steps have been taken by the judiciary, the legal profession, courts administration and others to mitigate any adverse effects and how effective have those steps been?

3 *The Rule of Law*, Allen Lane, London, 2010, page 88

6) What effects have the LASPO changes had on the take-up of mediation services and other alternative dispute resolution services, and what are the reasons for those effects?

7) What is your view on the quality and usefulness of the available information and advice from all sources to potential litigants on civil legal aid? Do you have any comments on the operation of the mandatory telephone gateway service for people accessing advice on certain matters?

8) To what extent are victims of domestic violence able to satisfy the eligibility and evidential requirements for a successful legal aid application?

9) Is the exceptional cases funding operating effectively?

6. The Committee has received written and oral evidence from a wide range of individuals and organisations and we are very grateful to all of them for providing that evidence and contributing to this inquiry.

2 The evidence base for the civil legal aid reforms

7. We conducted a short inquiry concurrent with the Government's consultation on the proposed legal aid changes in 2011. In that report, *Government's proposed reform of legal aid,*[4] published in March 2011, we raised concerns in a number of areas over the Government's evidence base for the proposed changes. We said, for example:

> We are disappointed in the dearth of evidence on legal aid expenditure at case level to enable the identification of key influences on cost…
>
> It has been put to us that the removal from scope of many areas of social welfare law will lead to significant costs to the public purse as a result of increased burdens on, for example, health and housing services. We are surprised that the Government is proposing to make such changes without assessing their likely impact on spending from the public purse and we call on them to do so before taking a final decision on implementation.[5]

8. In November 2014 the National Audit Office (NAO) published a report *Implementing reforms to civil legal aid*. That report concluded that the evidence base for the legal aid reforms was poor. When asked about the report's conclusions by the Public Accounts Committee, Dame Ursula Brennan, the Permanent Secretary at the Ministry of Justice, candidly told that Committee "the Government was absolutely explicit that it needed to make these changes swiftly. Therefore, it was not possible to do research about the current regime before moving to the cuts." Dame Ursula admitted the primary motivation for the changes was financial: "I was simply saying in terms of the evidence, the most critical piece of evidence that was relevant to the decision that was made was the size of the spend."[6]

9. We asked the Minister whether it was true that the legal aid reforms had been carried out on the basis of limited research. His response was telling:

> we had to take very urgent action, and that we did do. In an ideal world, it would have been perfect to have a two-year research programme speaking to all the stakeholders and then come to a decision. Sadly, the economic situation that the Government inherited did not allow that luxury.[7]

10. We asked the Lord Chancellor about the NAO's criticism of the implementation of the legal aid reforms. He did not accept the criticism was valid because the savings had been achieved and described the NAO's position as "strange": "The report showed very clearly

4 Third Report from the Justice Committee of Session 2010–11, *Government's proposed reform of legal aid*, HC 681–I

5 *Ibid,* Para 136

6 *Public Accounts Committee, Oral evidence: Implementing reforms to civil legal aid*, HC 808, 4 December 2014

7 Q 292

that we had met our financial objectives in taking what was a very difficult set of decisions."[8]

11. **We regret the Government's failure to carry out adequate research into the legal aid system before introducing the reforms.**

8 Q 44, Follow up session *on crime reduction policies and Transforming Rehabilitation*, HC 848 of Session 2014–15, 2 December 2014

3 Government underspend and access to legal aid

Underspend

12. In its November 2014 report, the NAO concluded that the Ministry of Justice had succeeded in its objective of making significant savings in the cost of the civil legal aid scheme, reducing its budget by around £300million a year at the current rate of expenditure, a higher than expected saving.[9] The Legal Aid Agency was funding "legal help in 326,004 fewer cases than would have been expected without the reforms. It agreed funding for representation in court in 36,537 fewer cases."[10] The report estimated that:

> If the Ministry had funded as many matters as it anticipated, we estimate that spending would have reduced by £268 million. The Ministry is on track to exceed spending reduction forecasts by £32 million because, following the reforms, the Agency is funding fewer matters than it had anticipated.[11]

The reasons for the underspend

13. We asked the Minister for Legal Aid if the Ministry of Justice knew why there had been an underspend in the civil legal aid budget. In response, Mr Vara emphasised that the National Audit Office figure was an estimate, and that reliable figures would not be available until 2018-19. Potential reasons for the underspend, Mr Vara told us, were that the Legal Aid Agency's debt collection system had performed better than expected; that they had seen a lower take-up of mediation than anticipated; and that "there are also many other agencies that do provide this sort of advice—law centres, citizens advice bureaux and so on. It may be that people are aware that there have been reductions in legal aid and they simply are not coming forward when, perhaps, they should be."[12]

14. We have heard evidence supporting Mr Vara's surmise that people eligible for legal aid are not accessing it because they do not have enough information on whether they are eligible. Most of our witnesses placed the failure to provide good public information on the Government's doorstep. Gillian Guy of Citizens Advice Bureau spoke for many of our witnesses when she told us: "The key message out there at the moment is that legal aid is not available for people. That is the premise upon which [potential litigants] start and upon which a lot of advisers start." Ms Guy described eligibility for legal aid as a "technical minefield".[13] Julie Bishop of the Law Centres Network criticised the new website which is the primary source of information on eligibility for legal aid as being a retrograde step from the direct.gov website which preceded it.[14] **We note that, since the introduction of the**

9 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 14–15, November 2014, para 5.

10 *Ibid*, para 8

11 *Ibid*, para 5

12 Q 282

13 Q 18

14 *Ibid*.

changes, the Ministry of Justice has introduced an online eligibility calculator for providers and a legal aid 'checker' which are welcome developments.

15. We asked legal aid providers if the perception that legal aid was no longer available was a result of the campaign against the legal aid cuts rather than inadequate provision of public information by the Ministry of Justice. Jenny Beck, Co-Chair of the Legal Aid Practitioners Group, accepted that the campaign may have inadvertently had that effect but thought the lack of clear, easily accessible public information was still the primary problem.[15] Andrew Caplan, the President of the Law Society, said that legal aid providers were putting out "very clear" information on the services they offered but cost and difficulty reaching the people eligible for legal aid presented problems.[16]

16. Providers also expressed concerns about the information on eligibility given to those holding legal aid contracts. The NAO noted that, of providers responding to its consultation on the reforms "73% thought that the guidance on individual eligibility was either poor or very poor and 78% felt this way about the guidance on scope changes."[17] The Housing Law Practitioners Association said it had:

> been seeking clarification for over a year of various aspects of LASPO. The Ministry of Justice has refused to provide clarification stating that it is for providers to interpret LASPO for themselves. In the absence of guidance, many providers are interpreting LASPO narrowly as they simply cannot afford to take the risk that they will not then be paid for their work.[18]

17. The NAO report said that "The Ministry considers that scope and eligibility are set out clearly in the legislation."[19]

18. ***We recommend that the Ministry of Justice undertake a public campaign to combat the widespread impression that legal aid is almost non-existent.*** **We are surprised that the Ministry of Justice did not undertake such a campaign at the time of the legal aid reforms given the magnitude of the changes to legal aid. The Government has a duty to ensure that the public are aware legal aid may be available as this is part of its commitment to ensure access to justice and cannot be left to legal aid providers who in any event may not have the resources to ensure it is effective.**

19. ***We recommend the Ministry of Justice and the Legal Aid Agency improve their communication with providers on eligibility for and scope of legal aid criteria and that they should respond to questions in a timely manner.*** **Failure to do so runs the risk that a legal aid provider will not take on an individual who is eligible for public funding, potentially denying that person access to justice.**

20. **We are not persuaded by the Minister's contention that people may not be accessing legal aid because they are getting all the legal advice they need from law centres and**

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15 Q 38

16 Q 39

17 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014, para 3.4.

18 Housing Law Practitioners Association (LAS0052)

19 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014, para 3.4.

citizens advice bureaux. As we note later in this report, the extent of service available from not-for-profit organisations has been diminished by the legal aid cuts and they are struggling to meet increased demand.

Shortfall in debt cases

21. An examination of the reasons for the underspend by the NAO's report revealed a significant shortfall in the number of exceptional cases funding applications granted (funding for cases out of scope but where there are particular reasons why legal aid should be granted) and a significant shortfall in the number of legally-aided mediations. We consider these issues at paragraphs 30–47 and 139–158 respectively. The NAO found that the estimates for the number of funding grants for family, housing and mental health cases was reasonably accurate being within 7% of predictions overall while grants for family law matters were 4% lower than anticipated. Other areas of law, however, saw grants fall well short of the MoJ's earlier estimates:

> For example, the [Legal Aid Agency] expected 16,466 debt cases to start but actually only started 2,434 (85% fewer cases). We estimate that this equates to £2.6 million less than expected.[20]

22. A shortfall of 85% in the number of cases of debt advice is an alarming statistic given the conclusion of the Centre of Social Justice in its 2013 report *Maxed Out* that: "The rising cost of living disproportionately affects low-income households and is pushing many into problem debt."[21] In our 2011 report on the Government's original proposals for civil legal aid reform we expressed concern over the provision of debt advice following the implementation of reform and questioned how sufficient debt advice would be provided once the deferred ending of the face-to-face service concluded.[22]

23. Publicly-funded debt advice, together with education law and discrimination advice, can only be accessed through the Civil Legal Advice telephone gateway. Recent research for the Ministry of Justice on the operation of the CLA gateway revealed a significantly lower number of calls to it than anticipated, leading to the number of telephone workers being cut; poor public knowledge of the service including difficulties in finding it online; and a lower than expected number of referrals from the telephone gateway for face to face advice.[23] There were more positive findings about the accessibility of telephone advice, with its extended opening times, no need for an appointment and communication by remote means.[24]

24. We were told by Julie Bishop that the primary reason for the low number of calls to the telephone gateway, and therefore a primary reason for the underspend on debt advice, was poor public information.[25] Anita Hurrell, of Coram Children's Legal Centre, agreed that

20 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 14–15, November 2014

21 *Maxed Out: Serious personal debt in Britain*, November 2013, Centre for Social Justice.

22 Third Report from the Justice Committee of Session 2010–11, *Government's proposed reform of legal aid*, HC 681–I

23 *Civil Legal Advice mandatory gateway: Overarching research summary*, Ash Patel and Catherine Mottram, Ministry of Justice Analytical Series 2014

24 *Ibid*, Pg 20

25 Q 19

public information on the telephone line, in this instance in relation to education law advice, was inadequate: "We are finding that people just do not know about civil legal advice; they do not know about the number that they need to call; and they are not being told by all those agencies by which they probably should be told."[26] Judith March, Director of the Personal Support Unit, a charity which has ten centres across the country supporting litigants in person at court, said that "Over the last week, I asked all our staff to tell me about the gateway. It is never mentioned; nobody who comes to us ever mentions it. That is quite an interesting bit of evidence in itself."[27]

25. Our witnesses corroborated the finding that there was a low number of referrals made from the telephone helpline for face to face advice. The Mary Ward Legal Centre told us, despite the Centre being able to take on four debt cases from the gateway, that they had not received any referrals.[28] Julie Bishop also described a difficult experience for one client who was attempting to ascertain his eligibility for legal aid:

> We had a particular case that came from one of the law centres where a very vulnerable client, who had communication issues, was unable to contact the gateway. They had tried and failed; they had a very complex matter. The law centre spoke on the client's behalf, and it took them three hours to get through to the gateway. Three hours!...There [then] were seven exchanges of letters [on eligibility].[29]

Ms Bishop told us that the client would not have been able to access legal aid if it had not been for the work of the law centre.

26. This evidence reflected the finding of the research into the CLA gateway. The researchers found that, while adjustments for people struggling to use the gateway, such as speaking to third parties, worked well when implemented, they were not routinely offered.[30]

27. **We conclude that failing to provide adequate public information on the Civil Legal Advice telephone gateway is one of the primary reasons why the gateway is underused. The underuse of the telephone gateway is one of the primary reasons for the underspend in debt advice as publicly-funded debt advice is only available through the gateway. We note with particular concern the finding from the Ministry of Justice's research that information on the Civil Legal Advice gateway is difficult to find online.**

28. ***We recommend that the Ministry of Justice undertake an immediate campaign of public information on accessing the gateway for debt advice, as well as for the other areas of law it covers.*** **Again, we are surprised that a concerted campaign of public information was not undertaken when the legal aid reforms were brought in and the telephone gateway was introduced.**

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26 Q 202

27 Q 20

28 Mary Ward Legal Centre (LAS0028)

29 Q 19

30 *Civil Legal Advice mandatory gateway, Findings from interviews with users*, Dr Caroline Paskell, Nilufer Rahim, Jane Kerr, Natalie Jago and Jasmin Keeble, NatCen Social Research Dr Nigel Balmer, UCL Faculty of Laws, Ministry of Justice Analytical Series 2014.

29. ***In its response to this report we request the Ministry of Justice update us on its response to the recommendations in the research the department commissioned on the Civil Legal Aid gateway.***

Exceptional cases funding- a "safety net" for the vulnerable?

30. The exceptional cases funding scheme was designed to ensure that the legal aid reforms did not put the Government in breach of its duty to protect individuals' European Convention or European Union rights.[31] During the passage of the Bill the scheme was described as a "safety net" to compensate for the Government's narrowing of legal aid.[32] It was also presumably intended to further the Government's objective of "targeting legal aid to those who need it most."

31. During the passage of the Bill through Parliament, the MoJ estimated that 5,000–7,000 applications for exceptional cases funding would be made annually, of which around 3,700 (74%–53%) would be granted.[33] The latest figures from the Legal Aid Agency, however, show that only 151 (7.2%) of the 2,090 applications for exceptional case funding made between April 2013 and September 2014 were granted (5% of applications were granted in April-March 2013-14; 14% in April-June 2014 and 14.7% in July-September 2014).[34] Of the 151 applications granted 90 (just under 60%) were for family representation at an inquest into the death of a relative. Of the other grants: 21 were for family law cases, 22 for immigration advice, two were for a housing case, two were for inquiries or tribunal cases and three were classed as 'Other'.[35]

32. We heard of a number of cases where, on the facts available to us, it appears surprising that exceptional case funding was not granted. Details of cases refused exceptional cases funding include an illiterate woman with learning, hearing and speech difficulties facing an application which would determine her contact with her children;[36] parents with learning difficulties who wished to contest their child's adoption but were £35 a month over the eligible financial limit;[37] a women with "modest learning difficulties" who the judge in the case told us was unable to deal with representations from the lawyer on the other side as a result of which she "now faces possibly not seeing her child again"[38]; and a destitute blind man with such profound learning difficulties he lacked litigation capacity.[39] In July 2014, at the beginning of our inquiry, the number of grants of exceptional funding for cases not

31 Section 10 LASPO

32 HL Deb 5 Mar 2012 : Column 1570

33 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014

34 LAA statistics bulletin June 2014, Table 8.1

35 Figure 22 p27, Legal Aid Statistics in England and Wales Legal Aid Agency 2013-2014; Figure 23, p30, Legal Aid Statistics in England and Wales, Legal Aid Agency, Apr to Jun 2014; Figure 32, p35 Legal Aid Statistics in England and Wales, Legal Aid Agency, Jul-Sept 2014

36 Re H [2014] EWFC 127

37 *Re D (A Child)* [2014] EWFC 39

38 Q 92

39 See *R (Gudanaviciene) v The Lord Chancellor*, [2014] EWCA (Civ)

involving inquests was sixteen. Julie Bishop of the Law Centres Federation, observed to us "Sixteen cases is not a safety net".[40]

33. **The number of exceptional cases funding applications granted has been far below the Ministry of Justice's estimate. We have heard details of cases where the refusal of exceptional cases funding to vulnerable litigants is surprising on the facts before us. We conclude therefore that the low number of grants together with the details of cases refused exceptional cases funding means the scheme is not acting as a safety net.**

Why is the grant rate for exceptional cases funding so low?

34. Several of our witnesses criticised the quality of the decision-making for exceptional funding cases. These concerns took two forms: the approach, knowledge and abilities of the caseworkers at the Legal Aid Agency themselves; and, more significantly, criticisms of the formal guidance given to caseworkers to assist them in making a decision under section 10 of LASPO.

Lord Chancellor's Guidance and the Ministry of Justice's understanding of the exceptional cases funding scheme

35. We heard that section 10 of LASPO, which provides the statutory basis for exceptional cases funding decisions to be made, is supplemented by Guidance issued by the Lord Chancellor. The Guidance provides that:

> The purpose of section 10(3) of the Act is to enable compliance with ECHR and EU law obligations in the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. Caseworkers should approach section 10(3)(b) with this firmly in mind. It would not therefore be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. Rather, section 10(3)(b) should be used in those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach of the rights set out at section 10(3)(a) but the risk of breach is so substantial that it is nevertheless appropriate to fund in all the circumstances of the case. This may be so, for example, where the case law is uncertain (owing, for example, to conflicting judgments).
>
> And:
>
> [Legal Aid Agency] caseworkers will need to consider, in particular, whether it is necessary to grant funding in order to avoid a breach of an applicant's rights under Article 6(1) ECHR. As set below, the threshold for such a breach is very high … will withholding of legal aid make assertion of the claim practically impossible or lead to an obvious unfairness in the proceedings?

36. The legality of the Lord Chancellor's Guidance has been challenged in the courts. In *R (Gudanaviciene) v The Lord Chancellor*,[41] the Court of Appeal concluded that the test for granting exceptional cases funding was that set out in the relevant sections of LASPO, and

40 Q 20

41 [2014] EWCA (Civ)

the means for determining whether that test was met was the relevant European Convention on Human Rights case law. The Lord Chancellor's Guidance therefore erred because it glossed the statutory test. The Court of Appeal said:

> There is no need for elaboration. When determining whether a complaint of a breach of Convention rights has been established, the ECtHR does not ask itself whether there has definitely been a breach or whether there has been a breach to a high level of probability. It simply asks whether there has been a breach. In our view, this approach should inform the meaning of the words "would be a breach" in section 10(3)(a).[42]

Of the five appellants who had had exceptional cases funding applications refused, the Court of Appeal found, on the correct interpretation of the law, three of those refusals were incorrect. The decision in *Gudanaviciene* is likely to increase the number of exceptional cases funding grants. It is not known whether the MoJ or one of the unsuccessful claimants intend to appeal the decision to the Supreme Court.

37. Mr Vara told us that "as far as the exceptional case funding is concerned, the answer, really, lies in the heading. It is meant to be exceptional. By definition, "exceptional" means that there is not going to be a very generous distribution of that particular fund unless the criteria are met."[43] This argument was explicitly rejected by the Court of Appeal in *Gudanaviciene*, which was handed down shortly after we heard from the Minister. The Court, headed by the Master of the Rolls, Lord Dyson, concluded:

> The fact that section 10 is headed "exceptional cases" and that it provides for an "exceptional case determination" says nothing about whether there are likely to be few or many such determinations. Exceptionality is not a test. The criteria for deciding whether an ECF determination should or may be made are set out in section 10(3) by reference to the requirements of the Convention and the Charter. In our view, there is nothing in the language of section 10(3) to suggest that exceptional case determinations will only rarely be made.[44]

Mr Vara attributed criticism of the exceptional cases funding scheme to a misunderstanding of its purpose: "there is a belief that it is a discretionary fund and that, if you are turned down through the normal route, then, if you apply here, you might just be lucky, but that is not so."[45] **We have seen no evidence to substantiate the Minister's contention that criticism of the exceptional cases funding scheme arises from a misconception as to its purpose. We note the Court of Appeal judgment which found that the Lord Chancellor's Guidance was unlawful, and that three of the five litigants who had been refused legal aid should have had their applications for exceptional cases funding granted.**

42 Para. 31 *R (Gudanaviciene) v The Lord Chancellor*, [2014] EWCA (Civ)

43 Q 287

44 *Gudanaviciene* para. 29

45 Q 287

Quality of decision-making and knowledge of caseworkers

38. The process of accessing the exceptional cases funding scheme was described to us as "onerous"[46] and "cumbersome" even for lawyers.[47] Catherine Evans, of the Southwark Law Centre, told us that the Legal Aid Agency showed "poor decision making and inconsistent decision making" and "failed to give paramount importance to access to justice".[48] Sarah Campbell from Bail for Immigration Detainees (BID) agreed, telling us "there are massive concerns about the quality of decision making".[49] Jenny Beck noted that "Islington law centre won a JR [on an exceptional cases funding refusal] just recently. Quite serious concerns were voiced by the judge who allowed it. It is not a system of "exceptional" if you have to take it to JR to access it, because often the case is over anyhow."[50] We heard that a lack of clarity over how the Legal Aid Agency approached a vulnerable client, as opposed to a legal case of great complexity, presented problems for those completing the application form. Emma Scott, Director of Rights of Women, said:

> There is a real lack of clarity about what the criteria is that…applications are being judged against. A particular concern…is where applicants have a particular vulnerability. It is not only the facts of the case and the complexities of cases but, also, there seems to be a lack of clarity around how cases are dealt with where applicants have particular vulnerabilities, such as mental health issues or English as a second language; perhaps they are very young or very old. We would like to see a much greater level of clarity for those making the applications…[51]

39. A further challenge for applicants was the lack of legal knowledge on the part of the Legal Aid Agency staff determining exceptional cases funding applications. Carita Thomas of the Immigration Law Practitioners' Association, said "I would respectfully submit that my experience of the exceptional funding decision-making team has not been very positive in how they understand immigration law and immigration clients. I would think that they need to have more specialised training in dealing with those or have an immigration team within that department who knows all about this."[52] Ms Thomas compared the experience of interacting with the exceptional cases funding team with that of applying for funding for court work to the Legal Aid Agency specialised team "I do not have to go through all the arguments about what article 8 is and what this immigration rule means, because those lawyers know it all inside out. So the process is far quicker."[53]

40. The lack of a specialised team dealing with applications for exceptional cases funding may be the reason why the Legal Aid Agency expect an application to be made on a fourteen page form[54] that takes lawyers, Jenny Beck told us, 3 to 4 hours to complete[55]

46 Law Centres Network (LAS0057)

47 Q 93

48 Q 201

49 Q 152

50 Q 20

51 Q 110

52 Q 178

53 Q 177

54 The form CIV ECF1 and accompanying guidance can be found at https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance

because it requires a detailed explanation of the legal merits of the case. This is in addition to the time required to interview the prospective litigant to obtain the facts of the case[56] which may not be a straightforward process. Nicola Jones-King, Co-Chair of the Association of Lawyers for Children, told us:

> to get the information you need from someone who is vulnerable and troubled is difficult. On one occasion I got part way through it; there was no way I could get the information together for this very vulnerable young man, who could not manage his own affairs. His finances and things were dealt with by the local authority. To defend an application for a non-molestation order was what he was facing in court. He could not articulate what he needed to articulate to deal with that.

Ms Jones-King told us that "in the end I just went to court and dealt with it, which was not really an ideal solution but was what he needed at that time."[57]

41. The President of the Family Division, Sir James Munby, said he was aware of judges who had telephoned the Legal Aid Agency in cases where an exceptional cases funding application was in process:

> There are one or two specific individuals there who tend to be approached and who are in fact enormously helpful. But, anecdotally, and also in my experience, the logjam is often too big to be unblocked by a simple telephone call. The complexities of getting legal aid applications through are considerable, so I am not sure that a system of judges ringing up the Legal Aid Agency will solve the problems.[58]

42. Lawyers are only paid for completing exceptional cases funding applications if the application is successful. The low rate of successful applications, we heard, therefore has a depressing effect on the numbers of applications made. We were told by Sarah Campbell of Bail for Immigration Detainees that:

> we deal with over 3,000 cases a year. In the last 18 months we have only been able to successfully refer two people to solicitors to make exceptional case funding applications for them. The main reason for this is that solicitors know that they are very unlikely to see any money as a result of making applications…payment is only made if the applications are successful. The vast majority of applications are being refused by the Legal Aid Agency. It simply is not financially viable.[59]

Catherine Evans, of Southwark Law Centre, said the Centre had decided they would no longer make exceptional cases funding applications because it was not an acceptable use of charitable funds:

> We made an application for exceptional funding and it took a very experienced caseworker six hours to make the application—a case that she was very familiar with—and it was refused. In our view, it was an unreasonable refusal. We do not get

55 Q 60

56 *Ibid*.

57 Q 93

58 Q 274

59 Q 152

> paid for that. After that, we took the decision not to make any exceptional funding applications because it was not in the interests of the client and it was not in the interests of the charity to expend charitable funds on making exceptional funding applications.[60]

43. The exceptional cases funding scheme can, the Ministry of Justice website states, can be accessed directly by a litigant. The website encourages "clients" to complete the forms even if they do not have a solicitor but the website states that if applicants do not complete the forms "we can only give you a preliminary view based on your information."[61] We questioned the Minister and the Director of the Legal Aid Agency on whether they accepted that the form made the exceptional cases funding scheme inaccessible to those vulnerable people for whom the exceptional cases funding scheme is designed. Mathew Coats told us:

> The form is broadly designed for providers because it is the providers to whom we pay legal aid. It has always been clear that individuals can seek a preliminary view, but less clear about exactly how. So we have changed and updated the website to make sure that that has more information on that subject.[62]

Mr Vara also emphasised that the preliminary view system was available to people who had been unable to find a solicitors. From April 2013 to September 2014 only two of the 2090 cases considered by the Legal Aid Agency received a positive preliminary view. It is not clear whether those two applications were made by individuals without legal assistance, or indeed whether any application made by an individual without legal assistance has been successful.[63] In this context we note the observation of Dave Emmerson, of Resolution, that: "In informal discussions…[with] the Legal Aid Agency—they have almost agreed that, if a litigant in person is able to complete that form, they are almost able to show that they are able to represent themselves, so it is self-defeating."[64] We were also told that the public information on the availability of exceptional cases funding was poor. This reflected other comments about the inadequate provision of information on legal aid, both to the public and to lawyers which we consider at paragraphs 18 and 19.

44. There have been a significant number of judgments, particularly in the family courts, in which the judiciary have held that the problems faced by one of the parties were so significant that they were unable to try the case fairly unless the Legal Aid Agency reversed its refusal of exceptional cases funding.[65] We asked the Minister why this had been allowed to occur. Mr Vara view was that at least in "some" cases the refusal of funding was due to the applicants failing to submit "sufficient information". Mr Vara was confident that: "Had

60 Q 202

61 https://www.gov.uk/legal-aid-apply-for-exceptional-case-funding

62 Q 310

63 Figure 22 p27, Legal Aid Statistics in England and Wales Legal Aid Agency 2013-2014; Figure 23, p30, Legal Aid Statistics in England and Wales, Legal Aid Agency, Apr to Jun 2014, Figure 32, p35 Legal Aid Statistics in England and Wales, Legal Aid Agency Jul to Sept 2014

64 Q 92

65 See eg *Q v Q* [2014] EWFC 31

the applicants provided all the information in the first instance, they would have qualified without the judge having to make that steer in the first place."[66] Mr Coats told us:

> The exceptional case route was always likely and even designed to be changed by judgments and case law—and, indeed, it has around asylum and immigration. The rate of grants has changed accordingly. It was always the intention that the scheme would mature over a period of years and be influenced by the courts.[67]

45. **The exceptional cases funding scheme has not done the job Parliament intended, protecting access to justice for the most vulnerable people in our society. This is because of the failure of the Legal Aid Agency, and the Lord Chancellor's Guidance, which was recently held to be unlawful, to give sufficient weight to access to justice in the decision-making process. The wrongful refusal of applications for exceptional cases funding may have resulted in miscarriages of justice. *All agencies involved must closely examine their actions and take immediate steps to ensure the exceptional cases funding scheme is the robust safety net envisaged by Parliament.***

46. **The Legal Aid Agency compounded its error in mismanaging the exceptional cases funding scheme by failing to appreciate that the very low number of grants compared to the Ministry of Justice's estimate was a sign that the process was not working as Parliament intended. Urgent investigative and remedial action was required, and in failing to take it the Legal Aid Agency and the Ministry of Justice were failing to focus legal aid on the most serious cases and the most vulnerable litigants, which was their declared objective.**

47. **We were surprised to learn that exceptional cases funding applications are not determined by officials with specialist knowledge of the relevant fields of law. We are particularly concerned by the impact this has on the accessibility of the scheme for vulnerable individuals seeking funding. *We recommend the Legal Aid Agency revise the staffing of its exceptional cases funding scheme so as to reduce the time taken for lawyers to complete the form and so as to make the process more accessible to laypeople.***

Our conclusions on the reasons for the underspend

48. The underspend in the civil legal aid budget arose because the Legal Aid Agency and the Ministry of Justice failed to ensure that the people who are eligible for legal aid have been able to access it. The reasons for this failure include an overly restrictive and bureaucratic approach to the exceptional cases funding scheme; poor provision of information on the availability of and eligibility for legal aid; and a lack of understanding of the routes people take to mediation.

49. The impact of the underspend in the civil legal aid budget is that vulnerable people are unable to obtain access to justice. We heard evidence on the distressing consequences this can have. Paula Twigg, of the Mary Ward Legal Centre, described a recent encounter with a man who had mental health difficulties:

66 Q 309

67 *Ibid.*

> I dealt with a man on reception who had a decision on employment support allowance…He did not know what to do; he did not understand. He kept focusing on the wrong bit in the letter, but he needed desperately to get a mandatory revision in against the decision and he just did not understand what to do. He did not live in Camden and we could not help him. I advised him to go to a CAB. He had already been to a CAB. They had said they had no capacity to deal with it and, anyway, he needed to see a specialist adviser. I am not sure what happened to him. I had nowhere else to refer him to.[68]

50. Ruth Hayes, of Islington Law Centre, told of us two people who had collapsed in their offices due to lack of food as a result of benefits sanctions they had been unable to resolve: "in one case the man had not eaten for six days…In another very troubling case, a woman collapsed who had two small children. She had been sanctioned for three months and was simply unable to feed the family."[69] People desperate to access legal advice but unable to do so are at risk of exploitation. For example, Bail for Immigration Detainees told us that "a lawyer who BID regularly refers cases to has informed BID that she has represented destitute women who are working in prostitution in order to pay legal fees."[70]

51. The National Audit Office concluded that "The Ministry does not know whether or not all those eligible for legal aid are able to access it. Therefore, it cannot be confident that it is targeting funding at those most in need."[71] The Minister did not accept that criticism:

> We have extensive measures in place to monitor what is happening…LASPO itself says that there will be a thorough review within three to five years after implementation, but we are not waiting for the three years. We have started the process and we are taking a view on what is being said.[72]

Despite these assurances the Minister was not able to tell us why there was a 85% shortfall in debt cases or why the grant rate for exceptional cases funding was so unexpectedly low. He had no real explanation for the underspend in the civil legal aid budget at all, and we were given no evidence on action taken to address the inevitable concerns about access to justice that must arise when such a significant and unexpected financial saving is made in the civil legal aid budget. **We have heard ample evidence that legal aid is not reaching many of those eligible for it. We do not therefore accept the Minister's assurance that the Ministry has extensive measures in place to monitor whether vulnerable people are able to access legal assistance. Had that been the case it might have been expected that the Ministry would have provided us with the results of that monitoring process to date.**

52. **The Ministry of Justice needs to appreciate that a significant and unexpected saving in the civil legal aid budget requires immediate investigation as it may indicate a significant impairment of access to justice. Our examination of the reasons for the**

68 Q 186

69 *Ibid*.

70 Bail for Immigration Detainees (LAS0098)

71 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014.

72 Q 289

underspend reveals considerable weaknesses in the administration of measures intended to ensure access to justice for vulnerable people.

Residence test

53. In 2013, the Government brought forward a proposal to limit legal aid to people with a "strong connection" to the UK.[73] We took limited evidence on the proposed residence test as secondary legislation containing the test was withdrawn after the Government lost a judicial review in July 2014.[74] The case was decided against the Government on the grounds that the introduction of the residence test as secondary legislation under the Lord Chancellor's powers in LASPO was *ultra vires*. We understand the Government is pursuing an appeal which is likely to be held in the summer of 2015.

54. We note the conclusions of the Joint Committee on Human Rights that, while a residence test would not necessarily be a breach of the right to effective access to a court, the test would have to be carefully drawn to ensure it was not disproportionate. The Joint Committee had particular concerns over the application of the test to refugees, and to people without mental capacity to litigate, and over the lack of clarity of exemptions from the test for asylum seekers and victims of trafficking.[75] That Committee concluded in a later report that, in its opinion, the residence test applied to children would be unlawful. [76] The judgment in *Public Law Project* had the following examples of cases where the claimant may not have satisfied the residence test had it been in force:

> P, a severely learning disabled adult, who had been "forced to live in a dog kennel outside the house, had been beaten regularly by his brother and mother, and starved over an extensive period of time". With the benefit of legal aid and the involvement of the Official Solicitor, proceedings in the Court of Protection resulted in a determination that it was in P's best interests to live separately from his family in a small group home with his friends and peers and 24-hour care.[77]

P's family appears to have opposed the proceedings in the Court of Protection because they wanted to maintain access to his benefits. Another case noted by the High Court was:

> L, who had recently arrived in the UK for the purposes of refugee family reunion with her husband, and who would be unable to access legal advice in relation to the failure of the local authority to assess the needs of her autistic eight year old son because she had only been in the UK for three months.[78]

73 *Transforming legal aid: delivering a more credible and efficient system*, Ministry of Justice, April 2013

74 *R (Public Law Project) v Secretary of State for Justice* [2014] EWHV 2356 (Admin)

75 Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform legal aid* (7th Report, Session 2013–14, HL Paper 100/HC 766)

76 Joint Committee on Human Rights, *Legal aid, children and the residence test* (1st Report, Session 2014–15, HL Paper 14/HC 234)

77 *Public Law Project* Para. 30

78 *Ibid, p*ara.27

55. The Lord Chancellor told the court during the judicial review that the intention behind introducing the residence test was to save money.[79]

56. **We question whether pursuing an appeal in the 'residence test' case is a good use of public money. It seems to us that the residence test is likely to save very little from the civil legal aid budget and would potentially bar some highly vulnerable people from legal assistance in accessing the courts. There is no reference that we can trace in the debates on the LASPO Bill to use of secondary legislation under the Bill's provisions in order to introduce such a test.** ***We recommend that, if the Government wants to pursue this issue, it would be better to introduce primary legislation which can be properly debated and is open to amendment in both Houses of Parliament.***

Legal advice and representation of children

Children as parties to proceedings

57. The legal aid changes did not distinguish between children and adults.[80] We heard concerns from some witnesses that children were facing particular difficulties in accessing legal advice and representation. Coram Children's Legal Centre told us that the legal aid changes had had a "profoundly negative impact on access to justice…on children's access to justice in particular."[81] We heard from witnesses that immigration, family and education law presented particular problems. Coram Children's Legal Centre told us that for children who have been trafficked or otherwise separated from their families "representing themselves is often not possible due to [their] young age, language barriers and significant vulnerabilities, and the extreme complexity of immigration law and the Immigration Rules."[82] The Centre said it experienced significant frustration in this area because, while the Centre could identify the legal issues in a case, the child involved was then unable to act on that advice.[83] Concerns over children's access to appropriate legal advice in education and family matters centred on the right for children to have their voices heard in matters affecting their welfare[84] and the requirement for all decisions about children's welfare to be made in their best interests.[85] Cafcass officers, who are involved in private family law cases where parents are unable to agree, work solely in the family courts and do not have jurisdiction elsewhere.[86] In September 2014, research commissioned by the Office of the Children's Commissioner concluded the legal aid changes are likely to have "negatively

79 *Public Law Project* Para 37

80 Although Regulation 20, Civil Legal Aid (Procedure) Regulations 2012 provides that under-18s are exempt from using the mandatory telephone gateway when seeking legal advice on debt, education or discrimination.

81 Coram Children's Legal Centre (LAS0034)

82 *Ibid*.

83 *Ibid*.

84 Article 3 (1) of the United Nations Convention on the Rights of the Child

85 Article 12 of the UNCRC

86 https://www.cafcass.gov.uk/about-cafcass.aspx

impacted" on children's rights under the United Nations Convention on the Rights of the Child.[87]

58. Carita Thomas, of the Immigration Law Practitioners' Association, told us that children's access to other sources of legal funding was highly variable:

> local authorities are more inclined to provide funding for immigration advice when somebody is under a care order. The legal team from the Howard League for Penal Reform have said that their experience when assisting young people who are in custody or in detention—care leavers—is that they have found it very difficult to get local authorities to pay, so the experience is highly variable. They have often had to take pre court steps in order to try and force local authorities to live up to their duties. So there is at the moment highly variable experience in getting local authorities to pay.[88]

59. The Coram Children's Legal Centre said it had made four exceptional cases funding applications on behalf of children, all of which had been refused. It noted that, in one case, the refusal letter stated material details about the applicant incorrectly including nationality, gender and timing of arrival in the UK. The Centre decided not to use more pro bono funding on making "futile" applications.[89] This reflects wider evidence we have heard on the exceptional cases funding process which is detailed at paragraphs 30 to 47. The Centre also noted a dearth of free advice on the issues most likely to affect children.[90]

60. Witnesses noted the knock-on costs from failing to resolve the legal problems faced by children included a long-term impact on their behaviour and even mental health; loss of contact with a parent; and struggling at school due to concerns about their situation. We received some helpful estimates of the cost to the taxpayer of establishing legal aid schemes for children in different areas of law including separated children's immigration cases "approximately 2490 children's cases per annum costing £1.1m" around £403 per case, and housing matters "approximately 430 cases per annum costing £100,000" around £233 each.[91]

Special Guardianship Orders

61. The Association of Lawyers for Children told us that they were "particularly worried" that applications for Special Guardianship Orders by members of the extended family, made because the parents were struggling to look after the children, did not receive legal aid. The Association pointed out that the alternative, that the local authority take the children into care, would see the court application funded by the taxpayer in addition to the costs of looking after the child.[92] Other witnesses agreed. Dave Emmerson, of Resolution, said public funding for members of an extended family seeking Special

87 Office of the Children's Commissioner (2014). Legal aid changes since April 2013: Child Rights Impact Assessment. London: Office of the Children's Commissioner

88 Q 134

89 Coram Children's Legal Centre (LAS0034)

90 *Ibid*, (LAS0101)

91 *Ibid*.

92 Association of Lawyers for Children (LAS0062)

Guardianship Orders, could save local authorities "huge sums".[93] Susan Jacklin QC, Chair of the Family Law Bar Association sounded a note of caution, however, when she told us that applications for this type of court order in private family law applications meant the parents of the child were also not represented.

62.* Children are inevitably at a disadvantage in asserting their legal rights, even in matters which can have serious long-term consequences for them. We are particularly concerned by evidence that trafficked and separated children are struggling to access immigration advice and assistance. *We recommend that the Ministry of Justice review the impact on children's rights of the legal aid changes and consider how to ensure separated and trafficked children in particular are able to access legal assistance. We also recommend that further consideration be given to the provision of legal aid in private law applications for Special Guardianship Orders where applicants are members of the extended family."

93 Q 83

4 The domestic violence gateway

63. While family law in general was removed from scope, prospective litigants who can provide evidence of domestic violence can still be granted legal aid. The exception was introduced because of a concern that victims of domestic violence might be vulnerable to intimidation, and disadvantaged in legal proceedings, if they were forced to represent themselves against the perpetrator of the violence.[94] Both the definition of domestic violence and the evidence required for a grant were the subject of debate throughout the passage of the Bill. In its submission the MoJ summarised the types of evidence needed as follows:

i. a conviction, police caution, or ongoing criminal proceedings for a domestic violence offence;

ii. a protective injunction;

iii. an undertaking given in court (where no equivalent undertaking was given by the applicant);

iv. a letter from the Chair of a Multi-Agency Risk Assessment Conference (MARAC);

v. a finding of fact in court of domestic violence;

vi. a letter from a defined health professional (which included a doctor, nurse health visitor or midwife);

vii. evidence from social services of domestic violence; and

viii. evidence from a domestic violence support organisation of a stay in a refuge.[95]

64. Evidence, except for convictions, is subject to a 2 year time limit.[96] Convictions do not constitute evidence for the domestic violence exemption if they are spent. The system was reviewed in early 2013 and new regulations were brought into force in April 2014 which extended the types of evidence accepted to include:

i. police bail for a domestic violence offence;

ii. a bindover for a domestic violence offence;

iii. Domestic Violence Protection Notice/ Domestic Violence Protection Order;

iv. evidence of someone being turned away from a refuge because of a lack of available accommodation;

v. medical evidence expanded to include evidence from practitioner psychologists; and

94 *R (Rights of Women) v Lord Chancellor* [2014] EWHC 35 (Admin)

95 Ministry of Justice (LAS0073)

96 Civil Legal Aid (Procedure) Regulations 2012

vi. evidence of a referral to a domestic violence support service by a health professional.[97]

Legal aid is also available for proceedings which provide protection from domestic violence, such as protective injunctions, without the need to provide evidence of domestic violence.

65. Rights of Women, a charity specialising in advice on family law and which campaigns on women's rights, has been monitoring the operation of the domestic violence gateways since their introduction in April 2013.[98] Emma Scott, Director of Rights of Women, welcomed the additions to the types of evidence accepted as indicative of domestic violence but said they did not go far enough:

> Since 1 April 2014…there has been a slight increase in the number of women who have been able to successfully apply for family law legal aid using those new forms of evidence. The survey, as of yesterday, showed that 39% of women [who were victims of domestic violence] still had none of the forms of evidence, which is a slight reduction from the 43% in our previous research, which looked at the year from April 2013.[99]

66. Clare Laxton, Public Policy Officer of Women's Aid, told us some of the most common forms of domestic abuse are particularly difficult to evidence: "in a survey that we did last year of over 1,000 survivors of domestic violence, 80% of them experienced emotional and psychological abuse and over 50% experienced financial abuse. It is those sorts of abuses …that are very difficult to evidence."[100] We heard from Nicola Jones-King, Co Chair of the Association of Lawyers for Children, that it could be a "huge challenge" to obtain evidence in cases of abuse.[101] Ms Jones-King agreed with Dave Emmerson, of Resolution, when he told us that one of the two changes he would like to see to ensure access to justice for vulnerable individuals was "a catch-all clause, where representations can be made where it is evident that someone is suffering from domestic abuse but it is not evidenced in the existing gateway requirements." The President of the Law Society, Andrew Caplan, said the failure to resolve the difficulties around accessing legal aid for victims of domestic violence was an example of the Ministry of Justice failing to achieve its objective of focusing legal aid on the most serious cases and the most vulnerable individuals.[102]

67. A legal challenge to Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012, which sets out the evidence required to access the domestic violence gateway, recently failed,[103] although media reports suggest this decision is likely to be appealed.[104] The MoJ told us that it was committed to keeping the type of evidence required to qualify for the

97 Ministry of Justice (LAS0073)

98 *One Year On*, Rights of Women.

99 Q 105

100 Q 106

101 Q 65

102 Q 30

103 *R (Rights of Women) v Lord Chancellor* [2014] EWHC 35 (Admin)

104 http://www.theguardian.com/law/2015/jan/23/high-court-legal-aid-domestic-violence

domestic violence exemption under review. **We note with concern the evidence from the Rights of Women survey suggesting 39% of women who were victims of domestic violence had none of the forms of evidence required to qualify for legal aid. Any failure to ensure that victims of domestic violence can access legal aid means the Government is not achieving its declared objectives.**

68. **We welcome the Ministry of Justice's commitment to keeping the types of evidence required to qualify for the domestic violence gateway under review and recommend the introduction of an additional 'catch-all' clause giving the Legal Aid Agency discretion to grant legal aid to a victim of domestic violence who does not fit within the current criteria. *We also wish to see regular publication of figures on grants of legal aid made on the grounds of domestic violence.***

69. We also heard concerns that the 24 month time limit on all evidence of domestic violence, other than convictions, presented problems for victims, as a court case could arise a considerable time after the breakdown of a relationship.[105] As was noted by the court in *R(Rights of Women) v Lord Chancellor*, the "[t]he policy intention [of the domestic violence gateway] is to provide legal aid where an individual will be materially disadvantaged by facing their abuser in court, not simply to provide open-ended access to legal aid for domestic violence. The time limit provides a test of the on-going relevance of the abuse."[106] We note that this case is likely to be the subject of an appeal.[107] Our witnesses gave us a number of examples where the 24 month time limit presented problems, Philippa Newis, of Gingerbread, described a case where:

> …a single parent had experienced domestic violence in the past, her partner had not been on the scene for a number of years and then came back and wanted to go to court around a contact order, but she could not access legal aid through the domestic violence gateway because her domestic violence experience had been over two years.[108]

Jenny Beck, Co-Chair of the Legal Aid Practitioners Association, described a case where the victim had suffered a severed finger as a result of domestic violence and highlighted the child safety concerns arising in such cases. The perpetrator of the violence had been in prison for over two years for an unrelated offence and was now seeking contact with his children: "the violence against her was too old for it to count in respect of gateway evidence…That woman was clearly extremely vulnerable again, and of course there were extremely important issues of child contact with a very violent man."[109]

70. ***We recommend Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 be amended to give the Legal Aid Agency discretion to allow evidence of domestic violence from more than 24 months prior to the date of the application in cases where the person who has suffered the violence would be materially disadvantaged by having to face the***

105 Q 106

106 [2014] EWHC 35 (Admin) Para 60

107 See footnote 48.

108 Q 109

109 Q 28

perpetrator of the violence in court. We make this recommendation in recognition of the potential artificiality of the 24 month time limit given the ongoing nature of familial relations that can be the subject of court proceedings and the lasting impact domestic abuse can have on victims.

71. Lack of knowledge of the domestic violence gateway among healthcare professionals in particular, was noted as a weakness of the scheme. Emma Scott told us "The Ministry of Justice has some very useful guidance on its website and some very useful precedent letters that can be used" however "there is perhaps an issue around making sure that it is disseminated effectively among the kind of professionals that are going to be asked for this evidence…the front-line health professionals and social care professionals."[110] Ms Laxton noted some recent National Institute for Health and Clinical Excellence guidance had recommended improvements in domestic violence training and knowledge for healthcare staff,[111] while Ms Scott had told us the impact of poor knowledge was seen when some victims of domestic violence had met with a refusal or given a letter which did not qualify as evidence because "the wording was not quite right".[112] Philippa Newis, of Gingerbread, expressed concern that a requirement to pay for some of the forms of evidence was a barrier to the gateway for those on low incomes.[113]

72. **We were pleased to hear from witnesses that the Ministry of Justice has published helpful advice to healthcare professionals on their role in providing victims of domestic violence with the evidence required to access legal aid.** ***We recommend the Ministry of Justice consider further engagement with the representative bodies for healthcare professionals so that all relevant parties are aware of their role in the domestic violence legal aid gateway. We also recommend that the Ministry of Justice take measures to ensure that victims of domestic violence are not expected to pay for the production of the required documentary evidence.***

110 Q 107

111 *Ibid*.

112 *Ibid*.

113 Q 106

5 Sustainability and 'advice deserts' – the legal aid market

73. In our 2012 report on the legal aid reform proposals we expressed concern at the limited evidence the Government had on the likely impact of the reforms on providers of publicly-funded legal services:

> …we think that, for several reasons, there could be significant under-supply of providers in some areas of the country, or indeed some 'advice deserts'…The Government's own impact assessment notes that there is "much uncertainty" about the impact on providers and we urge the Government to conduct a more thorough assessment of the likely effect on geographical provision of each category of civil and family law before deciding whether to implement the proposals.[114]

In its response to our report the Government accepted that the legal aid changes were likely to result in a reduction in the number of legal aid providers but committed itself to ensuring that there were "robust mechanisms in place to identify any developing market shortfall" and responding "promptly, effectively and appropriately, should this materialise in any form".[115] The Government assured us that the Ministry of Justice would continue "to assess the sustainability of the legal aid market throughout the procurement process."[116] The Government did not respond to our concerns over the geographical provision of legal aid.

74. There has been a reduction in legal aid providers since the introduction of the legal aid reforms. The Legal Aid Agency's annual report stated that there were 1,435 civil legal aid providers in March 2014, down from 1,899 in March 2013.[117] Our evidence shows, however, that the number of providers is a comparatively meaningless measure in assessing the state of the market given the complexities of the ways in which legal aid providers have responded to the legal aid, and other, reforms.

The impact of the legal aid reforms on the for-profit sector

75. The Law Society told us:

> Whilst the overall number of legal aid contracts may not have significantly reduced, the scope cuts will have resulted in the downsizing of departments reliant on legal aid work and consequent redundancies. Some firms have closed and others have survived by shifting their focus to privately funded work.[118]

114 *Ibid*, para 156

115 Justice Committee *Government's proposed reform of legal aid* Third report of Session 2010–11, HC681

116 Government Response to Justice Committee's Third Report of Session 2010–11: the Government's proposed reform of legal aid, June 2011, para. 78.

117 Legal Aid Agency, *Annual Report and Accounts 2013–14*, p19.

118 The Law Society for England and Wales (LAS0039)

They added that legal aid practitioners were "very demoralised by the LASPO scope and fee cuts and the further cuts that are being implemented by the Transforming Legal Aid proposals affecting both civil and criminal legal aid."[119] The Family Justice Council told us that "family law firms/departments are downsizing due to lack of work with consequent redundancies and permanent loss of provision."[120] The Civil Justice Council observed that there was an inevitable impact on access to pro bono legal services, and consequently access to justice: "the very practitioners who have seen their rates and work reduced are the ones with the expertise for whom demand is strongest."[121]

76. The Civil Justice Council was of the view that "we understand some of those with contracts are not using these to the full, as the contract is hard to run, and time spent interviewing potential clients who turn out not to be in scope is not funded."[122] The observation that even solicitors with legal aid contracts may be reluctant or unable to take on eligible work was reflected by evidence from witnesses representing not for profit providers that finding a solicitor able and willing to take legal aid cases is becoming more difficult. For example, Greenwich Housing Rights reported a particular difficulty in finding solicitors for social welfare litigants with appropriate cases,[123] Rights of Women for domestic violence victims needing assistance in family law proceedings[124] and the Immigration Law Practitioners' Association expressed concern over problems accessing specialist immigration advice.[125]

77. The Law Society told us that the culmination of all the changes meant "the future sustainability of legal aid practice is in significant doubt."[126] The Civil Justice Council agreed that the sustainability of the market in publicly-funded legal services was in question. The Family Justice Council agreed: "Given the outcome of LASPO and the implementation of 'Transforming Legal Aid', there must be serious doubt as to the survival of service providers in the private sector."[127] Matthew Coats, Director of the Legal Aid Agency, disagreed, assuring us "We regularly review market capacity to assure ourselves about coverage and sustainability."[128]

The not-for-profit sector

78. We were told of a number of advice centres which had closed down following the reforms including nine law centres (one in six of the Law Centres Network members)[129] and 10 run by Shelter.[130] Julie Bishop, of the Law Centres Network, said the centres that

119 *Ibid.*

120 Family Justice Council (LAS0082)

121 Civil Justice Council (LAS0080)

122 *Ibid.*

123 Greenwich Housing Rights (LAS0027)

124 Rights of Women (LAS0081)

125 Q 160

126 *Ibid.*

127 Family Justice Council (LAS0082)

128 Q 291

129 Law Centres Network (LAS0057)

130 Shelter (LAS0066)

closed were the ones whose primary funding stream was legal aid "it was 80% or more of their income. They were well-run centres but they simply did not have local authority or any other support."[131] As with for-profit providers, however, the relatively limited number of centres which have closed altogether hides the fact the centres that survive have had to significantly reduce their capacity to assist those seeking advice, as Julie Bishop explained: "We are now targeting specific groups of clients, rather than having an open door service. There have been major savings by reducing staff and dropping the number of trainees."[132] Shelter told us it had reduced its housing work by 40 per cent and its debt work by 60 per cent.[133] Conditions on funding also mean law centres have to alter the way they work, Paula Twigg described the situation for the Mary Ward Legal Centre in Camden:

> we only have funding from Camden council now because we lost our legal aid contract. We are a pan London provider and we were able to help round about 1,200 people a year to resolve the welfare benefits legal issue. Now we can only help about 300 people a year…our Camden funding is restricted to help people who live, work or study in Camden. We are turning one in four people away who present from other boroughs…[134]

Gillian Guy of Citizens Advice Bureau said the CAB had lost 350 specialist advisors. This was despite the fact the CAB has a variety of funding streams meaning it is less dependent on legal aid than other not-for-profit advisors.[135]

79. Several witnesses expressed concern over the future of other funding streams for the-not-for-profit sector. Ms Bishop told us that local authority funding for law centres had been "critical" but the cuts in central government funding for local government would inevitably have an impact in future.[136] The Low Commission, which carried out an inquiry into social welfare funding, found that local authority funding cuts were likely to see financial support fall from around £220million in 2010–11 to £180million, or less, by 2015–16.[137]

80. Witnesses observed that demand for services was going up, partly as a result of the legal aid reforms but also because of other reasons such as changes in the benefits system and immigration rules, pressure on housing and rising use of zero hours contracts.[138] The NAO report found that 70 per cent of not-for-profit providers could meet half or less of the demand for legal assistance from people not eligible for legal aid.[139] The Citizens Advice Bureau told us it saw an increase of 62 per cent in the number of page visits from April

131 Q 11

132 Q 119

133 Shelter (LAS0066)

134 Q 186

135 Q 11

136 *Ibid*.

137 Low Commission Report of the Low Commission on the future of advice and legal support: *Tackling the Advice Deficit a strategy for access to advice and legal support on social welfare law in England and Wales*, January 2014, para. 1.15 (Low Commission Report).

138 Southwark Law Centre (LAS0061), Law Centres Network (LAS0057).

139 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014.

2013 to March 2014.[140] The Law Centres Network said "our offices have experienced a surge in enquiries after help in the areas now out of scope, primarily family, immigration and employment". As an example, "Hackney Community Law Centre…in winter 2013 reported a 400% increase in people looking for help with welfare benefits, a 200% increase in people looking for immigration help and a 500% increase in calls to their telephone advice line."[141]

Matter start allocation

81. Matter starts are the number of cases a legal aid provider may take on under its legal aid contract. Witnesses raised a number of concerns over the operation of matter starts and the consequent impact on access to justice. The Housing Law Practitioners Association said that matter starts were running out "within a few months"[142] but the Legal Aid Agency usually refused to allocate more, meaning providers could not help any more clients. Sara Stephens of the Housing Law Practitioners Association explained that the system presented a problem for the MoJ's objective of targeting legal aid at the most serious cases:

> The idea that a finite amount of people can get assistance is a problem and does go against the supposed aims of LASPO, which is to help the most serious and vulnerable clients—the most serious cases—because it effectively means that the first, say, 100 people through the door get the help and anyone who arrives after that does not.[143]

Ms Stephens acknowledged this was a long-standing problem with the system of matter starts but was of the view it had been significantly exacerbated by the reduction in the number of matter starts allocated to providers under LASPO.[144]

82. The cumulative effect of all the issues was, the Housing Law Practitioners Association suggested, that there were now "advice deserts" for some areas of law in some parts of the country.[145] This conclusion may be supported by the National Audit Office's finding that in 14 local authorities no face-to-face civil legal aid work was started in 2013–14 and that legal aid providers in a further 39 local authorities started fewer than 49 pieces of legal aid work per 100,000 people.[146] The reasons for the level of variation are unknown.[147] What is clear to us is that the Ministry of Justice does not know why that variation is occurring, and is certainly in no position to deny the existence of advice deserts.

140 Citizens Advice (LAS0040)

141 Law Centres Network (LAS0057)

142 Housing Law Practitioners Association (LAS0052)

143 Q 119

144 *Ibid*.

145 Housing Law Practitioners Association (LAS0052)

146 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 14–15, November 2014, para. 3.23 The highest figure of matter starts was in Camden in London, where providers based in the area started 4,283 pieces of legal aid work for every 100,000 people who lived there.

147 *Ibid*, para. 3.24

Conclusions on the legal aid market

83. In its recent report on the changes, *Implementing Reforms to Civil Legal Aid*, the National Audit Office said:

> The Ministry reduced fees for providers without a robust understanding of how this would affect the market, and its monitoring has been limited. Many providers told us they were struggling to provide services for the fees paid, despite using a range of approaches to reduce costs. The Ministry wanted to stimulate the development of innovative solutions to providing services at a lower cost. It has monitored whether providers are in financial distress. However it has not monitored the extent to which providers are choosing not to undertake civil legal aid work. There is no requirement to perform a minimum level of work to remain a provider.

84. The NAO concluded "The Ministry needs to improve its understanding of the impact of the reforms on the ability of providers to meet demand for services. Without this, implementation of the reforms to civil legal aid cannot be said to have delivered better overall value for money for the taxpayer."[148]

85. Mr Coats noted that the re-tender for legal aid contracts attracted more bidders than for the previous tender.[149] The National Audit Office raised concerns, however, over the number of firms failing the Legal Aid Agency quality assurance tests. Based on unpublished data collated by the Legal Aid Agency: "In 2013–14, 32% of targeted firms and 23% of firms selected at random failed the review." The NAO went on to observe, however, that "this is a reduction on 2012–13 when 41% of non-targeted and 28% of targeted firms failed."[150] In our view it is difficult to draw any clear conclusions from these figures.

86. The Minister told us he believed there were "enough providers."[151] He dismissed the concerns about the sufficiency and sustainability of the market in these terms:

> We have had to take tough decisions whereby we have had to reduce scope. We have had to reduce fees. If you are talking to solicitors and you have to look them in the eye and say, "We are going to give you fee cuts," clearly there is going to be disagreement. Our view is that we are in a tough climate with austerity measures. Many individuals and businesses are suffering, and the legal profession should not be immune from the measures that we are taking.[152]

87. **We were not impressed by the Minister's response to our concerns about the impact of the legal aid reforms on providers of publicly-funded legal services. We share the concerns of the National Audit Office, concerns we raised in our report in 2011, that the legal aid reforms were carried out without adequate evidence of the likely impact on the sufficiency and sustainability of the legal aid market.**

148 *Ibid*.

149 Q295

150 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014, para. 3.12.

151 Q 290

152 Q 291

88. **The National Audit Office found that fourteen local authority areas saw no face to face civil legal aid work at all in 2013–14, and very small numbers of cases were started in a further 39 local authority areas. We are deeply concerned that this may indicate the existence of a substantial number of 'advice deserts.'**

89. ***We urged the Government in 2011 to carry out research into the geographical distribution of legal aid providers to ensure sufficient provision to protect access to justice. Not only did the Ministry of Justice fail to heed our warning, it has also failed to monitor the impact of the legal aid reforms on the geographical provision of providers. We do not know for certain if there are advice deserts in England and Wales, and nor does the Ministry of Justice. This work needs to be carried out immediately because once capacity and expertise are lost the Ministry of Justice will find it difficult, and potentially expensive, to restore them. In some areas it may already be too late.***

6 Litigants in person

90. Reducing the scope of legal aid was inevitably going to increase the number of litigants in person before the courts, even if the "behavioural change" anticipated by the Government had in fact occurred. We received evidence that there has been a significant rise in the number of self-represented litigants before the courts but even approximate numbers are difficult to determine. Figures for litigants in person are not collated in the civil courts, but the Master of the Rolls, Lord Dyson, told us that the civil courts had experienced a significant impact from a rise in litigants in person.[153] Similarly, no figures exist to show how many litigants have legal representation in tribunals, although the Senior President of Tribunals, Lord Justice Sullivan, told us that the tribunal system had been less affected than the civil courts as there had been limited legal aid funding prior to LASPO, tribunals were used to dealing with litigants in person, and the cases were, usually, more straightforward as they stemmed from a reasoned decision by a Government department.[154]

91. Figures for representation are collated for the family courts. There are, however, some issues with the collated figures as the Court Quarterly Statistics acknowledge: "The legal representation status reflects whether the applicant/respondent's legal representative has been recorded or left blank. Therefore, parties without legal representation are not necessarily self-represented."[155] In addition, even where legal representation is correctly recorded, the figures are drawn from the litigant's status at the first final order. This means the statistics do not capture litigants who may have received legal advice but not representation, have been represented earlier but are not at this stage or who have legal representation later in proceedings.[156]

92. The National Audit Office in its report, *Implementing the civil legal aid reforms*, found the number of cases in which neither party in a family law case had representation had increased by 18,519, around 30% of all cases.[157] In the first quarter of 2014, 80% of all private family law cases had at least one party that was not represented. In contrast, the Minister told us, however, that the number of litigants in person in private family law cases had only risen by a "small percentage" from 66% of cases in which at least one party was not represented to 74%.[158] An additional complication is that the number of cases in the family courts has dropped since the introduction of the legal aid reforms by around 40%.[159] Whatever the true figure may be, evidence we have received strongly suggests not only a significant increase in parties without legal representation but also that litigants in person may be appearing in more complicated cases or be less able to represent themselves. We consider this aspect of the changes in detail below.

153 Q 256

154 *Ibid*.

155 Court Quarterly Statistics

156 *Ibid*.

157 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 14–15, November 2014, page 4

158 Q 293

159 See Court Quarterly Statistics 2013–14, Figure 2.1.

93. The increase in litigants in person following the legal aid reforms was anticipated by the Government when it noted as one of the criteria for making decisions on reforming the provision of legal aid:

> the litigant's ability to present their own case: considerations included the type of forum in which the proceedings are held, whether they are inquisitorial or adversarial, whether litigants bringing proceedings were likely to be from a predominantly physically or emotionally vulnerable group (for example, as a result of their age, disability or the traumatising circumstances in which the proceedings are being brought).[160]

94. Limited research has been carried out into litigants in person, their experience of court processes and their impact on proceedings. Prior to the introduction of LASPO, the MoJ commissioned research into the experience of litigants in person in the family courts to "inform policy and practice responses to LIPs following the legal aid changes."[161] The research team was led by Professor Liz Trinder, Professor of Socio-Legal Studies at the University of Exeter, and included Professor Rosemary Hunter and Professor Richard Moorhead. The team sent its final report to the MoJ in September 2013. The MoJ, without explanation, failed to release the report until November 2014, when it was unexpectedly published, days after we had written to the Lord Chancellor requesting sight of a copy to inform this inquiry. We later received an assurance from the Lord Chancellor that there was "no political delay" or "ministerial involvement" in publishing the report and the problem lay in "various to-ings and fro-ings between the team doing it and the analytical team on matters related to methodology and the rest".[162] The research was a considerable undertaking covering five sample courts, detailed analysis of 151 cases, interviews with all family court stakeholders including court and Cafcass staff as well at the judiciary and the litigants themselves. The limited research base on litigants in person meant much of the information it contained was unique and could not be obtained elsewhere. Its recommendations and conclusions will need cost-benefit and further policy analysis before implementation. Furthermore, the scope changes meant that the profile of litigants in person after LASPO was different from the profile when legal aid was available to those who qualified on financial grounds.

95. **We are concerned that it took the Ministry of Justice over a year to publish the report on litigants in person carried out by Professor Liz Trinder and her team. The report seems to us a thoughtful and high-quality piece of work containing unique information capable of informing not only Government responses to the difficulties faced and presented by litigants in person but also those of other stakeholders, including the Judicial Working Group on Litigants in Person. The lack of availability of this report during our inquiry has adversely affected our ability to have an informed debate on this issue. Early consideration of the report could have mitigated the £3.4million knock-on costs for the courts from the rise in litigants in person identified by the National Audit Office.** ***We deeply regret the fact it took this Committee's***

160 Ministry of Justice (LAS0073)

161 *Litigants in person in private family law cases*, Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce, Ministry of Justice Analytical Series 2014, p1 (Trinder report)

162 HC (Session 2010–11) 681–II, Q 46

intervention for the Trinder report to enter the public domain. We accept the Lord Chancellor's assurance that there was no ministerial involvement in the delay but still require an explanation for it.

The impact of the rise in litigants in person on the courts

96. The removal of private family law from the scope of legal aid, except for cases involving evidence of domestic violence, was one of the most significant changes brought about by LASPO. The MoJ anticipated the reduction in legal aid would lead to "behavioural change" and potential litigants would seek other ways to resolve their problems.[163] As noted above, the NAO concluded in its report that this had been an assumption which the MoJ had no evidence to support, an issue we examine at paragraphs 155 to 158.

97. In evidence to us the Minister said: "It is important to recognise that courts were very used to dealing with litigants in person, and this is not something new..."[164] As we have noted above, there is debate between the Government and court stakeholders over how many more litigants in person the courts are seeing. We have heard evidence, however, that suggests that the 'new' litigants in person, those who would previously have qualified for means-tested legal aid, are qualitatively different from the self-represented litigants the courts dealt with prior to the legal aid reforms. The Family Law Bar Association said:

> pre LASPO LiPs…were more likely to be employed people with some level of ability to articulate issues and engage in the court process. The removal from scope of all private family cases…has left those who are least able to represent themselves having to engage in the court process without the benefit of any legal advice. The MoJ naively assumed that the system could absorb more LiPs without adverse effects as long as more information was made available. This belief fails to recognise the limitations of the litigants involved…[165]

Sir James Munby agreed:

> Previously we had a lot of litigants in person who were there through choice. They tended to be people who had a particular point of view, but who understood the case, were articulate and had the confidence to appear in court. We now have a lot of litigants in person who are there not through choice and who lack all those characteristics…[166]

98. **Our witnesses agreed that there has been a rise in the number of litigants in person following the removal of means-tested legal aid from family and other areas of law, although the exact numbers are difficult to ascertain. We believe, however, that it is of more significance that the rise in litigants in person constitutes at least some people who struggle to effectively present their cases, whether due to inarticulacy, poor education, lack of confidence, learning difficulties or other barriers to successful engagement with the court process. It is vital that the difficulties of such self-**

163 Ministry of Justice (LAS0073)

164 Q 293

165 Family Law Bar Association (LAS0069)

166 Q 260

represented litigants are at the forefront of the minds of Ministers when developing and implementing measures to assist litigants in person.

Impact on court resources and proceedings

99. The National Audit Office found in its report that the increase in litigants in person had led to an estimated £3.4million additional costs for the MoJ in the family courts alone. The NAO did not attempt to quantify additional costs arising in the civil courts due to a lack of data on the number of litigants in person appearing in those courts either before or after the reforms.[167]

100. We heard mixed evidence as to whether litigants in person increase the length of court hearings. The Magistrates' Association, among others, thought that they did because of "the need for parties to be guided through the court process. This has an effect on the estimates of court time needed to deal with cases and the basis for the allocation of resources…"[168] The MoJ, however, has recently published research indicating that the length of hearings in which self-represented litigants appear is comparable with those in which lawyers act.[169] There are a number of methodological concerns over these data, primarily focused on the fact the hearing times are drawn from estimates entered in a case management tool for court staff, not real hearing times, but the Master of the Rolls, Lord Dyson, told us that, in any event, a focus on the length of hearings was not a good indication of the impact of litigants in person on courts resources:

> The problem comes not at the hearing stage, but at the pre-hearing stage and the case management conference stage when the judge first gets to grips with the case, tries to knock it into shape, see what the issues are, and give directions for the efficient and proportionate conduct of the litigation. It is at that stage where, if you have lawyers present, they are used to narrowing the issues, and they do.[170]

He said that is was primarily lack of legal advice, rather than lack of representation, which meant that "Judges have to spend ages ploughing through page after page of applications for permission to appeal, very often in almost illegible manuscript, and they take much longer than would something equivalent from a lawyer. In fact, the likelihood is that a lawyer would not do it because they would know there was [no legal merit] in it."[171] The need for judges to ensure justice is done means they cannot rely on unrepresented litigants' conception of their cases. Sir James Munby told us: "…litigants in person, particularly in family cases, think they have a lot of good points. Most of their good points are thoroughly bad points. It is a slight exaggeration, but they have great difficulty in finding the good points. You have to go on your own search to find the good points, and that takes up a lot of time."[172] Sir James also said that "there is a lot of anecdotal material" that litigants in person led to hearings in the early stages of family cases taking longer because of the need

167 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 14–15, November 2014, para. 1.17–1.34

168 The Magistrates' Association (LAS0043)

169 Experimental Statistics Research in the Family Courts, Ministry of Justice, November 2014

170 Q 258

171 Q 264

172 Q 260

to explain proceedings to the unrepresented litigant, although Sir James also said "I suspect there may be truth in the assertion that the final hearing is taking less time…" because "litigants in person…tend to dry up."[173]

101. Lord Dyson agreed with Sir James that hearing times are not a good indication of whether the litigant in person is able successfully to represent themselves:

> I am afraid, that very often litigants in person are totally overawed by the experience and they just dry up…They put in their witness statement and their case, and you say, "Now, Mr So-and-So, what do you want to add?" They just say, "Well, nothing." They just freeze, frankly. Of course, there are some litigants in person who will go on talking for ever, but if you balance the two it does not surprise me, if the evidence shows this, that overall the length of a hearing with a litigant in person is no greater than with lawyers.[174]

Lord Dyson told us, that while judges make all possible allowance for litigants in person, they could only go so far: "We still have an adversarial system…I suppose a judge could say, if the judge sees that there is something in the litigant in person's witness statement that is crying out for some elaboration, "Mr So-and-So, I see you say this in paragraph 25 of your statement. I wonder whether…"" but the judge ran the risk of losing the faith of the other party in the case if he or she was seen to do the opposing party's job for them.[175]

102. The Family Justice Council told us that: "The judicial members of the FJC have all experienced a much greater pressure upon HMCTS both in terms of the administrative and judicial staff. Unwilling litigants in person take more time and resource from the courts, both administrative and judicial, CAFCASS and other supporting organisations."[176] We note that recent years have seen reductions in both the opening times for court counters and the numbers of court staff and accept the evidence of the Civil Justice Council that this has "badly compromised" the role court staff can play in assisting litigants in person although "efforts to improve assistance to LiPs are increasingly being made in at least some areas thanks to the willingness of the staff involved."[177] **We welcome and are grateful for efforts by court staff to assist litigants in person as much as they are able while recognising the limitations placed on those efforts by reductions in numbers of staff and the opening times of court counters.**

Specific problems arising from litigants in person in the courts

Cross-examination of a complainant by an alleged abuser in the family courts

103. Section 34 of the Youth Justice and Criminal Evidence Act 1999 bars the alleged perpetrator from cross-examining the complainant in any criminal proceeding involving a

173 *Ibid*.

174 Q 258

175 Q 265

176 Family Justice Council (LAS0082)

177 Civil Justice Council (LAS0080)

sexual offence. There is no equivalent bar in the family courts where one party alleges serious domestic violence or rape, a matter which has been the subject of significant concern to the judiciary in a number of judgments. In *P v D*, a father who was serving a 17 year jail sentence for repeatedly raping his wife and who, it was alleged, had also assaulted his elder daughters leading to one taking two overdoses at the age of 13, cross-examined all three women over an extended period during a hearing to decide the outcome of his application for contact with the youngest child of the family.[178] The Family Law Bar Association (FLBA) said such a case was "not uncommon."[179] Lucy Reid, a family law solicitor who has written a guidebook for litigants in person, told us: "Neither alleged victim nor alleged perpetrator is well served by having to confront one another in court and cross examine one another or be subject to cross examination from the other. The suggestion in new [Practice Direction] 12J to the [Family Procedure Rules] para. 28 that judges or magistrates might conduct cross examination on behalf of litigants is highly concerning and impractical."[180]

104. In *Q v Q*,[181] Sir James Munby considered the position of two men, accused of raping the mothers of their children, who were seeking contact with those children. While both men sought public funding for representation, Sir James briefly considered whether the family courts had the power to prevent alleged abusers from cross-examining their victims and concluded that the position was unclear. While the family courts probably did not have the power to prevent cross-examination of the complainant by the alleged abuser, the position of the court would change if the experience of being cross-examined by the alleged perpetrator engaged, and potentially breached, the victim's right not to be subject to degrading treatment under Article 3 of the European Convention on Human Rights or the complex rights to private and family life under Article 8 as the court is obliged to prevent such breaches.[182] Sir James also noted that the issue was one "which the Children and Vulnerable Witnesses [Judicial] Working Group…will no doubt wish to consider".[183] In evidence to us Sir James observed:

> The discrepancy between the family system and the criminal system that I identified is the result of parliamentary decisions, because Parliament legislated…in relation to the criminal courts but did not legislate similarly in relation to the family courts... It is essentially a matter of policy to be determined by Parliament.[184]

105. This is an issue we have considered before. In our report *Operation of the Family Courts* in which we recommended that "the Ministry of Justice considers allowing the court to recommend that legal aid be granted to provide a lawyer to conduct the cross-examination in such cases."[185] The Government response noted that this issue was being considered by the Family Justice Review which concluded, later that year, that judges

178 *P v D,* [2014] EWHC 2355 (Fam)

179 Family Law Bar Association (LAS0069)

180 *Ibid*.

181 [2014] EWFC 31

182 Paras. 73–75

183 Para 71

184 Q 274

185 Para. 244

probably had sufficient safeguards to protect vulnerable witnesses[186] but "the government and the judiciary should actively consider how children and vulnerable witnesses may be protected when giving evidence in family proceedings."[187] Mr Vara, observing that the lack of a bar pre-dated the legal aid reforms said "Judges are well trained in these matters to ensure, where you have a situation of a defendant cross-examining somebody who is also a victim, that it is done appropriately and sensitively and, where necessary, those questions may even be asked by another party. There is the use of video conferencing or screens."[188] This contrasted with the view of Sir James who, while not wishing to comment further on the analysis in *Q v Q* detailed above, observed that analysis raised "some very obvious questions, and to some people may even suggest some answers."[189]

106. **We find the President of the Family Division's judgment that the judiciary are not necessarily able to ensure the cross-examination of victims by or on behalf of alleged abusers is appropriate and sensitive more persuasive than the Minister's contention that the judiciary have sufficient training and tools at their disposal to do justice in such cases.**

107. **The family courts make decisions which often have life-long consequences for the children involved. The courts need the best evidence possible to make the right decisions; this will not be achieved by putting vulnerable witnesses through cross-examination by their abuser. On its own this is a powerful case for ensuring such cross-examinations do not occur and consideration of the trauma experienced by the witness in such a case strengthens it enormously. The rise in litigants in person in the family courts further strengthens the case for a statutory bar. *We therefore recommend the Ministry of Justice bring forward legislation to prevent cross-examination of complainants by alleged abusers in the family courts while ensuring justice is done to all parties.***

Parties lacking capacity

108. The courts have also struggled with cases where one party lacks the mental capacity to instruct a representative but the Official Solicitor has difficulties in representing them. In *Re D (A Child)* the parents of the child were seeking to have him returned to their care following removal by the local authority on the grounds that the parents' learning difficulties meant they could not care for him. The local authority wanted the child adopted. The father worked and the family lived independently, with assistance. Their income was around £35 a month over the limit for legal aid. The Official Solicitor refused an application to act for the father unless he was indemnified against an adverse costs order. The father's solicitor, who had been acting pro bono and had spent over 100 hours on applications and appeals to the Legal Aid Agency, agreed personally to indemnify the Official Solicitor.

186 See Lady Hale in *Re W* [2010] UKSC 12.

187 Family Justice Review Report (2011) Ministry of Justice, Department for Education, and Welsh Assembly Government. para 4.151

188 Q 298

189 Q 269

109. In *IS*,[190] the Official Solicitor sought exceptional cases funding to obtain specialist immigration advice for a blind Nigerian man with learning difficulties. IS needed to regulate his immigration status, which he did not know and which may have been entirely lawful, in order to access community care as he was cognitively incapable of looking after himself. He had been surviving on small handouts from a relative and begging. The Legal Aid Agency only agreed to fund the case after it lost in the High Court.

110. **It is surprising to us that cases involving adults lacking capacity in which the Official Solicitor is involved do not appear to be differentiated from other cases by the Legal Aid Agency. Such cases, by their very nature, concern some of the most vulnerable people in our society, whose impaired understanding means they are barred by law from conducting litigation without assistance. It seems to us that access to justice for such litigants requires that such cases should receive special consideration by the Legal Aid Agency as these individuals cannot access the courts without the Official Solicitor's assistance. *We recommend the Legal Aid Agency adopt a policy that ensures the Official Solicitor is able to properly represent people without litigation capacity, given the consequences for access to justice for highly vulnerable individuals if he cannot do so.***

Legal Aid Agency refusal to pay for expert evidence

111. One area that has presented significant difficulties in cases involving litigants in person is the financing of expert reports in the family courts. The Consortium of Expert Witnesses summarised the problems as follows:

> In [private family law] cases where the parents are litigants in person, they have neither the funds nor the necessary knowledge to instruct expert clinicians. In cases where some of the parties are legally aided, which may include the appointment of a Children's Guardian, the Legal Aid Agency refuses to allow the cost of an expert instruction to be borne by the publicly funded parties alone. Since the litigant(s) in person cannot pay a share of the fee, instruction becomes impossible.[191]

In a recent case, the President of the Family Division, Sir James Munby, considered the position of the court where funding cannot be obtained for an expert report. He concluded that, as the family courts are required by statute to order expert evidence only when it is "necessary" to determine a case in the best interests of the child, if funding was refused by the Legal Aid Agency and unobtainable elsewhere, the law required that the courts bear the cost: "It is, after all, the court which, in accordance with FPR [Family Procedure Rule] 1.1, has imposed on it the duty of dealing with the case justly. And, in the final analysis, it is the court which has the duty of ensuring compliance with Articles 6 [right to a fair trial] and 8 [right to private and family life] [of the European Convention on Human Rights] in relation to the proceedings before it."[192] Sir James adjourned the case in order, amongst other reasons, for the Legal Aid Agency to think again.[193]

190 *R (Gudanaviciene) v The Lord Chancellor*, [2014] EWCA (Civ)

191 Consortium of Expert Witnesses to the Family Courts (LAS0086)

192 *Q v Q* [2014] EWFC 7

193 *Ibid*.

112. The Minister told us that:

> The Legal Aid Agency is bound by legislation and case law. It has its rules. Where people fit the criteria, funding is available…This is taxpayers' money. We have a duty to the taxpayer to ensure that that money is properly utilised according to the rules as prescribed by Parliament and case law…It cannot be right that, when you have two people who are both going to benefit in a particular case from an expert report, there is an expectation that only the legal aided party will pick up the full cost of the expert report. There has to be an element of apportionment.[194]

113. **We were concerned to hear that judges in some family law cases were struggling to access the expert evidence necessary for them to determine a case fairly due to the Legal Aid Agency approach to apportionment of expert fees when only one of the parties is legally-aided. Given that family courts are required to allow expert evidence only when it is "necessary" to decide a case in the best interests of the child we believe that, if the court says that evidence is required and the non-legally aided party is not in position to pay a contribution, the Legal Aid Agency will have to take financial responsibility in order to ensure the courts are able to try the case justly.**

Solutions to the impact of litigants in person on the courts

114. The Low Commission concluded that there was no silver bullet to mitigating the impact of litigants in person on the courts and to meeting the challenge of ensuring litigants in person are able effectively to access justice. The Commission concluded that a package of individually relatively small changes were required, and the evidence we have received entirely supports that conclusion.

The Government's litigant in person advice scheme

115. In October 2014, the Government announced a £2million package over the next two years to assist litigants in person, £414,000 in 2014–15 and between £1.4 million and £1.6 million in 2015–16.[195] The announcement stated that the programmes will be delivered in partnership with selected not-for-profit organisations and would include:

- increasing the number of personal support units in courts;
- funding community law centre clinics to give initial legal advice;
- improving online information for separating couples;
- funding a telephone helpline pilot for separating parents who are in dispute.

116. Lord Low of Dalston, Chair of the Low Commission, welcomed the Government's announcement but thought it likely to be limited in its effects:

194 Q 296

195 MoJ press notice 23 October 2014; *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014a. 1.30

> The scheme relies heavily on a more strategic use of pro bono lawyers, and building the capacity of personal support units that can support people but cannot assist them in establishing and arguing their rights or advise them on the merits of their case…The scheme would be more valuable if it could recruit and retain a specialist back-up resource.[196]

117. **We welcome the announcement by the Ministry of Justice of funding to assist litigants in person. The increase in Personal Support Units in courts will help litigants get their papers in order and supply emotional support at a testing time. The funding of law clinics to give initial advice is an issue we address in depth below in Chapter 8. Even with these facilities, there will continue to be significant pressure on the courts caused by the rise in self-represented litigants and the courts will need to develop ways of dealing with that pressure. We therefore welcome the work of the Judicial Working Group on Litigants in Person.**

One stop legal helpline and website

118. The Low Commission recommended the creation of a one-stop national helpline for all those with legal or quasi-legal problems who could not get assistance from other helplines due to lack of expertise or lack of capacity. The helpline would have a comprehensive and up to date list of providers of legal aid services for those who qualify and would be "supported by relevant websites, including Law for Life's Advicenow website, which we consider to be the premier, most comprehensive advice website, and Citizens Advice own Adviceguide website."[197] The Commission strongly recommended the Government ensure that a comprehensive approach was taken and ensure that services were not being replicated, and noted that the MoJ had reduced its long-term funding of Advicenow (which contains both information links through to other sites) to a "one-off" basis. The Commission was unclear as to the reasons for this but noted that the Government's own website (www.gov.uk) "depends for its success…on links through to sites such as this." We also note in this context, the research by Professor Roger Smith, formerly Director of JUSTICE, who in an international review of legal information helplines found they are most useful to better-educated prospective litigants.[198]

119. The Minister did not explain why the approach to funding Advicenow had been changed other than to say "We are constantly trying to update and ensure that the facilities we have available are fit for purpose. Occasionally, we take the view that there are other measures that may be used in terms of better communication. There are procedural matters here, but, believe me, our aim is to ensure that as much information as possible is put out for the public to be able to access it as easily as possible and that it is in as user-friendly a way as is possible."[199]

120. **We agree with the Low Commission that a comprehensive approach to legal information is absolutely crucial to ensuring litigants in person are able to represent**

196 Q 220

197 Low Commission Report

198 Civil Justice Council (LAS0080)

199 Q 301

themselves effectively. We note the Low Commission's conclusion that Advicenow and Adviceguide are the premier online resources and the Commission's concern that services that already exist might be replicated unless the Government took care to avoid this. ***We would like the Government to explain to us why it has changed its approach to funding Advicenow, what its future plans are for online advice and how it intends to ensure services are not replicated.***

121. ***We recommend the development of a one-stop legal helpline able to divert inquirers to other services, whether online or over the telephone, or to assist with their inquiries. In particular, the helpline should be able to divert people to legal aid providers in cases where legal aid is available. This appears to us to be a cost-effective way to improve access to justice for litigants in person as well as being a significant step towards ensuring that people eligible for legal aid are able to access it.***

Litigants in person assistance by the courts

122. The Civil Justice Council told us that the Judicial Working Group on Litigants in Person, which produced a comprehensive report in 2011 regularly followed up the conclusions of that report. The Council told us:

> good progress has been made with high quality, accessible, information and guidance, with a considerably increased focus from all quarters on changes required to meet the needs of LiPs as major users, with coordinated developments in pro bono provision and in access to Personal Support Units, with access to appeals after a refusal of permission to appeal on paper, and with debate about both the involvement of McKenzie friends (including appreciation of the possibility of different approaches in different situations) and the use of a more investigatory or inquisitorial approach in some cases where LiPs are involved.[200]

The Council said less progress had been made in accessing mediation for litigants in person, the use of IT for initial advice, "on improved court forms, the development by the professions of accessible retail of pieces of legal advice and assistance (rather than conduct of the whole case), and clarification of the position over pro bono working by in-house counsel and legal executives."

123. The Lord Chief Justice, in a speech early last year, did not rule out the introduction of a more inquisitorial process in cases where one or both litigants were self-represented but he set out a number of questions he thought needed to be answered:

> What effect would that have on the ability to give other cases their fair share of the court's time and resources? What consequences would it bring to, for instance, the efficient use of judicial time? Would an increased workload mean we would need more judges, or need to introduce a new cadre of junior judges? What effect would it have on the structure of our courts, and courts administration? What would be its cost?[201]

200 Civil Justice Council (LAS0080)

201 Lord Thomas of Cwmgiedd, 3 March 2014, Speech to "*JUSTICE*".

124. A move from the current adversarial legal system to a more inquisitorial approach presents significant challenges.[202] James Sandbach, adviser to the Low Commission, said work by the Civil Justice Council found: "the main issue about moving towards an inquisitorial system would be the civil procedure rules themselves. There would need to be very different types of civil procedures, and possibly a more general rule about flexibility within those civil procedures."[203]

125. **Moving to a more inquisitorial legal system for some types of case would be a seismic shift for our courts. While such a possibility should not be ruled out, it would have to be very carefully planned and implemented. We do not anticipate that this is likely to occur in the near future.**

McKenzie friends

126. A McKenzie friend supports a litigant in person by providing moral support, taking notes, helping with case papers and (quietly) giving advice in court. A McKenzie friend does not have the right to conduct litigation or act as an advocate but the courts may, in the interests of justice, grant rights of audience to a McKenzie friend on a case-by-case basis. The Legal Services Consumer Panel, in a review of McKenzie friends, identified four different approaches to the role:

- The 'traditional' McKenzie friend, such as a family member or friend who provides a supportive presence in the courtroom and limited non-legal assistance;
- Volunteer McKenzie friends attached to an institution/charity;
- Fee-charging McKenzie friends offering the conventional limited service understood by this role;
- Fee-charging McKenzie friends offering a wider range of services including general legal advice and speaking on behalf of clients in court, where permitted.

The Legal Services Consumer Panel identified fee-charging McKenzie friends as an "emerging market" following the removal of much of civil law from the scope of legal aid.[204]

127. We heard a number of concerns about the services provided by 'professional' McKenzie friends. Nicholas Lavender QC, Chair of the Bar Council, highlighted the lack of redress for litigants if the McKenzie friend makes a mistake: "People are now starting to make a living out of providing legal advice, legal assistance and, if the court permits, legal representation…although they are not regulated; you cannot complain to the Legal Ombudsman if something goes wrong, and they are not insured."[205] Andrew Caplan,

202 Qq 270–271

203 Q 221

204 Legal Services Consumer Panel, *Fee Charging McKenzie Friends*, (April 2014)

205 Q 47

President of the Law Society, agreed and expressed concerns about the quality of the advice given by McKenzie friends: "As solicitors, we have about six years' training…[McKenzie friends] have no training..."[206] Mr Lavender also told us that the absence of a regulator meant there was no protection for litigants against "McKenzie friends with an agenda, particularly people who tend to represent one side in certain types of litigation, and who may in certain cases be more interested in pursuing their agenda than doing what is right for their "client.""[207] Steve Brookner, of the Legal Services Consumer Panel acknowledged that this was a concern, and this type of McKenzie friend could damage the litigant's case "consciously, in terms of exploiting litigants in person to pursue a political agenda, or…subconsciously by antagonising the court."[208]

128. The President of the Family Division told us that "in the areas where there is no representation, some kind of support or input is better than nothing. In my experience most McKenzie friends add value. They tend to be articulate and to have understood what the case is. Many of them have a surprisingly good grasp of the law, not just book law but how the courts work."[209] The Master of the Rolls agreed that "in principle, McKenzie friends are a good thing, provided that they are reasonable McKenzie friends." Lord Dyson emphasised, however, that further safeguards were required:

> Paid professional McKenzie friends do not owe a duty to the court, and our system depends so much on the advocates having a professional duty not to mislead the court…There is no regulatory body at the moment to regulate them. There is quite a raft of issues which, if we are to go down that route, would have to be addressed.

Sir James also emphasised the use of safeguards, such as hearing directly from the litigant, even where the McKenzie friend has been given permission to address the court.[210] Steve Brookner, of the Legal Services Consumer Panel, which supports the greater use of McKenzie friends, emphasised that judges had the power to exclude disruptive McKenzie friends.[211] The Judicial Working Group on Litigants in Person is considering the role and future of McKenzie friends.[212]

129. James O'Connell of the Institute of Paralegals put the position starkly:

> McKenzie friends have many pitfalls, but what is the alternative? "Go away. The courts are not for you." Speaking personally, I would rather take my chance with a flawed McKenzie friend advocate than go it alone. Indeed, I probably would not go it alone at all…McKenzie friends are not competition to solicitors in the traditional sense. They are the desperate last chance "no one else to turn to" brigade…People go

206 Q 48

207 Q 47

208 Q 242

209 Q 272

210 *Ibid*.

211 Q 242

212 Q 272

> to them when they cannot find a solicitor. They are not at the top of anyone's speed-dial list.[213]

Elizabeth Davies, Chair of the Legal Services Consumer Panel, said McKenzie friends were an example of litigants in person moulding the legal services market around themselves and noted: "Research by the Legal Services Board says that just 21% of people with a problem who seek advice now get it from a regulated lawyer."

130. The Legal Services Consumer Panel recommended that McKenzie friends become self-regulating, echoing the Civil Justice Council's view that there should be a code of conduct for McKenzie friends.[214] Steve Brooker told us this was to ensure this form of court assistance remained affordable:

> The majority of McKenzie friends are part-time, and they might earn in the high hundreds or low thousands of pounds a year. If you require those McKenzie friends to have indemnity insurance, to have qualifications and to fall under the jurisdiction of the legal ombudsman and the rest of the panoply that comes with regulation, you will quickly find that their costs soon exceed their annual income, and you would drive them away from the market.[215]

We heard that a group of McKenzie friends had responded to the Legal Services Consumer Panel Report by meeting to develop a code of practice and requirements such as some legal qualifications or experience and indemnity insurance for all members.[216] The Minister told us that McKenzie friends are "an issue we are looking at and monitoring" but confirmed the Government had "no plans, at present, for the regulation of McKenzie friends."[217]

131. The very wide range of roles undertaken by McKenzie friends presents challenges for any attempt at regulation. Regulation of family members or friends providing emotional support and assistance to litigants would be absurd. Regulation of McKenzie friends holding themselves out as quasi-legal advisors would protect the litigants they are advising but could be viewed as giving them an inappropriate level of authority. **We are concerned that encouraging the use of McKenzie friends may in some circumstances amount to a counsel of despair: individuals who cannot afford properly regulated legal advice and feel unable to adequately put their own case could find themselves disadvantaged if relying inappropriately on people without legal qualifications. We are also concerned by the increase in the number of McKenzie friends in the courts. *We recommend the Government consider and consult on whether there should be formal regulation of McKenzie friends who could be classed as engaging in professional activity, whether fee-charging or not.***

213 Q 243

214 Q 222

215 Q 240

216 Q 239

217 Q 340

Unbundling

132. Unbundled services are where a lawyer provides one or more discrete pieces of legal advice, for example research or advising on merits or a particular point of law or drafting documents and negotiating with the other side, so informing the litigant and, in theory, better equipping them to conduct litigation on their own. The motivation behind unbundling is to keep the cost of litigation down while allowing self-represented litigants to access legal assistance for specific parts of litigation. While unbundling is attractive in theory in practice there are a number of difficulties. The Legal Services Consumer Panel summed up the risks of providing unbundled services as follows:

> Lawyers may be fearful of breaching their code of conduct or being made the scapegoat if something goes wrong. There is a balance to strike between removing regulatory barriers that prevent lawyers from offering such services while maintaining necessary consumer protections. The Law Society has issued a practice guidance note identifying a series of risks, for example around allegations of professional negligence arising from insufficient knowledge of the client's situation; allegations of professional misconduct in relation to client care and duties to the court and third parties; unwittingly creating a full retainer and the consequent liabilities; compliance with professional indemnity insurance terms; and dealing with complaints. While these risks need to be addressed, the Panel is encouraged that the Solicitors Regulation Authority has said it has no fundamental objections to unbundling.[218]

133. Steve Brooker, of the Legal Services Consumer Panel, told us that very little was known about how unbundling works in practice but "one in five of all legal transactions currently involves at least some unbundling, mostly in probate, immigration and employment matters." While unbundling was clearly more suited to "probate" rather than "complex child custody disputes" Mr Brooker was of the view that proscribing specific types of legal work from being offered as unbundled services was not the way to protect solicitors and clients and the current approach, in which "solicitors have to consider whether the client is capable of doing legal work themselves before they agree to such arrangements" was preferable for its flexibility. Mr Brooker told us that the Legal Services Board and Legal Services Consumer Panel were planning to carry out research in this area.[219]

134. **The use of unbundling to provide affordable legal services is attractive but carries a number of risks for both lawyers and clients. We look forward to the results of the Legal Services Consumer Panel research in this area.**

Californian model

135. The President of the Family Division drew our attention to the process adopted by the Californian courts to deal with litigants in person:

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[218] Legal Services Consumer Panel (LAS0012)

219 Q 237

> the state runs a system which applies, as I understand it, in both family cases and civil cases, such as debt and landlord and tenant, where public money is focused not on representing individual litigants but on providing support and advice to litigants as a class. The model is very interesting. Each Californian courthouse has facilities on site where litigants in person are assisted to fill in the forms correctly, so that when they go to the counter the form is quickly filled in. They run training seminars so that you can go along to an LIP class and there will be somebody there to explain to you how the system works.[220]

Sir James told us that "they found that the cost of that to the public purse is much less than the cost of providing lawyers to individual litigants" and that the Californian judiciary has found the system works well.[221]

136. **We were interested by the evidence from the President of the Family Division on the approach adopted by the Californian courts to assist litigants in person. We received this evidence relatively late in our inquiry so have been unable to investigate the system in any detail but we believe it warrants further consideration as an additional way to improve access to justice for some litigants.**

Overall conclusion on litigants in person

137. The Master of the Rolls, Lord Dyson, told us "It is impossible to prove but it would be extraordinary, frankly, if there were not some cases that are decided adversely to a litigant in person which would have been decided the other way had that litigant in person been represented by a competent lawyer. It is inevitable." Lord Dyson described a case in which a litigant in person lost a case he should have won because of a technical point of law.[222] The President of the Family Division noted that, while a judge may spot a legal point, an issue of fact which may be determinative of a case was more difficult simply because if the litigant has failed to appreciate its significance it is unlikely to be mentioned in court.[223] Steve Matthews of the Magistrates' Association observed that some people would have been "put off making what may be a legitimate application because of the fact that they cannot get legal representation, have been unable to get advice and are put off by the forms and the process and so on."[224] All three witnesses said the numbers of litigants affected by the scenarios they outlined was unknowable.

138. **The problems presented by litigants in person are complex. We reiterate that there is no "silver bullet" which will solve all the issues that arise, not least because litigants in person themselves are a diverse group with widely differing needs.** ***Fundamentally, the courts need more funding to cope with the numbers of self-represented litigants appearing before them and this is an area which should attract some of the underspend from the civil legal aid budget. Only with assistance will the courts be able to ensure access to***

220 Q 266

221 *Ibid*.

222 Q 268

223 Q 269

224 Q 268

justice. It is imperative that litigants in person are given every possible assistance to make their cases clearly and effectively.

7 Mediation

The Government's objective

139. The Ministry of Justice told us in its submission that "The continued availability of legal aid for mediation was a key mitigating factor in the decision to remove legal aid from private family law proceedings."[225] Mediation was also seen by the MoJ as key to another of the LASPO objectives:

> One of the objectives of the LASPO reforms was that in private family law cases …couples should be encouraged wherever possible to resolve their disagreements as early as possible, and without recourse to court proceedings and unnecessary legal expense.[226]

Consequently, the MoJ estimated removing family law from scope would lead to an additional 9,000 Mediation Information and Assessment Meetings (MIAMs) each year.[227] The opposite happened. Despite the continued funding of mediation the number of such meetings declined by an estimated 17,246 following the introduction of LASPO, a fall of 56 per cent.[228] The NAO estimates that the MoJ underspend on mediation in 2013–14 was around £20 million.[229]

140. In its report, *Implementing reforms to civil legal aid*, the National Audit Office concluded that "The Ministry currently has a limited understanding of what influences people to go to court, but it is seeking to develop this."[230] In evidence to the Public Accounts Committee, on the National Audit Office's conclusions, Dame Ursula Brennan, Permanent Secretary at the Ministry of Justice, accepted that the assertion in the impact assessment for LASPO, that the availability of publicly-funded mediation would deter people from going to court was a claim for which the Ministry of Justice "didn't have evidence".[231] Catherine Lee, Director General of the Law and Access to Justice Group at the Ministry of Justice, said the expected increase in mediations was based on:

> …the fact that when we first introduced compulsory mediation for legal aided people back in '97, there had been just 400 mediations at the time. That went rocketing up, by the time we were writing the legal aid review consultation, to the thousands; I think it was 13,000…and partly the assumption that if you are taking away legal aid for people going to court but providing it for people to go to mediation, they would take up that option.[232]

225 Ministry of Justice (LAS0073)

226 *Ibid*.

227 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 14–15, November 2014, p7.

228 *Ibid*, p4.

229 *Ibid,* p13.

230 *Ibid*. para. 2.5

231 Public Accounts Committee, Oral evidence: *Implementing reforms to civil legal aid*, HC 808, Thursday 4 December 2014, Q56

232 *Ibid*, Qq 59–60

When we questioned Mr Vara about Dame Ursula and Ms Lee's evidence he told us:

> we had to take a lot of decisions, or the predecessor to the present Lord Chancellor had to take decisions, along with his then team. They had clearly expected that there would be a greater uptake on mediation. What they had not anticipated was that the requirement for behavioural change and the encouragement required for that would be more than was around at the time.[233]

Why did the number of mediations fall following LASPO?

The end of compulsory mediation assessment

141. Prior to the introduction of LASPO on 1 April 2013 all litigants in receipt of legal aid in private family law proceedings had to attend a MIAM as a condition of receiving public funding.[234] With the removal of family law from the scope of legal aid this channel towards mediation ceased. The Children and Families Act 2014 requires anyone who wishes to issue private law proceedings in the family court to attend a MIAM, but this only came into effect on 1 April 2014.[235] Jane Robey, of National Family Mediation, told us the "vacuum of a year" in which no one was required to go through mediation assessment had contributed significantly to the fall in MIAMs:

> There was the pre application protocol, which said that people should come or that judges should advise people to come to a MIAM, but it was a protocol…judges and courts were not under any obligation to make any kind of referral, and that is one of the fundamental reasons that the collapse in mediation numbers has taken place.[236]

The role of solicitors in referring clients to mediation

142. We were also told that the fall in MIAMs was caused by potential family law litigants being unable to access sufficient information about mediation. Sir James Munby, President of the Family Division, told us that "there is a desperate lack of information available to those coming into the system" and that this, at least in part, was likely to be because "one important route to mediation, namely encouragement from solicitors, [has] disappeared."[237] Dave Emmerson, of Resolution, told us that when legal aid was available for family proceedings "lawyers…did an awful lot of selling of out-of-court solutions and were better able to explain how mediation works, which is a very difficult concept. With that funding not available, then the publicity around mediation just isn't there."[238] The Family Justice Council noted that, although legal aid is still available for mediation, there is now "almost no legal aid lawyer involvement in legally aided mediation processes. Of 82,432 family claims made in England and Wales between April and October 2013, just 20

233 Q 323

234 Q 97

235 Section 10(1). Rule 3.8 of the Family Procedure Rules sets out exemptions to the requirement to attend a MIAM prior to making an application to the court.

236 Q 97

237 Q 286

238 Q 96

included help with mediation claims. By contrast, in the preceding 12 months lawyers made 62,390 'funding code' referrals to publicly funded mediation."[239] National Family Mediation told us that solicitors were not telling people legal aid was available for mediation because it was "not in their interests" for them to do so.[240] Resolution told us that:

> The LAA's approach to matter start allocation fails to promote Help with Mediation. Although mediation starts are not limited for mediator providers, Help with Mediation matter starts are included within allocations of limited schedules of Legal Help matter starts, which legal aid providers report having to ration…there is no guarantee of increased matter starts for doing Help with Mediation.[241]

143. The Ministry of Justice's response to its consultation on the legal aid reform proposals noted that a "key issue raised" by contributors to the consultation was that there was "the potential for a decline in mediation take-up due to the loss of the (legal aid funded) referral system through solicitors."[242]

Poor quality public information on mediation and the continuing availability of legal aid

144. Sir James Munby echoed other witnesses when he told us that the problem was not the availability of information about mediation but its accessibility:

> The trouble is that without a public education solution somewhere on the web where you can get easy access to information of a trustworthy and impartial sort, the first time that many people bump up against mediation is when they go into the court office and get the 20-page form that spends 12 pages asking them incomprehensible questions about MIAMs… One of the problems is that we have too much material. Every agency in the system has stuff on its website about mediation and stuff about LIPs. There is no coherent strategy. There is no obvious port of call.[243]

While difficulties in accessing information on mediation were not a consequence of LASPO, they exacerbated the impact of removing solicitors from the process following the changes in scope to legal aid. In its response to its consultation on the proposed legal aid reforms, the Ministry of Justice said:

> We are working with providers of mediation services on plans to increase awareness and use of mediation and to help people to better understand the options available to them. Information about mediation is currently available on the MoJ website and other online sources.[244]

239 Family Justice Council (LAS0082)

240 National Family Mediation (LAS0016)

241 Resolution (LAS0037)

242 Reform of Legal Aid in England and Wales, Government Response, June 2011, Para. 55

243 Q 286

244 Reform of Legal Aid in England and Wales, Government Response, June 2011, Para. 73

145. It is unclear how much work was done on providing easy to access, reliable information on mediation prior to the introduction of LASPO. The Family Mediation Taskforce, however, reporting in June 2014, clearly considered the publicity around mediation inadequate as it recommended that the "MoJ should undertake a sustained low level campaign to increase awareness" and welcomed "*the consideration* currently being given by MoJ to the creation of a single authoritative, lively and interactive web presence and help line (our emphasis)."[245]

146. We heard that the public information on the continued availability of legal aid for mediation was poor. Mrs Robey told us:

> If you looked at the MOJ website, immediately after LASPO it said there was no legal aid available…Now it has a basic calculator. Basically, you are eligible for legal aid if you are on some passportable benefits, but it is more complicated than that. You could be eligible for legal aid if you take into account all sorts of other factors. So they need to provide much better information rather than this bald, "You're either in or you're out."[246]

Mrs Robey's evidence was corroborated by evidence received by the National Audit Office's to the effect that "the Ministry's promotion of the fact that mediation remained in scope for civil legal aid was inadequate."[247] This reflects criticism from witnesses of the poor provision of information on eligibility under the legal aid scheme more generally (see paragraphs 13 to 19).

The Ministry of Justice's response to the fall in mediation

147. The Ministry of Justice responded swiftly to the fall in mediations. A Family Mediation Taskforce led by Sir David Norgrove was set up early in 2014 and reported in June 2014. The Taskforce recommended a range of measures.[248] Those taken up by the MoJ include:

- Funding 'one single mediation session for everyone', if one of the parties is already legally aided. (At present only the legally aided party can have the session for free, meaning there is a cost for the other member of the couple, which can deter them from taking part)
- Setting up an advisory group of experts to improve practice and make sure mediation is focussed on the best outcomes for any children involved
- Reviewing future Legal Aid Agency (LAA) contracts with mediation providers to improve service
- Exploring options for reforming the management of the mediation sector

245 Report of the Family Mediation Taskforce, June 2014, Ministry of Justice, p3.

246 Q 100

247 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 2014–15, November 2014 para 2.9

248 Report of the Family Mediation Taskforce, June 2014, Ministry of Justice, pp3–4.

- Expanding the ongoing campaign to increase awareness of mediation and legal help for mediation, and the availability of legal aid for it.[249]

148. The figures for mediation following the introduction of compulsory MIAMs in April 2014 suggest that the provision is having a positive effect.[250] The impact of the adoption of recommendations by the Taskforce in August 2014 will only begin to become apparent in the next set of legal aid statistics but Sir James Munby was cautiously positive when he told us: "The figures [on mediation] are getting better, and I suspect that over the next year or two we will get back to where we were three years ago."[251]

149. **The fall in the number of mediations for separating couples following the introduction of LASPO was a consequence of the end of compulsory mediation assessment, the removal of solicitors from the process and the inadequate attention given by the MoJ to providing clear, reliable and easy to access advice on mediation and on the continuing availability of legal aid.**

150. **It is unclear to us why the requirement for attendance at a Mediation Information and Assessment Meeting before a litigant can issue court proceedings was not included in the 2012 Act. This indicates an unfortunate lack of 'joined-up' thinking in the preparation of the new legal aid regime.**

151. **In contrast to its sluggish response to the shortfall in the number of exceptional cases funding grants, the Ministry of Justice responded quickly to the decline in the number of mediations following the introduction of the legal aid changes by setting up the Family Mediation Taskforce under Sir David Norgrove and adopting many, although not all, of its recommendations.**

The impact on providers of mediation services

152. The Family Justice Council (FJC) told us that the fall in the number of MIAMs had caused "significant pressure on the mediation industry resulting in the closure of many services." The FJC also said:

> Many more solicitor based mediation services are turning their practices towards fixed fee legal services. The not for profit sector providing mediation services is already shrinking and given both the reduction in the numbers taking up mediation and cuts in funding as a result of other government policies, will soon disappear. Once the supplier base has been lost, it is difficult to see how it could be rebuilt quickly.[252]

National Family Mediation told us that the fall in mediations had resulted in five of its services going into administration and "many more…teetering on the brink of collapse."[253]

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249 Press Release, Ministry of Justice, 20 August 2014.

250 Legal Aid Statistics in England and Wales, Legal Aid Agency, Apr to Jun 2014, Figure 7.1; Legal Aid Statistics in England and Wales, Legal Aid Agency, Jul-Sept 2014, Figure 7.1

251 Q 286

252 Family Justice Council (LAS0082)

253 National Family Mediation (LAS0016)

153. The Director of the Legal Aid Agency, Matthew Coats, however, was confident that there were sufficient mediation providers to satisfy the anticipated increased demand:

> We have got about 270 mediation providers providing services in about 1,700 locations. Given the issues that we have seen, we have decided to extend the contracts for a period and, indeed, to seek new providers to encourage access. We have received applications from around 65 more organisations that want to provide services. We are assessing that at the moment, to see whether they will be added to the network.[254]

154. **The fall in the number of mediations in the family courts which took place after the coming into effect of LASPO will inevitably have had a significant impact on providers of mediation services. We were encouraged to hear that the Legal Aid Agency has extended the contracts for suppliers and is seeking new providers in anticipation of an increase in mediations.** ***We recommend that the geographical distribution of mediation providers is kept under review to ensure all those who need to access mediation are able to do so.***

Encouraging behavioural and cultural change

155. One of the justifications the Minister gave us for making the legal aid reforms without significant evidence of the legal aid system then in place was the Ministry of Justice felt removing legal aid would force potential litigants to find other more appropriate ways of resolving their disputes. "There was…the feeling that a large part of those savings would enable the ultimate end users of the legal services—the public—to be better served by not going through the legal route but by other routes, such as mediation and the like".[255] The fall in mediations, together with the rise in the number of litigants in person, suggests however that this sanguine view was misplaced.

156. The MoJ rejected some of the Family Mediation Taskforce's recommendations, including that the MoJ pay for all MIAMs, whether parties are legally-aided or not, for a period of twelve months.[256] Jane Robey, Director of National Family Mediation, was critical of the MoJ for rejecting this recommendation, noting that the cut in financial eligibility rates for legal aid meant the number of couples receiving a free session was limited:

> If you were to provide for a limited period, to anybody applying to court, a Mediation Information and Assessment Meeting for free, we, the mediation providers, would be able to convert people or tell people what mediation is and start to drive the culture change that makes people think about resolving their disputes without going to litigation.[257]

157. In evidence to us, the Minister agreed that such a culture change was crucial to the Government objective of encouraging couples to resolve their differences out of court: "The difficulty we have with mediation is that it requires a behavioural change. We have all

254 Q 327

255 Q 292

256 Report of the Family Mediation Taskforce, June 2014, Ministry of Justice, p3

257 Q 98

heard people saying, "I'll see you in court." I am not aware of anyone ever having heard, "I'll see you at mediation.""[258]

158. **The Ministry of Justice hoped and assumed that without legal aid more people would resolve their difficulties outside court, as a large majority of couples already do. The fall in the number of mediations as well as the rise in the number of litigants in person shows that the Ministry of Justice was wrong. We recognise that the court process is not, in many cases, an effective means of reducing conflict between parties and presumably to reach and carry out agreement. We strongly support the use of mediation for separating couples where appropriate. We agree that a behavioural and cultural change which sees the public resort to mediation in the first instance is desirable. We would like to see the number of mediations exceed the figures achieved prior to the unintended consequences of the legal aid changes.** ***We recommend the Ministry of Justice adopt the recommendation by the Family Mediation Taskforce that the Government fund all Mediation and Information Assessments Meetings for a year, to encourage behavioural change. The cost of this approach can be met from the money saved by the initial shortfall in the number of mediations.***

258 Q 306

8 Value for money

Early intervention: "a fence at the top of the cliff not an ambulance at the bottom"

159. The Ministry of Justice told us one of its objectives in introducing the legal aid reforms was to focus money on the most serious cases.[259] Our witnesses were almost unanimous in telling us, however, that early intervention is considerably cheaper than allowing legal aid to kick in only when an individual faces a threat to life, liberty, physical safety or homelessness. A small sample of the evidence we received on this issue is as follows. John Gallagher, of Shelter, said "the restriction on scope with LASPO means that people now cannot get legal advice on a range of landlord and tenant and housing issues, such as tenancy deposit schemes, rent increases, joint tenancies, relationship breakdown…It is that preventative element that has now gone."[260] On debt matters, Paula Twigg of the Mary Ward Legal Centre said: "There are issues that, if you do not nip them in the bud at the early stage, will go all the way through the court system, and so…you are looking at things like bankruptcy, or…with debt, where a charge is being applied to a property, an order for sale is in scope but the charging order element is not in scope."[261] Dave Emmerson, of Resolution, said a small amount of initial legal advice in which litigants could be given "an analysis of the problem…detailed advice…on how the law particularly applies to that person's case, information about how they could take litigation themselves [and] out-of-court solutions such as mediation or collaborative law" would be particularly valuable in achieving access to justice for vulnerable individuals.[262] Susan Jacklin QC, of the Family Law Bar Association agreed that early advice was the most cost-effective when considered in the round.[263] Julie Bishop, of the Law Centres Network said that "the current system allows problems to escalate…you are not getting in early as you were able to do previously."[264]

160. In its final report the Low Commission concluded that focusing on the seriousness of the claimant's position "creates a perverse incentive to wait until things reach a crisis point. If the government wishes to see individuals resolve their problems outside the formal justice system, removing the availability of early advice to help people resolve their problems before they become more intractable does not make sense." The Commission added: "If individuals are only able to access support on crisis issues, and advisers are not funded to address clusters of associated problems or the fundamental cause of the problem (such as unemployment, not receiving the correct benefit, or resolving underlying financial problems), then the individual will keep returning to crisis point as the problem will only be temporarily masked, not solved."[265] The Low Commission noted that a survey

259 Ministry of Justice (LAS0073)

260 Q 135

261 Q 190

262 Q 71

263 Q 89

264 Q 2

265 Low Commission Report

conducted of attitudes towards civil justice by UCL, *Paths to Justice*, found that two out of three people advised that nothing could be done about their case did not seek to pursue the matter through the courts saving court time and the associated costs to public authorities.[266]

161. An issue closely related to early intervention is the complexity and cost of cases where some parts remain eligible for legal aid and others are outside the scheme. We heard that this was a particular problem for housing matters where the landlord had brought possession proceedings for non-payment of rent, for which legal aid is available, but the primary reason for non-payment of rent is a problem with the payment of housing benefit, which is not eligible for legal aid. Connor Johnston, a barrister at Garden Court Chambers, said in such cases he usually asked the judge for an adjournment for the tenant to sort out the housing benefit claim:

> Judges understand the situation and they are generally amenable to adjourning at least once. The client then goes off for several weeks and they try and sort out this problem. They can't get an appointment at their local Citizens Advice Bureau because of capacity; they can't get help from their solicitor because legal aid is no longer available. So we come back to court and I am in the unpalatable situation of having to explain to the judge that we are no further on.[267]

The upshot of such cases is usually a possession order, often with the knock-on costs to the local authority of having to house someone who is now homeless.[268] Sara Stephens, of the Housing Law Practitioners Association, said that lawyers on the Lambeth county court duty scheme found around half of all housing cases were being adjourned for this reason.[269] Other areas in which the complexity of the scope changes on eligibility can lead to escalated costs are debt cases as noted by Paula Twigg (see paragraph 159 above).

162. The Senior President of Tribunals, Lord Justice Sullivan, told us legal advice, rather than legal representation, was of the greatest value to cases heard in tribunals: "If you can advise people as to the merits of their claim so that they are discouraged from putting in duff claims and encouraged to put in good ones in a sensible way, you can probably leave it in the tribunals world to the expert tribunal to sort it out."[270]

163. Lord Low told us that it "it makes more sense to put the fence at the top of the cliff than to call the expensive ambulance when the person has fallen to the bottom", [271] an analogy we find compelling. The Low Commission recommended a "sense check" be conducted of the cost-benefit of the changes to scope to ensure that each aspect of the reforms was saving money.

266 *Ibid*.

267 Q 122

268 *Ibid*.

269 Q 138

270 Q 246

271 Q 209

Costs-shifting onto public funds and individuals

164. The cost of delaying intervention in cases is not only a direct cost to the Ministry of Justice. We noted above evidence from Connor Johnston on the increased costs to public authorities arising from homelessness cases. Sarah Campbell of Bail for Immigration Detainees told us that problems in accessing advice meant that people:

> are being held in detention as a result of that. If they could access legal aid, two things could happen. One is that if they access competent legal representation and they did not have merits to their case, legal representative could advise them of that. If they did have merits to their case it could be pursued, but neither of those things can happen for very many people.[272]

The cost of detaining people because they cannot access advice to resolve their cases is an additional cost to the state as well as constituting a human cost to the individuals concerned. Denise McDowell, of the Greater Manchester Immigration Unit, said: "We do not give counselling, but…we are often trying to maintain people's mental health. People are in a situation which is unbearable; they are neither moving forward nor being removed…"[273] The potential for a negative impact on health and well-being in cases where the litigant finds it difficult to resolve their case is not confined to immigration matters. We noted above evidence that people under benefit sanctions may suffer ill-health as a result of limited access to food and other necessities while the stress of trying to resolve problems around contact with children in the aftermath of an acrimonious break-up is likely to be considerable. The 2010 English and Welsh Civil and Social Justice Panel Survey found that 50% of respondents who were eligible for legal aid reported that their civil legal problem had a negative effect on their health and wellbeing.[274]

165. Prior to the legal aid reforms, we recommended the Ministry of Justice seek to quantify the level of additional costs to the public purse the legal aid changes might cause.[275] The Ministry did not do so despite research carried out by Dr Graham Cookson of King's College, London on behalf of the Law Society, who concluded that the knock-on costs to the Government of all the changes could potentially undermine the financial savings achieved by around £139million.[276] Following the reforms, the National Audit Office concluded that the level of unquantified knock-on costs risked undermining the level of financial savings achieved by the reforms.[277]

166. **While it is clearly right that legal aid be available for people facing threats to life, liberty, personal safety or their home, our evidence shows that the legal aid changes focused disproportionately on the crisis point of some cases and failed to appreciate the costs saving inherent in resolving disputes before they arrive at court.**

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272 Q 170

273 Q 175

274 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 14–15, November 2014, para 1.34

275 Para 136, HC (Session 2010–11) 681–I

276 *Unintended Consequences: the cost of the Government's Legal Aid Reforms*, A Report for The Law Society of England & Wales, Dr Graham Cookson, November 2011, p6.

277 *Implementing reforms to civil legal aid*, NAO, HC 784, Session 14–15, November 2014, para 1.34

167. **We note in particular the frustration experienced by housing and debt advisors when clients stand in danger of losing their homes because of an inability to access advice earlier due to the scope changes.**

168. ***The Ministry of Justice has avoided quantifying the level of knock-on costs arising from the reforms. Without this information the Ministry of Justice is unable to say whether it has achieved its objective of significant financial savings to the taxpayer. We recommend that the Ministry of Justice conduct a post-hoc cost-benefit analysis of the legal aid reforms.***

Preventable demand

169. We have long been concerned about poor decision-making at Government Departments, particularly the Department for Work and Pensions and the Home Office. The Government has a duty to adjudicate fairly in matters between the state and an individual. The consequences of a failure to achieve justice for the individual involved are at best distressing and at worse can lead to destitution or deportation to a country in which that person is in danger. We are particularly alive to the fact that poor decision-making by other Government Departments leads to increased costs for the Ministry of Justice through increased use of HM Courts and Tribunals Service and grants of legal aid.

170. In 2011, following our inquiry into the Government's proposed reform of legal aid, we recommended that a form of the 'polluter pays' principle be developed" with the DWP (and other public authorities whose decisions impact upon the courts and tribunals) required to pay a surcharge in relation to the number of cases in which their decision-making is shown to have been at fault."[278] The Government rejected the recommendation, saying a "strict application of the "polluter pays" principle might call into question the effective cost protection that the legal aid fund currently receives when funding litigation. A significant proportion of cases funded by the [Legal Services Commission] are not successful, and any requirement for the [Legal Services Commission] to routinely meet the costs of other parties in unsuccessful cases would be a significant drain on the fund."[279] In evidence the then Parliamentary Under-Secretary of State at the Ministry of Justice, Jonathan Djanogly MP, commented that our recommended approach seemed to be a matter of "robbing Peter to pay Paul."[280]

171. Our recommendation was picked up by the Low Commission which, however, preferred an approach involving a system of capped summary costs orders against a Government Department where the claimant has been represented by a qualified lawyer—£100 for a short hearing under an hour up to a maximum of £500 for a hearing lasting over three hours. This would not only incentivise the Department concerned but recompense representatives in areas of law which have gone out of scope, encouraging them to assist meritorious claimants. The Commission suggested the system should cover all "tribunals

278 Para 60, HC (Session 2010–11) 681–I

279 Government Response to Justice Committee's Third Report of Session 2010–11: The Government's proposed reform of legal aid, June 2011, Cm 8111

280 *Ibid*, para 59.

concerning public authorities, which in practice will mainly involve the DWP, the Home Office and the UK Border Agency."[281]

172. We were interested to hear the evidence from Lord Low on a pilot carried out in Nottinghamshire in which advice agencies and Nottingham City Council's Housing and Council Tax Benefits service worked together to identify and implement changes to improve service delivery. Lord Low said the idea was to look at:

> clients in the round rather than in silos, with the aim of reducing failure demand, or systemic and repeat problems. It looks not just at the presenting problems but at the background issues of poverty, unemployment, homelessness, mental ill health, drug and alcohol addiction and so on. As I say, it puts a premium on early intervention, getting decisions right first time and the savings to be made on the processing costs of getting it wrong.[282]

The results of the pilot were striking: the time taken to process cases fell in the advice service from 142.2 days to 30.8 days, and in the benefits services from 56.3 days to 16.3 days.[283] In addition, none of the decisions involved in the pilot were appealed.

173. ***We reiterate the recommendation from our Report on the Government's proposed reform of legal aid: that Government departments should be penalised for poor decision-making that leads to increased costs for the courts system.***

281 Low Commission Report

282 Q 216

283 *Ibid.*

9 The operation of the Legal Aid Agency

174. The Legal Aid Agency was set up under LASPO as an executive agency, following the repeated qualifying of the accounts of the Legal Services Commission, an arms-length body. The Director of the Legal Aid Agency told us that: "The accounts of the predecessor organisation were qualified for reasons of accuracy of payment. We have made sure, through proper stewardship procedures and checking the details, that the error rate is now down to 0.7%. There is an obligation for us to keep it there."[284]

175. We heard that the Legal Aid Agency's approach to means-testing is often overly bureaucratic. Andrew Caplan, President of the Law Society, told us providers faced perpetual further requests for information: "A couple of weeks ago, somebody was asked to explain a pound that had appeared in their bank account. It had got in there because their mother had tried to stop them being overdrawn and suffering bank charges. The request came back, "Can you explain the mysterious pound that has appeared?""[285] This made it significantly harder for people to pass through the means test as, even where they are in fact eligible, they may struggle to provide the evidence required. Shelter also had experience of a bureaucratic approach to means testing and :

> …the additional demands which the LAA has made of applicants whose means assessments clearly demonstrate their eligibility. Examples include cases in which adult children living in the household are themselves required to complete full means assessments, and cases concerning destitute clients in which benefactors who have supported the client in the past have been regarded as a possible source of funding for litigation. Questions are often raised about comparatively modest expenditure disclosed on a bank statement. A failure to respond to such enquiries (which is especially understandable when a household has become homeless or is threatened with homelessness) may lead to the client's certificate being embargoed at a crucial time in the proceedings, whereupon the provider is unable to do any more work under legal aid until the embargo is lifted.[286]

Shelter told us that "these demands are often rescinded following complaints" but the fact they are made adds to the work involved in administering a legal aid contract and "they… risk fuelling a culture of distrust which prevents providers carrying out essential legal work on the client's behalf and puts their case at risk."[287]

176. Sir James Munby has also expressed concern that the Legal Aid Agency may be taking an overly-bureaucratic approach. In *Re C (A Child) (No 2)* [2014] EWFC 44, he noted that a change in the financial circumstances of the applicant for exceptional cases funding saw the Legal Aid Agency require him to submit a full further application during the case and at a point which would lead to further delay as well as making the hearing date void. This was a purely procedural issue and the Legal Aid Agency had at no time made any

[284] Q 319

[285] Q 28

[286] Shelter (LAS0066)

[287] *Ibid*.

assessment of the merits of the applicant's case or the urgency of the case. The Civil Justice Council observed "It is understood that diligence is required with public money, but processes on establishing means and contract monitoring risk those needing emergency aid e.g. housing repossession may not be helped in time."[288]

177. Mr Coats told us that the Legal Aid Agency has sought to respond to the concerns of providers. It has changed its practices in some areas, for example, now only asking for one month's worth of bank statements not three; reducing the numbers of prior authority that need to be sent to the Agency before approval; and paying providers in a timely fashion. Mr Coats said:

> we do not want to make it more difficult to get the ability to have legal aid, so we have got an innovations group with providers, a controls optimisation group with representative organisations, and regular dialogue with both providers and their umbrella organisations about how we can do that. Where we can introduce changes, we do.[289]

178. **The reduction in the payment error rate which has been achieved by the Legal Aid Agency is highly commendable but we do not, realistically, think it would be imperilled by a policy decision not to investigate the origin of tiny sums of money. The Legal Aid Agency's duty is to administer public money responsibly, not to waste its resources on irrelevant or *de minimis* inquiries. We are concerned at the various examples we have seen of the Legal Aid Agency failing to give sufficient weight to its vital role in ensuring access to justice.**

[288] Civil Justice Council (LAS0080)

[289] Q 319

10 Overall conclusions

179. **We conclude that the faulty implementation of the legal aid changes contained in Part 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 has harmed access to justice for some litigants.**

180. **The underspend in the civil legal aid budget should have rung alarm bells in the Ministry of Justice. The considerable shortfall in debt advice and exceptional cases funding grants should have received urgent investigation. The Ministry responded swiftly to the shortfall in mediation cases. We regret that a similar approach was not taken in other areas.**

181. **The Ministry of Justice has failed in three of its four objectives for LASPO: it has not discouraged unnecessary and adversarial litigation at public expense because the courts and tribunals are having to meet the costs of a significant rise in litigants in person and a corresponding fall in mediation; it has failed to target legal aid at those who need it most because it has failed to properly implement the exceptional cases funding scheme; and it has failed to prove that it has delivered better overall value for money for the taxpayer because it has no idea at all of the knock-on costs of the legal aid changes to the public purse. The Ministry of Justice has made significant savings in the cost of the scheme but we conclude that it could have achieved greater savings if it had reduced the knock-on costs of the reforms.**

182. **The Ministry of Justice has achieved its primary objective of making significant savings in the cost of legal aid in civil cases but in doing so it has failed fully to meet three of the four objectives it set out. It has failed to target legal aid at some of those who need it because of the wholly inadequate implementation of the exceptional cases scheme. It cannot demonstrate that it has achieved better overall value for the taxpayer because it has no estimate of how great the knock-on costs on the rest of the system have been as a result of the changes. The changes appear at best to have had effect in discouraging unnecessary and adversarial litigation at public expense.**

183. **There is no realistic early prospect of substantially increased funding for legal aid in the civil courts. This makes it even more important that the recommendations we have made to ensure the current scheme works properly are implemented. These include: better information from the Government on remaining eligibility for legal aid; proper management of the exceptional cases funding scheme so that it works as Parliament intended; an amendment to the Civil Legal Aid (Procedure) Regulations 2012 giving the Legal Aid Agency discretion to grant legal aid in appropriate cases involving domestic violence; free mediation assessments for a year; a rethink on the Legal Aid Agency's approach in a number of areas; and careful monitoring of the geographical distribution of legal aid providers. In the longer term, proper research into the costs and effects of the scheme should inform a more fundamental review of the policy.**

Conclusions and recommendations

The evidence base for the civil legal aid reforms

1. We regret the Government's failure to carry out adequate research into the legal aid system before introducing the reforms. (Paragraph 11)

Government underspend and access to legal aid

2. We note that, since the introduction of the changes, the Ministry of Justice has introduced an online eligibility calculator for providers and a legal aid 'checker' which are welcome developments. (Paragraph 14)

3. *We recommend that the Ministry of Justice undertake a public campaign to combat the widespread impression that legal aid is almost non-existent.* We are surprised that the Ministry of Justice did not undertake such a campaign at the time of the legal aid reforms given the magnitude of the changes to legal aid. The Government has a duty to ensure that the public are aware legal aid may be available as this is part of its commitment to ensure access to justice and cannot be left to legal aid providers who in any event may not have the resources to ensure it is effective. (Paragraph 18)

4. *We recommend the Ministry of Justice and the Legal Aid Agency improve their communication with providers on eligibility for and scope of legal aid criteria and that they should respond to questions in a timely manner.* Failure to do so runs the risk that a legal aid provider will not take on an individual who is eligible for public funding, potentially denying that person access to justice. (Paragraph 19)

5. We are not persuaded by the Minister's contention that people may not be accessing legal aid because they are getting all the legal advice they need from law centres and citizens advice bureaux. As we note later in this report, the extent of service available from not-for-profit organisations has been diminished by the legal aid cuts and they are struggling to meet increased demand. (Paragraph 20)

6. We conclude that failing to provide adequate public information on the Civil Legal Advice telephone gateway is one of the primary reasons why the gateway is underused. The underuse of the telephone gateway is one of the primary reasons for the underspend in debt advice as publicly-funded debt advice is only available through the gateway. We note with particular concern the finding from the Ministry of Justice's research that information on the Civil Legal Advice gateway is difficult to find online. (Paragraph 27)

7. *We recommend that the Ministry of Justice undertake an immediate campaign of public information on accessing the gateway for debt advice, as well as for the other areas of law it covers.* Again, we are surprised that a concerted campaign of public information was not undertaken when the legal aid reforms were brought in and the telephone gateway was introduced. (Paragraph 28)

8. *In its response to this report we request the Ministry of Justice update us on its response to the recommendations in the research the department commissioned on the Civil Legal Aid gateway.* (Paragraph 29)

9. The number of exceptional cases funding applications granted has been far below the Ministry of Justice's estimate. We have heard details of cases where the refusal of exceptional cases funding to vulnerable litigants is surprising on the facts before us. We conclude therefore that the low number of grants together with the details of cases refused exceptional cases funding means the scheme is not acting as a safety net. (Paragraph 33)

10. We have seen no evidence to substantiate the Minister's contention that criticism of the exceptional cases funding scheme arises from a misconception as to its purpose. We note the Court of Appeal judgment which found that the Lord Chancellor's Guidance was unlawful, and that three of the five litigants who had been refused legal aid should have had their applications for exceptional cases funding granted. (Paragraph 37)

11. The exceptional cases funding scheme has not done the job Parliament intended, protecting access to justice for the most vulnerable people in our society. This is because of the failure of the Legal Aid Agency, and the Lord Chancellor's Guidance, which was recently held to be unlawful, to give sufficient weight to access to justice in the decision-making process. The wrongful refusal of applications for exceptional cases funding may have resulted in miscarriages of justice. *All agencies involved must closely examine their actions and take immediate steps to ensure the exceptional cases funding scheme is the robust safety net envisaged by Parliament.* (Paragraph 45)

12. The Legal Aid Agency compounded its error in mismanaging the exceptional cases funding scheme by failing to appreciate that the very low number of grants compared to the Ministry of Justice's estimate was a sign that the process was not working as Parliament intended. Urgent investigative and remedial action was required, and in failing to take it the Legal Aid Agency and the Ministry of Justice were failing to focus legal aid on the most serious cases and the most vulnerable litigants, which was their declared objective. (Paragraph 46)

13. We were surprised to learn that exceptional cases funding applications are not determined by officials with specialist knowledge of the relevant fields of law. We are particularly concerned by the impact this has on the accessibility of the scheme for vulnerable individuals seeking funding. *We recommend the Legal Aid Agency revise the staffing of its exceptional cases funding scheme so as to reduce the time taken for lawyers to complete the form and so as to make the process more accessible to laypeople.* (Paragraph 47)

14. We have heard ample evidence that legal aid is not reaching many of those eligible for it. We do not therefore accept the Minister's assurance that the Ministry has extensive measures in place to monitor whether vulnerable people are able to access legal assistance. Had that been the case it might have been expected that the Ministry would have provided us with the results of that monitoring process to date. (Paragraph 51)

15. The Ministry of Justice needs to appreciate that a significant and unexpected saving in the civil legal aid budget requires immediate investigation as it may indicate a significant impairment of access to justice. Our examination of the reasons for the underspend reveals considerable weaknesses in the administration of measures intended to ensure access to justice for vulnerable people**.** (Paragraph 52)

16. We question whether pursuing an appeal in the 'residence test' case is a good use of public money. It seems to us that the residence test is likely to save very little from the civil legal aid budget and would potentially bar some highly vulnerable people from legal assistance in accessing the courts. There is no reference that we can trace in the debates on the LASPO Bill to use of secondary legislation under the Bill's provisions in order to introduce such a test. *We recommend that, if the Government wants to pursue this issue, it would be better to introduce primary legislation which can be properly debated and is open to amendment in both Houses of Parliament.* (Paragraph 56)

17. Children are inevitably at a disadvantage in asserting their legal rights, even in matters which can have serious long-term consequences for them. We are particularly concerned by evidence that trafficked and separated children are struggling to access immigration advice and assistance. *We recommend that the Ministry of Justice review the impact on children's rights of the legal aid changes and consider how to ensure separated and trafficked children in particular are able to access legal assistance. We also recommend that further consideration be given to the provision of legal aid in private law applications for Special Guardianship Orders where applicants are members of the extended family.*" (Paragraph 62)

The domestic violence gateway

18. We note with concern the evidence from the Rights of Women survey suggesting 39% of women who were victims of domestic violence had none of the forms of evidence required to qualify for legal aid. Any failure to ensure that victims of domestic violence can access legal aid means the Government is not achieving its declared objectives. (Paragraph 67)

19. We welcome the Ministry of Justice's commitment to keeping the types of evidence required to qualify for the domestic violence gateway under review and recommend the introduction of an additional 'catch-all' clause giving the Legal Aid Agency discretion to grant legal aid to a victim of domestic violence who does not fit within the current criteria. *We also wish to see regular publication of figures on grants of legal aid made on the grounds of domestic violence.* (Paragraph 68)

20. *We recommend Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012. be amended to give the Legal Aid Agency discretion to allow evidence of domestic violence from more than 24 months prior to the date of the application in cases where the person who has suffered the violence would be materially disadvantaged by having to face the perpetrator of the violence in court. We make this recommendation in recognition of the potential artificiality of the 24 month time limit given the ongoing nature of familial relations that can be the subject of court proceedings and the lasting impact domestic abuse can have on victims.* (Paragraph 70)

21. We were pleased to hear from witnesses that the Ministry of Justice has published helpful advice to healthcare professionals on their role in providing victims of domestic violence with the evidence required to access legal aid. *We recommend the Ministry of Justice consider further engagement with the representative bodies for healthcare professionals that all relevant parties are aware of their role in the domestic violence legal aid gateway. We also recommend that the Ministry of Justice take measures to ensure that victims of domestic violence are not expected to pay for the production of the required documentary evidence.* (Paragraph 72)

Sustainability and 'advice deserts' – The legal aid market

22. We were not impressed by the Minister's response to our concerns about the impact of the legal aid reforms on providers of publicly-funded legal services. We share the concerns of the National Audit Office, concerns we raised in our report in 2011 that the legal aid reforms were carried out without adequate evidence of the likely impact on the sufficiency and sustainability of the legal aid market. (Paragraph 87)

23. The National Audit Office found that fourteen local authority areas saw no face to face civil legal aid work at all in 2013-14, and very small numbers of cases were started in a further 39 local authority areas. We are deeply concerned that this may indicate the existence of a substantial number of 'advice deserts.' (Paragraph 88)

24. *We urged the Government in 2011 to carry out research into the geographical distribution of legal aid providers to ensure sufficient provision to protect access to justice. Not only did the Ministry of Justice fail to heed our warning, it has also failed to monitor the impact of the legal aid reforms on the geographical provision of providers. We do not know for certain if there are advice deserts in England and Wales, and nor does the Ministry of Justice. This work needs to be carried out immediately because once capacity and expertise are lost the Ministry of Justice will find it difficult, and potentially expensive, to restore them. In some areas it may already be too late.* (Paragraph 89)

Litigants in person

25. We are concerned that it took the Ministry of Justice over a year to publish the report on litigants in person carried out by Professor Liz Trinder and her team. The report seems to us a thoughtful and high-quality piece of work containing unique information capable of informing not only Government responses to the difficulties faced and presented by litigants in person but also those of other stakeholders, including the Judicial Working Group on Litigants in Person. The lack of availability of this report during our inquiry has adversely affected our ability to have an informed debate on this issue. Early consideration of the report could have mitigated the £3.4million knock-on costs for the courts from the rise in litigants in person identified by the National Audit Office. *We deeply regret the fact it took this Committee's intervention for the Trinder report to enter the public domain. We accept the Lord Chancellor's assurance that there was no ministerial involvement in the delay but still require an explanation for it.* (Paragraph 95)

26. Our witnesses agreed that there has been a rise in the number of litigants in person following the removal of means-tested legal aid from family and other areas of law, although the exact numbers are difficult to ascertain. We believe, however, that it is of more significance that the rise in litigants in person constitutes at least some people who struggle to effectively present their cases, whether due to inarticulacy, poor education, lack of confidence, learning difficulties or other barriers to successful engagement with the court process. It is vital that the difficulties of such self-represented litigants are at the forefront of the minds of Ministers when developing and implementing measures to assist litigants in person. (Paragraph 98)

27. We welcome and are grateful for efforts by court staff to assist litigants in person as much as they are able while recognising the limitations placed on those efforts by reductions in numbers of staff and the opening times of court counters. (Paragraph 102)

28. We find the President of the Family Division's judgment that the judiciary are not necessarily able to ensure the cross-examination of victims by or on behalf of alleged abusers is appropriate and sensitive more persuasive than the Minister's contention that the judiciary have sufficient training and tools at their disposal to do justice in such cases. (Paragraph 106)

29. The family courts make decisions which often have life-long consequences for the children involved. The courts need the best evidence possible to make the right decisions; this will not be achieved by putting vulnerable witnesses through cross-examination by their abuser. On its own this is a powerful case for ensuring such cross-examinations do not occur and consideration of the trauma experienced by the witness in such a case strengthens it enormously. The rise in litigants in person in the family courts further strengthens the case for a statutory bar. *We therefore recommend the Ministry of Justice legislate to prevent cross-examination of complainants by alleged abusers in the family courts while ensuring justice is done to all parties.* (Paragraph 107)

30. It is surprising to us that cases involving adults lacking capacity in which the Official Solicitor is involved do not appear to be differentiated from other cases by the Legal Aid Agency. Such cases, by their very nature, concern some of the most vulnerable people in our society, whose impaired understanding means they are barred by law from conducting litigation without assistance. It seems to us that access to justice for such litigants requires that such cases should receive special consideration by the Legal Aid Agency as these individuals cannot access the courts without the Official Solicitor's assistance. *We recommend the Legal Aid Agency adopt a policy that ensures the Official Solicitor is able to properly represent people without litigation capacity, given the consequences for access to justice for highly vulnerable individuals if he cannot do so.* (Paragraph 110)

31. We were concerned to hear that judges in some family law cases were struggling to access the expert evidence necessary for them to determine a case fairly due to the Legal Aid Agency approach to apportionment of expert fees when only one of the parties is legally-aided. Given that family courts are required to allow expert evidence only when it is "necessary" to decide a case in the best interests of the child we believe

that, if the court says that evidence is required and the non-legally aided party is not in position to pay a contribution, the Legal Aid Agency will have to take financial responsibility in order to ensure the courts are able to try the case justly. (Paragraph 113)

32. We welcome the announcement by the Ministry of Justice of funding to assist litigants in person. The increase in Personal Support Units in courts will help litigants get their papers in order and supply emotional support at a testing time. The funding of law clinics to give initial advice is an issue we address in depth below in Chapter 8. Even with these facilities, there will continue to be significant pressure on the courts caused by the rise in self-represented litigants and the courts will need to develop ways **of** dealing with that pressure. We therefore welcome the work of the Judicial Working Group on Litigants in Person. (Paragraph 117)

33. We agree with the Low Commission that a comprehensive approach to legal information is absolutely crucial to ensuring litigants in person are able to represent themselves effectively. We note the Low Commission's conclusion that Advicenow and Adviceguide are the premier online resources and the Commission's concern that services that already exist might be replicated unless the Government took care to avoid this. *We would like the Government to explain to us why it has changed its approach to funding Advicenow, what its future plans are for online advice and how it intends to ensure services are not replicated.* (Paragraph 120)

34. *We recommend the development of a one-stop legal helpline able to divert inquirers to other services, whether online or over the telephone, or to assist with their inquiries. In particular, the helpline should be able to divert people to legal aid providers in cases where legal aid is available. This appears to us to be a cost-effective way to improve access to justice for litigants in person as well as being a significant step towards ensuring that people eligible for legal aid are able to access it.* (Paragraph 121)

35. Moving to a more inquisitorial legal system for some types of case would be a seismic shift for our courts. While such a possibility should not be ruled out, it would have to be very carefully planned and implemented. We do not anticipate that this is likely to occur in the near future. (Paragraph 125)

36. The very wide range of roles undertaken by McKenzie friends presents challenges for any attempt at regulation. Regulation of family members or friends providing emotional support and assistance to litigants would be absurd. Regulation of McKenzie friends holding themselves out as quasi-legal advisors would protect the litigants they are advising but could be viewed as giving them an inappropriate level of authority. We are concerned that encouraging the use of McKenzie friends may in some circumstances amount to a counsel of despair: individuals who cannot afford properly regulated legal advice and feel unable to adequately put their own case could find themselves disadvantaged if relying inappropriately on people without legal qualifications. We are also concerned by the increase in the number of McKenzie friends in the courts. *We recommend the Government consider and consult on whether there should be formal regulation of McKenzie friends who could be classed as engaging in professional activity, whether fee-charging or not.* (Paragraph 131)

37. The use of unbundling to provide affordable legal services is attractive but carries a number of risks for both lawyers and clients. We look forward to the results of the Legal Services Consumer Panel research in this area. (Paragraph 134)

38. We were interested by the evidence from the President of the Family Division on the approach adopted by the Californian courts to assist litigants in person. We received this evidence relatively late in our inquiry so have been unable to investigate the system in any detail but we believe it warrants further consideration as an additional way to improve access to justice for some litigants. (Paragraph 136)

39. The problems presented by litigants in person are complex. We reiterate that there is no "silver bullet" which will solve all the issues that arise, not least because litigants in person themselves are a diverse group with widely differing needs. *Fundamentally, the courts need more funding to cope with the numbers of self-represented litigants appearing before them and this is an area which should attract some of the underspend from the civil legal aid budget. Only with assistance will the courts be able to ensure access to justice. It is imperative that litigants in person are given every possible assistance to make their cases clearly and effectively*. (Paragraph 138)

Mediation

40. The fall in the number of mediations for separating couples following the introduction of LASPO was a consequence of the end of compulsory mediation assessment, the removal of solicitors from the process and the inadequate attention given by the MoJ to providing clear, reliable and easy to access advice on mediation and on the continuing availability of legal aid. (Paragraph 149)

41. It is unclear to us why the requirement for attendance at a Mediation Information and Assessment Meeting before a litigant can issue court proceedings was not included in the 2012 Act. This indicates an unfortunate lack of 'joined-up' thinking in the preparation of the new legal aid regime. (Paragraph 150)

42. In contrast to its sluggish response to the shortfall in the number of exceptional cases funding grants, the Ministry of Justice responded quickly to the decline in the number of mediations following the introduction of the legal aid changes by setting up the Family Mediation Taskforce under Sir David Norgrove and adopting many, although not all, of its recommendations. (Paragraph 151)

43. The fall in the number of mediations in the family courts which took place after the coming into effect of LASPO will inevitably have had a significant impact on providers of mediation services. We were encouraged to hear that the Legal Aid Agency has extended the contracts for suppliers and is seeking new providers in anticipation of an increase in mediations. *We recommend that the geographical distribution of mediation providers is kept under review to ensure all those who need to access mediation are able to do so.* (Paragraph 154)

44. The Ministry of Justice hoped and assumed that without legal aid more people would resolve their difficulties outside court, as a large majority of couples already do. The fall in the number of mediations as well as the rise in the number of litigants in person shows that the Ministry of Justice was wrong. We recognise that the court

process is not, in many cases, an effective means of reducing conflict between parties and presumably to reach and carry out agreement. We strongly support the use of mediation for separating couples where appropriate. We agree that a behavioural and cultural change which sees the public resort to mediation in the first instance is desirable. We would like to see the number of mediations exceed the figures achieved prior to the unintended consequences of the legal aid changes. *We recommend the Ministry of Justice adopt the recommendation by the Family Mediation Taskforce that the Government fund all Mediation and Information Assessments Meetings for a year, to encourage behavioural change. The cost of this approach can be met from the money saved by the initial shortfall in the number of mediations.* (Paragraph 157)

Value for money

45. While it is clearly right that legal aid be available for people facing threats to life, liberty, personal safety or their home, our evidence shows that the legal aid changes focused disproportionately on the crisis point of some cases and failed to appreciate the costs saving inherent in resolving disputes before they arrive at court. (Paragraph 166)

46. We note in particular the frustration experienced by housing and debt advisors when clients stand in danger of losing their homes because of an inability to access advice earlier due to the scope changes. (Paragraph 167)

47. *The Ministry of Justice has avoided quantifying the level of knock-on costs arising from the reforms. Without this information the Ministry of Justice is unable to say whether it has achieved its objective of significant financial savings to the taxpayer. We recommend that the Ministry of Justice conduct a post-hoc cost- benefit analysis of the legal aid reforms.* (Paragraph 168)

48. *We reiterate the recommendation from our Report on the Government's proposed reform of legal aid: that Government departments should be penalised for poor decision-making that leads to increased costs for the courts system.* (Paragraph 173)

The operation of the Legal Aid Agency

49. The reduction in the payment error rate which has been achieved by the Legal Aid Agency is highly commendable but we do not, realistically, think it would be imperilled by a policy decision not to investigate the origin of tiny sums of money. The Legal Aid Agency's duty is to administer public money responsibly, not to waste its resources on irrelevant or *de minimis* inquiries. We are concerned at the various examples we have seen of the Legal Aid Agency failing to give sufficient weight to its vital role in ensuring access to justice. (Paragraph 178)

Overall conclusions

50. We conclude that the faulty implementation of the legal aid changes contained in Part 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 has harmed access to justice for some litigants. (Paragraph 179)

51. The underspend in the civil legal aid budget should have rung alarm bells in the Ministry of Justice. The considerable shortfall in debt advice and exceptional cases funding grants should have received urgent investigation. The Ministry responded swiftly to the shortfall in mediation cases. We regret that a similar approach was not taken in other areas. (Paragraph 180)

52. The Ministry of Justice has failed in three of its four objectives for LASPO: it has not discouraged unnecessary and adversarial litigation at public expense because the courts and tribunals are having to meet the costs of a significant rise in litigants in person and a corresponding fall in mediation; it has failed to target legal aid at those who need it most because it has failed to properly implement the exceptional cases funding scheme; and it has failed to prove that it has delivered better overall value for money for the taxpayer because it has no idea at all of the knock-on costs of the legal aid changes to the public purse. The Ministry of Justice has made significant savings in the cost of the scheme but we conclude that it could have achieved greater savings if it had reduced the knock-on costs of the reforms. (Paragraph 181)

53. The Ministry of Justice has achieved its primary objective of making significant savings in the cost of legal aid in civil cases but in doing so it has failed fully to meet three of the four objectives it set out. It has failed to target legal aid at some of those who need it because of the wholly inadequate implementation of the exceptional cases scheme. It cannot demonstrate that it has achieved better overall value for the taxpayer because it has no estimate of how great the knock-on costs on the rest of the system have been as a result of the changes. The changes appear at best to have had effect in discouraging unnecessary and adversarial litigation at public expense. (Paragraph 182)

54. There is no realistic early prospect of substantially increased funding for legal aid in the civil courts. This makes it even more important that the recommendations we have made to ensure the current scheme works properly are implemented. These include: better information from the Government on remaining eligibility for legal aid; proper management of the exceptional cases funding scheme so that it works as Parliament intended; an amendment to the Civil Legal Aid (Procedure) Regulations 2012 giving the Legal Aid Agency discretion to grant legal aid in appropriate cases involving domestic violence; free mediation assessments for a year; a rethink on the Legal Aid Agency's approach in a number of areas; and careful monitoring of the geographical distribution of legal aid providers. In the longer term, proper research into the costs and effects of the scheme should inform a more fundamental review of the policy. (Paragraph 183)

Formal Minutes

Tuesday 2 September 2014

Members present:

Sir Alan Beith, in the Chair

Jeremy Corbyn	Andy McDonald
Nick de Bois	John McDonnell
Mr Elfyn Llwyd	

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Mr Llwyd declared his intention to return to legal practice in 2015; and declared that he would stand aside from the inquiry into the impact of the changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

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[Adjourned till Wednesday 3 September at 9.15am.

Wednesday 4 March 2015

Members present:

Sir Alan Beith, in the Chair

Mr Christopher Chope	Mr Elfyn Llwyd
Jeremy Corbyn	Andy McDonald
Nick de Bois	John McDonnell
John Howell	

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Mr Llwyd drew the Committee's attention to his declaration of 2 September 2014 that because of his prospective pecuniary interest he would not take part in the inquiry; and declared that he would not participate in consideration of the Chair's Draft Report.

Mr McDonald declared an interest as a former legal aid practitioner.

Mr Chope declared an interest as a non-practising barrister.

Draft Report (*Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 183 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Eighth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 11 March at 9.15am.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the Committee's inquiry page at www.parliament.uk/justicecttee.

	Question number
Tuesday 8 July 2014	
Judith March, Director, Personal Support Unit, Julie Bishop, Director, Law Centres Network, and **Gillian Guy**, Chief Executive, Citizens Advice Bureaux	Q1–27
Nicholas Lavender QC, Chairman, Bar Council, **Andrew Caplen**, Vice-President, Law Society, and **Jenny Beck**, Co-Chair, Legal Aid Practitioners Group	Q28–61
Tuesday 2 September 2014	
Dave Emmerson, Co-Chair, Legal Aid Committee, Resolution, **Jane Robey**, Director, National Family Mediation, **Susan Jacklin QC**, Chair, Family Law Bar Association, and **Nicola Jones-King**, Co-Chair, Association of Lawyers for Children	Q62–104
Clare Laxton, Public Policy Officer, Women's Aid, **Emma Scott**, Director, Rights of Women, and **Philippa Newis**, Policy Officer, Gingerbread	Q105–118
Tuesday 21 October 2014	
John Gallagher, Shelter, **Connor Johnston**, Garden Court Housing Chambers Team, and **Sara Stephens**, Housing Law Practitioners Association	Q119–151
Carita Thomas, Immigration Law Practitioners Association, **Denise McDowell**, Greater Manchester Immigration Aid Unit, and **Sarah Campbell**, Bail for Immigration Detainees	Q152–178
Ruth Hayes, Islington Law Centre, **Catherine Evans**, Southwark Law Centre, **Anita Hurrell**, Coram Children's Legal Centre, and **Paula Twigg**, Mary Ward Legal Centre	Q179–202
Wednesday 19 November 2014	
Lord Low of Dalston, Chair, Low Commission, and **James Sandbach**, Campaigns and Research Manager, Low Commission	Q203–225
Elisabeth Davies, Chair, and **Steve Brooker**, Consumer Panel Manager, Legal Services Consumer Panel, **David Holland**, Chief Executive, and **James O'Connell**, Head of Policy, Institute of Paralegals	Q226–244
Monday 1 December 2014	
Lord Dyson, Master of the Rolls, Sir James Munby, President of the Family Division, **Lord Justice Sullivan**, Senior President of Tribunals, and **Steve Matthews**, Magistrates' Association	Q245–281
Wednesday 10 December 2014	
Shailesh Vara MP, Parliamentary Under Secretary of State, Minister for the Courts and Legal Aid, Ministry of Justice, and **Matthew Coats**, Director of Legal Aid Casework, Legal Aid Agency	Q282–330

Published written evidence

The following written evidence was received and can be viewed on the Committee's inquiry web page at www.parliament.uk/justicecttee. INQ numbers are generated by the evidence processing system and so may not be complete.

1 Action Against Medical Accidents (LAS0021)
2 All Wales Family Panel Chairmens Forum (LAS0005)
3 Andrew Jackson Solicitors (LAS0002)
4 Association of Lawyers For Children (LAS0062)
5 Association of Personal Injury Lawyers (LAS0008)
6 Bail for Immigration Detainees (LAS0056) & (LAS0098)
7 Ben Hoare Bell LLP (LAS0072)
8 British Red Cross (LAS0036)
9 Cafcass (LAS0094)
10 Chartered Institute of Arbitrators (LAS0029)
11 Citizens Advice (LAS0040)
12 Civil Justice Council (LAS0080)
13 Clark Willis Law Firm (LAS0013)
14 Community Law Partnership (LAS0018)
15 Consortium of Expert Witnesses to the Family Courts (LAS0086)
16 Coram Children's Legal Centre (LAS0034) & (LAS0101)
17 Detention Action (LAS0054)
18 Family Justice Council (LAS0082)
19 Family Law Bar Association (LAS0069)
20 Foster & Foster (LAS0076)
21 Friends, Families and Travellers (LAS0026)
22 Garden Court Chambers Housing Team (LAS0049)
23 Gary Martin (LAS0102)
24 General Council of the Bar (LAS0044)
25 Gingerbread (LAS0022) & (LAS0099)
26 Gittins McDonald Solicitors (LAS0048)
27 Greater Manchester Immigration Aid Unit (LAS0015) & (LAS0017)
28 Greenwich Housing Rights (LAS0027)
29 Housing Law Practitioners Association (LAS0052)
30 Iain Wightwick (LAS0095)
31 Immigration Law Practitioners' Association (LAS0097) & (LAS0045)
32 Inquest Lawyers Group (LAS0083)
33 Institute of Paralegals (LAS0089)
34 Islington Law Centre (LAS0071)
35 Judicial Office (LAS0084)
36 Julie Burton (LAS0075)
37 Keele University, Community Legal Outreach Collaboration, Keele (LAS0068)
38 Knowsley Domestic Violence Support Services (LAS0014)
39 Law Centres Network (LAS0057)

40 Legal Action Group (LAS0006)
41 Legal Aid Practitioners Group (LAS0042)
42 Legal Services Consumer Panel (LAS0012)
43 Leigh Day (LAS0050)
44 Liberal Democrat Lawyers Association (LAS0065)
45 Liverpool Law Society (LAS0019)
46 London Gypsy and Traveller Unit (LAS0064)
47 Lucy Reed (LAS0078)
48 Mackintosh Law (LAS0074)
49 Mark Senior (LAS0001)
50 Mary Ward Legal Centre (LAS0028) & (LAS0096)
51 Mind (LAS0051)
52 Ministry of Justice (LAS0073) & (LAS0103)
53 National Family Mediation (LAS0016)
54 Osbornes Solicitors LLP (LAS0011)
55 Prison Reform Trust (LAS0053)
56 Refuge (LAS0041)
57 Resolution (LAS0037)
58 Rights of Women (LAS0081)
59 Sally Cheshire (LAS0023)
60 Shelter (LAS0066)
61 Southwark Law Centre (LAS0061)
62 Susan Jacklin QC (LAS0090)
63 The Angelou Centre (LAS0070)
64 The Family Law Company (LAS0020) & (LAS0085)
65 The Law Society for England and Wales (LAS0039)
66 The Magistrates' Association (LAS0043)
67 The Personal Support Unit (LAS0058)
68 UK Fathers For Equal Rights And Justice In Family Courts (LAS0092) & (LAS0091)
69 Watkins Solicitors (LAS0063)
70 Women's Aid (LAS0031)
71 Young Legal Aid Lawyers (LAS0025)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the Committee's website at www.parliament.uk/justicecttee. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681–I (Cm 8111)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021
Sixth Report	Operation of the Family Courts	HC 518–I (Cm 8189)
Seventh Report	Draft sentencing guidelines: drugs and burglary	HC 1211
Eighth Report	The role of the Probation Service	HC 519–I (Cm 8176)
Ninth Report	Referral fees and the theft of personal data: evidence from the Information Commissioner	HC 1473(Cm 8240)
Tenth Report	The proposed abolition of the Youth Justice Board	HC 1547 (Cm 8257)
Eleventh Report	Joint Enterprise	HC 1597 (HC 1901)
Twelfth Report	Presumption of Death	HC 1663 (Cm 8377)
First Special Report	Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12	HC 1901

Session 2012–13

First Report	Post-legislative scrutiny of the Freedom of Information Act 2000	HC 96–I (Cm 8505)
Second Report	The budget and structure of the Ministry of Justice	HC 97–I (Cm 8433)
Third Report	The Committee's opinion on the European Union Data Protection framework proposals	HC 572 (Cm 8530)
Fourth Report	Pre-legislative scrutiny of the Children and Families Bill	HC 739 (Cm 8540)
Fifth Report	Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 927
Sixth Report	Interpreting and translation services and the Applied Language Solutions contract	HC 645 (Cm 8600)
Seventh Report	Youth Justice	HC 339 (Cm 8615)
Eighth Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 965 (HC 1119)

Ninth Report	The functions, powers and resources of the Information Commissioner	HC 962 (HC 560, Session 2013–14)
First Special Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013: Government Response to the Committee's Eighth Report of Session 2012–13	HC 1119

Session 2013–14

First Report	Sexual Offences Guidelines: Consultation	HC 93
Second Report	Women offenders: after the Corston Report	HC 92 (Cm 8279)
Third Report	Transforming Legal Aid: evidence taken by the Committee	HC 91
Fourth Report	Environmental Offences Guideline: Consultation	HC 604
Fifth Report	Older prisoners	HC 89 (Cm 8739)
Sixth Report	Post-legislative Scrutiny of Part 2 (Encouraging or assisting crime) of the Serious Crime Act 2007	HC 639 (HC 918)
Seventh Report	Appointment of HM Chief Inspector of Probation	HC 640
Eighth Report	Ministry of Justice measures in the JHA block opt-out	HC 605 (HC 972)
Ninth Report	Fraud, Bribery and Money Laundering Guideline: Consultation	HC 804
Tenth Report	Crown Dependencies: developments since 2010	HC 726 (Cm 8837)
Eleventh Report	Appointment of the Chair of the Office for Legal Complaints	HC 916
Twelfth Report	Crime reduction policies: a co-ordinated approach? Interim report on the Government's Transforming Rehabilitation programme	HC 1004
Thirteenth Report	Serious Fraud Office Supplementary Estimate 2013-14	HC 1005
Fourteenth Report	First Joint Report from the European Scrutiny, Home Affairs and Justice Committees of Session 2013–14: The Government's response to the Committees' Reports on the 2014 block opt-out decision	HC 1177
First Special Report	The functions, powers and resources of the Information Commissioner: Government Response to the Committee's Ninth Report of Session 2012–13	HC 560
Second Special Report	Post-legislative Scrutiny of Part 2 (Encouraging or assisting crime) of the Serious Crime Act 2007: Government Response to the Committee's Sixth Report of Session 2013–14	HC 918
Third Special Report	Ministry of Justice measures in the JHA block-opt: Government Response to the Committee's Eighth Report of Session 2013–14	HC 972

Session 2014–15

First Report	Crime reduction policies: a co-ordinated approach?	HC 307 (Cm 8918)
Second Report	Theft Offences Guideline: Consultation	HC 554
Third Report	Mesothelioma Claims	HC 308 (HC 849)
Fourth Report	Joint enterprise: follow-up	HC 310
Fifth Report	Manorial Rights	HC 657
Sixth Report	Robbery Offences Guideline: Consultation	HC 1066
Seventh Report	Health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines: consultation	HC 1099
First Special Report	Mesothelioma Claims: Government Response to the Committee's Third Report of Session 2014–15	HC 849
Second Special Report	Joint enterprise: follow-up: Government Response to the Committee's Fourth Report of Session 2014–15	HC 1047