This paper sets out the gist of the oral evidence, with supporting papers, given at four hearings in 2017.

Please note: The contents of this appendix were collated by Sir Henry Brooke and considered by the Bach Commission. They should not be read as the collective work of the commission.
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Appendix 4: Oral Evidence: Second Session

Evidence: Lord Falconer
Date of session: 6 April 2017

PART I: Summary of Evidence

Three things, I think, are required:

- a legal statement of the minimum standard;
- an independent body to enforce it; and
- debate and agreement about what the content of minimum standards are.

It may be much better for there to be an Act of Parliament which sets out the minimum standard. You need a statutory right which is more detailed and goes beyond the European Convention of Human Rights. You’ve done a draft, roughly, of what you’ve been looking for in relation to it. It is something like that.

I would be very, very, very strongly in favour of this concept. It is similar to the Health Act 2009, but that Act is a total waste of time, in one sense, insofar as it creates a constitution for the NHS constitution because what is the good, ultimately, of rights that are not enforceable?

The NHS constitution contains a right to have any NICE-approved drug which is prescribed for you by a doctor, and it also gives you a right to be treated within 18 weeks of referral by a GP to a consultant. But all that the government’s got to do is to have regard to these rights.

So we need something that is a standard. Your draft is good. Maybe it can be improved, but we’re not into that at the moment. It’s got to be legally enforceable.

A Commissioner:

One of the things that I am interested in is the difference between target duties, such as NHS duties, which are always subject to a discretion because of the available resources, as opposed to individual duties, which are individual duties owed by the State to individual citizens or persons.

In community care law there is a particular section, section 117 of the Mental Health Act 1983, which is an individual enforceable right.

Lord Falconer:

I think it should be enforceable. The 18-week target is not an unreasonable approach to setting a target. You have got to get 92% of the people meeting that target, and that’s perfectly reasonable.

But I don’t think the way in which minimum standards in the law would work would be the same as that. I think that what you’ve got to identify is:

- In what circumstances are you entitled to advice?
- In what circumstances are you entitled to representation?
- What is the level of advice and representation that you are entitled to?
This will vary from situation to situation.

In private law family cases there are quite a lot of issues that you would not want to spend any of the State’s money in resolving. So if the parties cannot agree about a long list of chattels of no particular significance, you do not spend money on lawyers in relation to it. But a dispute as to whether there should be contact between father and children, or mother and children, is of huge consequence. Spend money on that.

How do you set out what the right standards in relation to that should be? Shouldn’t you have an OFSTED-type body that regularly opines in a practical way on what the standards are in a practical way, but is also looking all the time to see whether the standards are working?

So you might, for example, set a standard for what you’re entitled to in a private law family case, or, indeed, in a debt collecting case for a small business. Then OFLAW, or whatever one would call it, would discover that that standard is producing an incredibly bad result in practice.

Another area which I think is incredibly important is administrative law, because surely if the law has developed a means of preventing the government exceeding its power you’ve got to provide the means for everybody to be able, where appropriate, to bring judicial review proceedings. What does this involve in practical terms? Again, you will need OFLAW to be looking at whether the standard is working.

James Sandbach was going to produce a paper that fleshes this out in relation to the National Preventative Mechanism, which just deals with particular rights in relation to the detention of individuals. I’m quite in favour of this. Can you find some machinery similar to the National Preventative Mechanism?

A Commissioner:

In your 2005 paper you looked at how the system had effectively become over-bloated and disproportionate, and that we have to be more efficient, more focused on the disadvantaged. How do we come up with some kind of viable set of minimum standards that’s palatable to anybody holding the purse strings?

Lord Falconer:

You set the legal standard overall in your statute. You then set up a body that both defines the standards and also has an enforcement role in defining what it means. For instance:

- Everybody charged with a criminal offence is entitled to the following…;
- Everybody who has a dispute with their partner about children, money or domestic violence has the following rights in relationship to each of these three heads…;
- In relation to administrative law everybody has the right maybe to take their complaint to court, subject to a filter.

You need to think about how you can give people the opportunity to have their case, at least, examined. Most people’s cases will be rejected. You’ve got this problem in relation to administrative law about the huge volume of immigration cases that tends to squeeze everything else out, and you don’t want
minimum guarantees to become, as it were, a Court of Appeal against the refusal of decisions. It’s quite difficult to know how you balance it but you do need to do this.

You have to examine individual cases in accordance with the principles set out in the statute in the same way as OFSTED or the Quality Care Commission do. They are given certain principles for education and health, and they then see if they are being delivered in schools, hospitals, primary care trusts etc.

“Everyone is entitled to reasonable legal assistance to protect their rights.”

OFLAW must have regard to ensuring there is proper representation for the disadvantaged, children, the disabled, people suffering from inequality etc. In considering what an appropriate degree of representation and assistance should be, it should have regard to value for money and the appropriate use of resources. Certain groups should be prioritised for representation or advice.

Some groups need to make contribution to the cost of the legal system, by paying court fees, for instance. You have got to have a right to proper assistance and representation irrespective of your means. If you cannot afford it yourself, the state must fund it.

- In Crown Court cases you should get legal aid anyway, and you may have to make contributions subsequently.
- You have a right to be represented in proceedings in which your children may be taken away by the state;
- Or if you are accused of serious child misconduct by the state;
- Or if you are about to be deported;
- Or in child abduction cases.

If you are detained prior to deportation you have a right of access to assistance. If you are not given advice and representation you are being fundamentally deprived of your right to be protected by the law.

If the level at which you get legal aid is so prohibitive that it is possible to identify a section of society between the very poor and the very rich who are deprived of access to the courts, then you are failing in the basic duty of making sure that everybody has a right to representation or advice.

OFLAW will analyse whether the level is right. A taper sounds sensible. There used to be a taper whereby your contribution went up depending on how great your means were and what your capital was. That is much more sensible than a cliff edge.

[He listed the cases in which legal aid would be suitable for immigration cases]

At present the state is in effect determining what it thinks the minimum standard is – there is no independent check. Should this be done in a more independent, impartial way?

OFLAW should be able to declare that something is contrary to the terms of the Act, so that Government cannot do it. If statute is not willing to go that far, what moral and institutional power would this body have? The moral power of the institution is important.
A body that seeks to extend legal aid and representation will have no leverage with the public. It’s not a popular cause. There are three possible options:

- To give OFLAW power to say that something is unlawful. There would be huge resistance from the Treasury and MOJ;
- To give it only a moral power. Its moral strength will depend on the strength of the argument.
- A middle course: to require both the Chancellor of the Exchequer and the Lord Chancellor to consult it before it makes any changes; to have regard to the advice that it gives; to give it power to take proceedings against the government; or to make recommendations which the government must respond to from time to time. To create a situation where the government (including the Lord Chancellor and the Chancellor of the Exchequer) would feel it was difficult for them legally if they were disagreeing with the substance of any recommendations.

I don’t know whether it would be best to go direct for the middle course. It would not make much progress if one of these courses is not adopted.

It is interesting to have the Law Commission example before us. But I would go further: before government makes any proposal, it has got to consult OFLAW, to get its published views, and to give reasons if it disagrees.

The best chair would be a senior judicial figure who would not have an axe to grind as a lawyer. It would need lawyers, but it would also need people who are authoritative: i.e. the sort of people who you would expect to be giving advice. Also some sort of business/accountancy experience.

It has also got to be looked at perpetually from the point of view of efficiency and a challenge to the way that lawyers do things, but ultimately it must be a body that can speak with a degree of authority as to where the need is and, if the need is unmet, whether it is fundamentally wrong not to meet it.

You don’t want a fixer. There is a moral issue about legal advice and representation. It is very difficult to persuade the public of its importance. A senior judge or ex-judge appointed by the Lord Chancellor. A parallel, which is not exact at all, is the Sentencing Council, which is chaired by a senior judge. The attraction of that model is that there are lots of processes that require its views to be considered, and it has got a sort of force of law in practice. I envisage that a Legal Representation and Advice Council would have the same standing.

The body must be independent of government, but it has to be close enough to government – which means from time to time helping government when it is in difficulty - that ultimately government is least likely to want to upset it. It has got to be constantly pushing government to go further and further. At present there is an absolutely irreversible trend to restrict people’s entitlement to help in the law. You need to turn this round and get to a point where there are genuine institutional pressures to increase the amount you are receiving – as with health and education.

I was stunned to see the hostility to lawyers among politicians, and, to a more sophisticated extent, also among civil servants. I think a reason for this is that lawyers are a genuinely independent force against politicians and policy-makers. They can be useful when they are advancing a cause which politicians wish to advance; but once you are in government they are simply criticising, suing, judicially reviewing,
complaining, often with a degree of force that other people do not possess, so that there is a persistent tension and dislike of lawyers.

I agree that people do not see they need legal advice or assistance in the same way that they need health and education.

I would need to think whether OFLAW should be able to bring judicial review proceedings itself. I could envisage judicial review proceedings or declaratory proceedings – for a declaration that the standard currently offered by the government in relation to a particular area fails to comply with the legal standards set out in the Act of Parliament. Or test cases where government, or the legal aid board, or some similar body, habitually exercises a discretion in a particular way.

To make it stand the test of time it should be a non-political proposal. It should be the consensus view not just of the legal profession but also of a whole range of charities, third sector bodies and public sector bodies dealing with circumstances in which there is now an absence of legal assistance and representation.

If judges are saying that the courts are not functioning properly because of the high number of LIPs, so that they are unable to get to the heart of an issue because they cannot understand what is being said to them or what the issue is, and or are speaking about the extent to which there is an inequality of arms in relation to a whole range of disputes because of the absence of aid and representation, their role in leading the need for some degree of standard-setting and for a body to do it would be the most powerful way that you could demonstrate that this was a non-political initiative.

Judges are not the only people who can do it. You need to get judges, and people with experience in government dealing with domestic violence issues, and the Justice Department talking about the problems in relation to the courts, all building up a picture that embraces everybody who is involved in the field.

Judges are significant because they are dealing with cases in court all the time and they have got a very untarnished political record. If the Lord Chief Justice is saying that the system is breaking down in a particular area – and he has hinted at the problems caused by the absence of legal aid – and the President of the Supreme Court does so as well, this would be a way of creating the sense that this a consensus proposal.

The precise legal structure of the body is not as important as the fact that it should be the product of what everyone thinks.

You must start by identifying what is going wrong. It is pretty bad at the moment: horrendous when compared with what you could expect as a citizen 20 years ago. The victims are just ordinary people who are too frightened to go to court or to go to a lawyer. They are being disrespected either by the state or by a former partner or by the business that sacked them, and nothing is happening. The courts are
incredibly good at enforcing reasonable standards on people. If you take the courts out because people can’t get to them, then people feel licensed to behave badly because they know there is no kickback.

You will need quite detailed standards in the Parent Act because there is a reluctance on Parliament’s part to license a body that is to determine for itself what the standards for lawyers are. At the heart of the Bill should be a body which looks at the evidence, which is able to say if this is an area where people definitely need advice or assistance.

We have not yet talked about the following issues:

- Should OFLAW be able to complain if civil litigation is too expensive or complex?
- Should it have a role in online courts?
- Should it have a role in relation to fees for the courts?

I think it should have a role in requiring lawyers to give advice about alternative dispute resolution, but it shouldn’t poke its nose into how people run their procedures. It should also have a role in saying that it is wrong if fees make it prohibitive for groups that ought to be protected by the law from going to law for protection. Things have obviously gone wrong in relation to employment tribunal fees, for example.

You need to prepare a blueprint - a detailed, worked out protocol for minimum standards - for the next good Lord Chancellor to work on.

The attitude of the Treasury will be that we don’t wish to give up any control of expenditure unless it is politically expedient to do it. There will only be a political expedient to do it if an idea has reached fruition and its time has come. The way an idea gets to that point is if it is discussed and ventilated and reasonable sensible people think it is the right thing to do.

You can get to this point more quickly than you would think on the basis that if it gets out into the ether and people think it’s a good idea, and if you identify the extent to which the courts aren’t functioning properly at the moment, and if the judges support it, there will be a sense of urgency in relation to it, and you could get to a point where even this government might think it was the right thing to do.

You are not going to do this without ventilating the issues, so that there is a public argument providing counter-pressure to the Treasury whose instincts are to keep control over expenditure as much as possible.

The MOJ’s institutional strength comes from having good relations with the lawyers and the judges and being able to speak for them in an authoritative way within government. They are now looking for policy ideas that might redefine their role.

The counter-argument is that in the state of things as they are at present, when expenditure on legal aid is dropping at the behest of the Treasury, there is an indirect effect in that there are now increased costs elsewhere; in prisons or in housing - as when tenants cannot get advice on taking on the local authority or when they need rehousing at the local authority’s expense. There are always indirect costs when budgets are cut. The increased costs for courts that arise from the lack of representation are probably quite significant.
If you are not being properly advised in relation to a housing matter and you end up getting evicted where the eviction could have been avoided, there are both court costs and the cost of the eviction – but there is also the additional further cost of rehousing and the other social consequences that might flow from that.

The absence of proper and easily accessible advice in relation to dispute resolution between emotional partners is that you might end up in more domestic violence as a result, which will lead to further cost for the state.

There need to be two separate strands of work on this:

- What are the wider social costs?
- As the court system is now, is the justice system more expensive because there are no lawyers there to make cases shorter, to settle cases, to advise people not to go to court?
  I just don’t know. Has anybody done this work?

[James Sandbach said that the MOJ never accepted or disproved his data. Unless you can have a control group to compare with those to whom we are not now giving help you cannot definitively prove what the consequences of not getting advice are.]

[Julie Bishop said that there is a whole set of studies on the cost of each case of homelessness, so it should be able to work that up.]

If we live in a world in which the rule of law matters, you have got to be able to assert effectively whatever legal protections you are given by society. The state should not be funding you in what might be called an optional, luxurious piece of litigation (such as defamation or the distribution of chattels after divorce). But broadly speaking you should be able to assert your legal right to defend yourself against the illegitimate infringement of your rights: otherwise the rule of law doesn’t properly apply. This should be the starting point.

In the absence of minimum standards legal expenditure is always the most particularly vulnerable with the Exchequer because there is no political gain of any sort in increasing legal expenditure: there are absolutely no votes in it.

I think public legal education is incredibly important - the more that people understand about the importance of the law. The fact that the values of the law, the morality of the law and its significance in society say something about our society that is reflective of reasonable decent standards. This is because our society is based on two foundations – democracy and the rule of law. I don’t think that many people realise that the rule of law is just as significant constitutionally as democracy. If you are a politician you would probably disagree.
Evidence: Nick Hardwick
Date of session: 6 April 2017

Nick Hardwick took office as Chair of the Parole Board since April 2016. He was Executive Chair of the Independent Police Complaints Commission (IPCC) between 2003 and 2010, and Chief Inspector at HM Prisons Inspectorate (HMPI) between 2010 and 2016.

PART I: Summary of Evidence
On the question of independence, it depends on whose standards you are monitoring or inspecting, and who is responsible for their implementation. There was, for instance, a distinction between the Prisons Inspectorate and Ofsted in their relationship with government.

Ministers set education policy, and bodies with their own independent governance structures had to implement it. It was reasonable for ministers to want to know and to reassure the public that their policy was being implemented. Ofsted was inspecting largely on behalf of government, with standards largely set by government, together with some international norms.

The Prisons Inspectorate very explicitly inspected against international and regional human rights standards to which the government had signed up. There was a direct line of management between the Secretary of State and delivery on the ground. Our judgments were largely about whether what the Secretary of State was responsible for was meeting those international standards. Sometimes we would feel that a policy devised by ministers for institutions to implement didn’t meet the appropriate standards.

It follows that who you are inspecting and against what standards is critical on the issue as to how you want the balance of independence to lie.

Some people said that we seemed to know what was going on and that we should have the power to enforce our recommendations. I would say that in those circumstances what was the point of the chief executive of the Prison Service. If the Prisons Inspectorate enforced the standards, it would then be very difficult for me to say I could apply different standards from those adopted by the government of the day. That would immediately compromise my independence. And what if there was a liberal justice secretary and a much more conservative or harsher Prisons Inspector who said “I don’t have to take any notice of what this liberal justice secretary is doing. I can set my own standards, and you reformers can just whistle because I am not answerable to Parliament.”

In the case of the issues you are looking at, you want independence in the sense of your body’s objectivity, and in the fact that it is not immediately answerable politically. It seems to me that ultimately Parliament is responsible for these things in the justice field.

It might be important that there should be a trust and respect between the Secretary of State and HMPI, but sometimes we had a poor relationship (which was well documented). With Mr Grayling, in the end I would say what I felt needed to be said, and he would then take notice of it or not, as he chose. I don’t have a problem with that. There would be a real danger if your Inspectorate got too close to government.
Prisons will want good reports from the Inspectorate, and if I was looking for what ministers wanted there might be a clash there with what justice more widely required.

If you have a number of bodies who potentially have a responsibility for setting standards, and who are very jealous of their ability to set standards, it would be tricky for an over-arching body to determine the standards they should be required to achieve, and what its accountability should be, and to whom.

HMIP published expectations of what the standards were, interpreting international human rights standards in our regional context. In 2009 the government established the National Preventative Mechanism, which brought together the 21 bodies who all had some responsibility for prison standards or for standards in places of detention, including rights of access. This was relatively small scale, but getting them to work in a consistent way was pretty difficult to do. I think we made some progress.

I can see the attraction of putting the standards into legislation, as this is what people can act on. The reference to objective international standards gave us a source of legitimacy and authority that would otherwise have been missing.

As Chair of the IPCC we both set and tried to enforce standards in a very contested field. It would have been easier if there had been an implementation body separate from the standard-setting body. If what you might decide as a matter of fact in a particular case spills over into an issue about the standards that you are applying, it becomes a very sharply contested space. I can see arguments for separating out the standard-setting function and the enforcement function. I am not being too definitive about this. The issue to explore is whether these two things would fit neatly together in your particular context or whether one of them would get in the way of the other.

My experience of most ministers is that they did respect the independence of my organisation – not always. People always used to assume, if we turned up at a particular prison which ministers wanted to close, that they had sent us there, when this wasn’t the case. You need not only to be independent, but to be seen to be independent of ministers.

Occasionally you make a decision that will be unpopular and the media get involved. This is the point at which ministers may be tempted to interfere and you need to be able to patrol your boundaries.

You must ensure that your new body doesn’t become a mechanism whereby ministers could exercise improper influence over the rule of law if under pressure to do so. You want to make sure you are not designing a little hit squad which ministers can send in to sort out badly behaved judges.

My starting point is that I would need persuading as to whether the new inspectorate should have direct powers, but I haven’t studied this question in as much detail as you have. You should have a robust inspectorate which raises the alarm on matters of concern. If there is a significant injustice, you have a number of remedies. People suffering from that injustice should have the potential remedy of going to court. If the standards have been set by Parliament, and they haven’t been met, it seems to me there is some responsibility on Parliament to hold ministers to account.
If the inspectorate has a lot of powers, I would be concerned as to whether you are giving a mechanism to the executive to exercise improper control over independent judicial decision-making in its wider sense. There will be other bodies which have enforcement powers. It depends precisely on the type of issue you are looking at. If you are talking about access to justice in the prison system – a subject with which I am familiar – you need to consider whether prisoners facing quasi-legal judicial processes have access to the sort of rights you have outlined in your paper (to be represented, and so on).

You shouldn’t slip over the boundaries into operational matters – for example, how a disciplinary tribunal within a prison should operate. You don’t want to become too much a mechanism for ministers to use to determine how these processes should operate.

There are a lot of principles which you outline in your paper that should apply to the Parole Board, and they don’t always do so. I would be wary of another body answerable to ministers coming in and telling me how I should run the Parole Board.

There would be processes you could put in place which would reduce the risk of ministers using your new inspectorate as a plaything. Some ministers would want to interfere, and you would need a robust structure to avoid that.

 Bodies like these are not a static thing. Before my time John Reid read the Riot Act to Parole Board members because he felt we were letting out people who were dangerous, and he toughened up the risk test. As a consequence the release rate dropped.

You don’t want a mechanism that could come in and say “you are interpreting the risk tests incorrectly. You are letting out too many people. You have not got the balance right and this is how you should balance things in future.”

The reason why prisons got worse while I was Chief Inspector was not because individual governors’ performance deteriorated but because of policy decisions taken by politicians. They were warned about it.

And I think you could also argue that the reforms of David Cameron were direct responses to some of the things the inspectorate was saying. We know that there is now a wealth of evidence that we are not meeting the obligations we signed up to. I would argue that reforms, which you can still say are too little too late, are still happening as a direct result of what the inspectorate said. David Cameron’s speech on prison reform (which I think to some extent Michael Gove continued) was pretty much a “cut and paste” job from our Annual Report.

We certainly had the authority to say that things were wrong. Eventually this message is heard. I am very clear we made a difference.

The prevention stuff works because we have really clear standards and on the whole, for reasons of self-preservation, governors want to have good reports. Success occurred when we turned up and they had done pretty well what we wanted.
Ministers make operational decisions about prisons – whether prisoners can have books, what time lights go out in young offenders’ institutions etc. It is not the same with policing. At HMPI I had to focus on outcomes rather than processes. We were trying to focus on what are the outcomes for the people who are held in the prison, rather than the process by which they are achieved.

I would think this is a body that will develop, in a way a bit like the police and crime commissioners. The simpler you can make it at first the better. This wouldn’t necessarily mean that it would be like this forever. I would be cautious about going too wide. I wouldn’t just focus on legal aid. But there is an issue as to how much you encroach on other people’s territory. You will need to pick your battles.

I don’t think it was right that IPCC’s budget came from the Home Office, who also appointed the IPCC. The same applies with MOJ and HMIP. In other jurisdictions the budget would come more directly from Parliament. The National Audit Office and the Public Accounts Committee might be a better model. In France, it is the equivalent of the Cabinet Office. It is the Prime Minister’s office that funds them. I don’t think these bodies should be funded or appointed by the department whose work the Inspectorate is looking at. This budget issue is a real issue.

You need to separate things out as much as you can. You need some independent appointment mechanism. I would have thought that some parliamentary committee should do the appointing, or there might be some tripartite arrangement with the Lord Chief Justice. The way in which judges are appointed would be worth looking at. If the worst comes to the worst, it should be the Cabinet Office, not the MOJ.

How much money you would need will depend on the eventual scope you decide, but I would try and maintain flexibility for the people running it to decide how the money they get is spent and what size it should be. I would go for quality, not quantity. If you do the job really well, you can make the case for more money. If people start seeing this body doing a good job, then the case for more resources will become clear. Don’t spread yourself too thinly early on.

Rights are by their nature universal. Ministers can’t just take them away.

In any particular case, if you meet the merits of the issue, who you are shouldn’t be a factor so long as you are subject to the law.

The cultural things about independence are very important – what you look like, what kind of language you use, where you are based, what does your office look like etc. You also need clear governance structures, and a clear decision-making process.

Depending on how big you see this organisation becoming, you might need to have a regional structure. Then the extent to which the regional body is locally managed or part of a national organisation would be an important question.

The new body needs to say loudly and clearly that something is happening under this Act of Parliament. That is a very powerful idea. Some of its authority will come from the way it does its work. These things develop over time and in stages, not all in one go.
The people who should be responsible for ensuring that your standards are met are the people who run the services. You don’t want to absolve local managers of responsibility.

The NOMS Board had some excellent people on it that were appointed by the state, but they were very much state appointees. The Prisons Inspectorate was a corporation itself – just me. I had a Board of senior inspectors.

As I said before, the culture and appearance of independence is essential. It is also important to get external members into the governance of the agencies. You can have the best inspection mechanism in the world, but if you don’t do anything to fix the institutions they are looking at, then that won’t serve a purpose.

In my view the new body shouldn’t have enforcement powers, but I wouldn’t have a closed view. With the IPCC our extensive powers became a bit of a millstone. At HMPI I felt far more able to say what I thought about as plainly as I could. “More powers” isn’t necessarily the answer to anything.

You have to have a power to publish reports at your discretion. Whether the government takes notice of your reports depends on the authority and credibility that you have: this isn’t the same as powers. If you do give this body enforcement powers, you have got to be very clear about its independence from politicians and about identifying the person or organisation to whom it is accountable. You must make sure that you don’t have a body with inadequate accountability interfering improperly in the administration of justice.

This has all got to be worked out.

The date for publishing an HMPI report is now up to its discretion. They are published as soon as we can get them to the printer. The Secretary of State is required to respond to the report in 90 days or, if HMPI has raised a really serious concern, within 28 days. That seems a good process. The fact that someone has got to give you a response is very powerful. It is worth bearing this in mind.
Evidence: Jenny Beck
Date of session: 27 April 2017

Jenny Beck is co-chair of the Legal Aid Practitioners’ Group and chair of the Law Society’s Access to Justice Committee. She is also chair of the ABS and NewLaw Advisory Council. Jenny is a solicitor who has specialised in the practice of family law for over 25 years.

PART I: Summary of Evidence
I have practised family law for 25 years. At the start, funding was available for virtually any family law issues. LASPO reduced the available funding by about 80%: the entire area of private family law (unless it meets very tight requirements under the domestic violence gateway). This has fundamentally impacted the provision of family law services, which has had a fundamental impact on families. People usually see family lawyers when they are in distress.

The rules which are obvious to you and me within private law disputes, such as the child’s best interests being paramount, are not obvious when somebody’s run off with your brother and expects to have your child living with them. They’re not obvious at all. So, the lack of the ability to give any early advice on what the important principles are has meant that an awful lot of people have been unable to look after themselves and their families at all.

A person who wanted to grant contact to their husband, who is possibly not the safest of characters, but nevertheless has always been a good father, might think to themselves, “Well, hang on. When I could get a Prohibited Steps Order to stop him taking the child if he should keep the child after contact, I’d have been all right, but now I can’t do that, I’m not going to give him contact in the first place. The risk is too high that he’ll keep the kid and I won’t be able to get the kid back because I can’t get legal aid and can’t afford my legal bill.”

So, it’s changed people’s thinking. So, that child may not now see their father and probably he was a good dad and probably that would have been in the child’s best interests, but absent proof on her part of domestic abuse, she would not want to run the risk of granting that contact in the first place. That would seem quite a sensible decision to her and there’ll be no upfront advice about child’s best interests or how the courts quite sensibly view family cases. So, he’d have to apply for contact if he could do that, but he won’t get any public funding to do that. So, the child loses out and has one parent. That actually affects society in quite a fundamental way. I think that the sea-change that came with LASPO not only erodes access to justice, the rights of the individuals, most particularly children, but it will also change as time goes on, the fabric of our society.

The idea was that mediation would be the panacea, but we all know that that has fallen off a cliff.

I think the reason why it was considered to be a solution was purely, if I can be frank, as an excuse, because it’s cheap and, of course, it’s important that people proactively own their lives and their cases and they’re actively involved in co-parenting the children and making sensible adult decisions.
themselves, but if people are unprepared to do that, they can’t be forced. So, two things happened with mediation. First, the people that it was assumed might take this up as an option, rather than going to court, often can’t, because if you’re the party who’s been denied legal aid ... so, say you want to regain contact with your child when that contact’s been denied, if the other side won’t mediate, you’re stuck. You can say, “I’m happy to mediate” all you like, but if the other side won’t come to mediation you can’t mediate on your own. Well, not with any sensible solution.

So, that’s the first thing. The second thing is that the people who encouraged clients to go to mediators and help them understand what it was all about were usually the solicitors giving the initial advice. So, since that’s gone, the mother in that particular example who might come and say, “Oh, he wants contact. I don’t know what to do,” rather than thinking, “Well, I won’t do anything. I’ll just wait until it goes away,” might be encouraged to go to mediation, but because she can’t get legal advice either, she won’t be going there. So, it’s fallen off a cliff.

There is evidence of how much longer family cases are lasting with one or both parties unrepresented. The length of proceedings has soared, because procedural rules are impossible for laypersons to follow.

There was always a substantive benefit test, which should always have been applied to the ongoing legal aid. How well that’s ever been policed by anybody is questionable because it’s hard to say when a case has become petty. Cases may have started with great merit and finally you get down to irrelevant minutiae such as whether or not children have been returned from contact with odd socks. However, a sense of a proper obligation to the fund and appropriate guidance on substantive benefit should be able to resolve that issue.

I think it was a sledgehammer to crack a nut. I don’t think removing the whole of family from scope was the solution. I think the enforcement of the test that still exists to ensure that there is still a legal case which merits the use of an expensive resource could have been bolstered up a bit. This might be slightly controversial, but I was not uncomfortable with divorce coming out of scope because, absent domestic abuse or huge power imbalance, divorce itself is a paper process and limited resources could have been deployed better elsewhere. The problem is the safety net is not working at all.

The gateway’s wrong, in my view, in two perspectives. Firstly, it only evidences physical abuse. The government recognises that domestic abuse is wider than physical abuse and includes coercive control and financial abuse. So, it only ever evidenced that, and also the evidence required didn’t show any real understanding of the journey that a victim has. So, it was usually, you have to go to your doctor, you have to pay, you have to secure a report, which is fraught with just a myriad of different practical problems. You may not have a doctor, you may not have £50.00 for the report, the doctor might be unwilling to see you, and the doctors themselves, many GPs, were saying, “Well, we don’t want to go to court and we can’t say whether this has been abuse or not” and they couldn’t understand what was being asked and that was impossible to explain from the client’s perspective and there’s nobody hand-holding them through it, because there’s no initial legal advice until you’ve got through the gateway.

So, it all became very, very difficult to get the right people through the gateway as a consequence. A report by Rights of Women and, I think Women’s Aid as well, but certainly Rights of Women, showed
that ... I’m going to say, 47% of people - I will check that statistic\(^1\) - who should have been entitled to gateway couldn’t get it. So, there’s something very wrong with the gateway and that was just the practical side of it, that wasn’t the people who were victims of coercion and control. That was people who had some proof of physical abuse, but actually couldn’t find a way of navigating that evidential hurdle. So, for those reasons, half the people supposedly ringfenced by this provision weren’t actually getting through it.

We had very constructive discussions with the Ministry about the way forward. An article in The Guardian six weeks ago said that the gateway was going to be widened, and a further meeting seemed to go very well, but then the General Election was called.

I couldn’t agree more about reinstating Family Help Level 1, with the equivalent legal aid early advice. It would cost £14 million. This could be recouped from the savings from the mediation budget.

The domestic violence gateway won’t in itself solve that problem, but, obviously, people can be assisted with that. It’s that upfront advice and I think it would be saved, not just by getting people into mediation and therefore not clogging up the courts, but it would be saved in court time. There has been some research done and there is some more being done on the Access to Justice Committee about trying to find a way of working out what the knock-on cost of not having that advice is and they’ve found a way of re-visiting some old data, we hope to have the results quite soon actually, for people who did and didn’t have initial advice and comparing the costs of that.

Of course, it’s one of those things that’s really, really hard to quantify and it covers all spheres, what was the cost to the prison service or the police or the mental health services or GPs? You can’t add all of that up for people who lose touch with their family because they couldn’t get early advice. It’s too big to manage and therefore people lose it, but, yes, you should restore the early legal advice in terms of self-help, because people are able to help themselves more in family cases if they understand the principles.

I agree that trained lawyers should be giving this advice. The amount of times you have seen something that ... just when you’re training staff, they take advice on something and you think, “You’re absolutely right in your advice, but you’ve failed to see this whole other angle, because you have to have been around the block a few times before you can actually work out how it’s going to pan out.” It can be done so much more quickly and effectively.

I did a couple of studies on it, actually. I used to advise law firms on law firm management and how to gear effectively for staff and everybody used to say, “Well, we’ve got our junior who takes the initial instructions and then depending on the severity of the case it gets passed on to one of these people and we’ve got it all structured.” I used to say, “That is completely the wrong way around. Ridiculous as it sounds, it’ll take your senior half the time in a really targeted way to work out the whole case in that first instance and then deliver what the client needs, whether that be self-help or referral onto something

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\(^1\) The correct figure was 38%.
really important. Your chances of missing a trick are massively reduced, professional negligence is hugely reduced and the client gets better service and quicker.”

I don’t see the high fee cases. The fixed fees have been cut again, this is not LASPO, this is Transforming Legal Aid, by a further 10%. They’re very tight. There is some disparity between the Bar and between the solicitor’s profession in the Family Advocacy scheme which is the scheme under which the advocacy is done, but for the vast majority of cases the Family Advocacy scheme predates LASPO, and although it slight favours counsel in the sense that they can claim some things on account that solicitors can’t, it doesn’t give them more money.

Now, right at the top end where you’ve got a really complex case and you’ve got a QC and you’ve moved into a high-cost case plan, that’s a separate issue. They’re a tiny, tiny minority of cases, but they may account for a much bigger spend.

The vast majority of care cases are concluded in 46 weeks and cost about £3,000, with fees for advocacy on top of that. This includes run of the mill child abuse cases. Child murders and extremely serious cases receive authority for a QC and quite high fees. I haven’t had one for two years. They don’t come up all the time.

If we are to have a proper system of family justice, with access to justice, I would certainly suggest the reintroduction of early legal advice. There should also be improved access to the gateway, and the gateway should be improved, so that having had that first advice, if your solicitor deems it appropriate and you are a victim or are in such an imbalanced relationship that justice won’t be done and there’s not equality of arms, you should qualify for representation. Then there are a myriad of different smaller issues, which we didn’t really notice, because we were answering too many consultations at the same time, I think. For example, grandparents, who are a huge saving to the government when they step in and care for... Many of these people can never get past the gateway and are often unrepresented which can mean they are not supported in getting the help they need for a child to be placed with them and for that placement to be solid and secure.

Equally, in certain circumstances, parents can lose their funding as against a grandparent. So, there’s those other areas where you’ve got a child that has been placed, for example, with a grandparent and then, again, you’ve got a situation where there’s about four or five different odd quirky areas where funding should be back in and there needs to be a better approach than the current approach for exceptional case funding in circumstances where it’s the right thing to do.

The General Election stopped a remedy being provided for the cases in which an abusive husband who is unrepresented now cross-examines his victim.

I have never seen anyone invent abuse which hadn’t happened. I can believe that people may know that they need to pursue a remedy for domestic abuse for their case to get through the gateway.

Well, there aren’t any up to date figures on the ... What would be interesting to find out is how much of the savings has come from private law cases where there isn’t domestic abuse, because if you brought
back in early legal advice those are the people who could and should be directed to mediation and if there was a proper programme of public information about that that was accessible ... I see private clients who come and they want to sort out contact and the first thing I’m able to do is show them a comprehensive parenting plan, a handy booklet that Cafcass produce, explain to them what mediation is and send them off, it’s done, because there’s no power imbalance and they can sort it out between themselves. What would be interesting is to see how much of the savings were in that sector. That’s a solution, a not inappropriate solution.

I think that one of the things that early legal advice does, and Resolution champions this, is to explain to clients what the principles behind the law actually are. I think the first thing I said was that some of family law seems counterintuitive when you’re in a very highly emotional stat , and it’s very, very common for somebody to come in and when you tell them, actually, they have no rights to see their child and neither does their partner, but the child has rights to see both parents, you notice something happening and they start to think about this and think, “Perhaps I am looking at this the wrong way” and you can get people to focus around the other way. It’s not necessarily a legal task, but that comes from explaining what the law is, explaining that the court is interested in the best interests of the child, not what you want, not what he wants.

Then, they start to think, “Okay, what ..” You’ve got that framework as opposed to the need to hold onto everything when you’ve been in a separation situation and treat the children as possessions in the same way that you don’t want to let the car go. It’s that kind of ... a combination of wishing to hurt, defensive mechanism and it brings all the wrong things out that they’re not what the law says. The law treats children very differently. Yes, I think the early legal advice would be my first thing for family.

I agree with the four exceptional categories suggested by the Society of Labour Lawyers: cases where the primary care of a child is an issue and the child may be transferred; cases where representation of both parties is needed for a just solution; cases involving particularly vulnerable people; cases involving an application to remove the child from the jurisdiction.

I think all those four exceptional categories would cover the cases that I was mentioning before that have been ... we didn’t drill down enough at the time to work through what that meant, like the kinship carers, grandparents or other family members that are caring, like the private law cases which effectively are public law cases, because you’ve got a children’s guardian involved and social services. So, it’s all but in a name a public law case and those would cover it absolutely perfectly. The problem is, of course, that that widens it and then the costs associated with it. I think that catchall, as well, is a sensible one in cases where it would be inequitable to consider that people would need to represent themselves.

On the proposals for a different way of cross-examining a victim of abuse, it has not been fully explained whether this would be provided at legal aid rates or by some other form of public funding. It is not quite the same position as in crime. There are still some questions to be resolved. The other day a client of mine simply couldn’t give evidence. She literally tried to stand up, but just crumpled on the floor.
Some say that some men bring cases to court to use the courts to perpetuate the abuse through this mechanism. If we had an inquisitorial system and other mechanisms for getting to the truth, a cost would be levied on judicial time.

For dealings with the LAA, policy and operations need to be brought together. The current arrangements are frustrating and expensive.
Evidence: Jawaid Luqmani

Date of session: 27 April 2017

Jawaid Luqmani is a member of the Committee of the Legal Aid Practitioners’ Group. He served on the Committee of the Immigration Law Practitioners’ Association for 12 years, and was Chief Assessor of the Immigration and Asylum Accreditation scheme between January 2010 and February 2013. He is a partner in the firm of Luqmani Thompson, and has specialised in immigration issues for over 20 years.

PART I: Written Submission

April 2017

Experience in delivering legal aid services

I am a partner in the firm of Luqmani Thompson and Partners and my work has focused upon issues of immigration for at least the last 20 years. For the majority of that time I have had a mixed practice of private and legal aid cases involving advice, applications and litigation before the Immigration Tribunal, the High Court, Court of Appeal and Supreme Court, the Court of Justice in Luxembourg as well as the European Court of Human Rights.

In addition to currently being a committee member of the Legal Aid Practitioners Group, I was previously elected to the committee of the Immigration Law Practitioners’ Association (ILPA) for approximately 12 years and was appointed by the Law Society to be an assessor for the Immigration Law Panel and thereafter for the Immigration and Asylum Accreditation scheme and held the position as Chief Assessor of that scheme between January 2010 and February 2013. Those firms undertaking work in immigration and who wish to receive remuneration from the legal aid agency must be accredited, otherwise the work undertaken will not be paid for.

There are 3 levels of accreditation, advanced being the level considered to reflect the highest level of competence. It is not currently a requirement of the Legal Aid Agency for every firm practising in this field to have an individual accredited to that level, but it is necessary to be accredited to at least senior casework level in order to ensure that there are adequate supervision mechanisms in place. There is a separate examination to assess an individual's fitness to supervise and if a firm does not have a supervisor there may be difficulties claiming funds for any legal aid work. The existence of the arrangements for supervision and accreditation were introduced long before LASPO in 2004 and were aimed at ensuring that only value for money services were being purchased by the Legal Aid Agency, in the belief that the accreditation system would eliminate poor practice. I believe that the number of firms undertaking legal aid cases in immigration had fallen as a result of the introduction of compulsory accreditation. The

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2 A consultation document issued by the Legal Services Board in March 2012 seemed to consider that accreditation did represent a mechanism for regulating the quality of advice in this field. Accessed September 2017: http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/20120301_immigration_discussion_doc_1_1_final.pdf
accreditation scheme does not apply to barristers in independent practice, though I believe there are a small number of barristers who are currently accredited.

I have also undertaken work for the Legal Services Commission (as was) for peer review work in the past as well as providing training to staff at the Commission in connection with Accreditation.

**Legal aid practice now compared with before LASPO**

The areas of work that are largely unchanged by LASPO relate to issues concerning protection, whether on the basis of the refugee convention or the Convention on human rights, as well as protection for victims of trafficking (where a reasonable grounds decision has been made) or for those seeking leave to remain in the UK who are overseas nationals married to persons who are either British or settled in the UK where the relationship has broken down due to domestic violence. In addition, work relating to applications for bail as well as appeals before the special immigration appeals commission (SIAC) continue to be available under the legal aid scheme.

Issues such as appeals against deportation (which are not said to raise protection issues) issues of family unity/reunion, applications for long residence or citizenship (including the registration of citizenship for children) are all outside of the scope of funding. It might also be observed that the introduction of court fees, whilst relatively modest in themselves, operate as an additional barrier in securing access to justice, where such fees are no longer available to be claimed against the legal aid fund/exempted in cases no longer in scope. For example an individual seeking to bring a partner and 3 children may have to pay 4 court fees, rather than just one. Although these fees may be recoverable in the event of an appeal succeeding, they can operate as a deterrence on the pursuit of an appeal particularly as there may be no funding available and the cost of the initial application may also be significant (application fees to the Home Office were increased on 6 April 2017 in some cases by more than 20% 

**Exceptional Case Funding**

There remains the possibility of seeking exceptional case funding in cases which are no longer within scope following the changes to the legislation.

Looking at statistics produced by MOJ over the last 12 months:

- Jan – March 2016
  - Immigration represented 40% of applications
  - 115/156 immigration granted out of total of 390 applications (76% grant rate)
- April- June 2016
  - Immigration represented 41% of applications
  - 153/216 immigration granted out of total of 424 applications (71% grant rate)
- July- Sept 2016

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Appendix 4: Oral Evidence: Second Session

- Immigration represented 53% of applications
- 147/255 immigration granted out of total of 479 applications (58% grant rate)

- October-December 2016
  - Immigration represented 57%
  - 189/253 immigration granted out of total of 441 applications (74% grant rate)

A success rate of 70%+ apart from the July quarter would suggest that the ECF process is operating as a safety valve for the cases that are no longer in scope but this does not give the full picture in terms of the numbers of individuals that may be able to access justice.

If the total number of such applications in England and Wales is only 1734 in total for cases now outside of scope (some of which may be repeat applications or cases taking longer to process) and in the immigration category 880 cases (just over 50% for the 12 month period) although this is a positive step, the proper comparison would be the number of individuals who would have been able to access representation before the ECF system were in place.

There are also a number of inhibitors preventing access to ECF:

- A perception that the probability of success is far lower than the probability of failure (incorrect on the present data)
- The inability or unwillingness of practitioners to spend time making an application on a speculative basis where the application may take between 2-3 hours to progress

It is likely that the spread of cases where applications for ECF have been made would be limited to a number of organisations, with many more firms not applying than applying.

Furthermore even to apply would require the firm to have a contract with the legal aid agency and that number appears to be decreasing.

In immigration the volume of legally aided immigration cases halved between April- June 2012 and the same period a year later with new matter starts in categories out of scope falling from an average of 5000 to just a few cases in each quarter following LASPO.\(^5\)

There has also been a reduction in asylum category being 24% lower in the same quarter than a year earlier- this may reflect reduced asylum numbers (though that seems unlikely) but may be connected with both the cases start limits placed on firms, the introduction of fixed fees and the reduction in firms wishing to undertake legally aided work, particularly where the differential in the rate of remuneration and private client work has become so significant.

Other issues that may be relevant to the take up of ECF is that these figures may also mask whether the individual is seeking assistance for the first time or whether this involves an individual who has already been through the process when the scope changes were different. A recent example is an individual who has pursued 3 separate judicial review claims (successfully) relating to his detention and potential removal.

\(^5\) Page 29. Accessed September 2017:
and the denial of a right of appeal on statelessness grounds. Statelessness is not in scope even though asylum is. His appeal against the latest decision on statelessness was to be heard as an appeal in country and would not attract funding so an application for ECF was made and subsequently granted. The figures for ECF do not show the number of individual better able to access justice, merely the number of applications/appeals that may disproportionately apply to some individuals given that unlike some other areas of civil justice, immigration decisions may provoke several decisions during the lifetime of an individual seeking residence in the UK rather than just one of finality.

**What works/ doesn’t work?**

The availability of ECF can and should ameliorate the bluntness of the removal of scope from any client group where there is likely to be additional vulnerability.

To some extent the low number of applications made, albeit representing a higher proportion than any other category, does something to redress the potential complete denial of access of justice, but very frequently the inhibitors to ECF can operate as a mechanism for ensuring that the numbers of applications will always be low. A reduction of 5000 to a few cases per quarter does not represent a guarantee of access for the most vulnerable or the least equipped particularly as finding a practitioner to undertake legal aid in certain geographical areas is becoming more difficult.

The retrospective nature of legal aid costs claims in judicial review has also had an impact and although there may be disagreement as to the precise temperature of the cooling/chilling effect, the figures for judicial review claims granted by the Agency for the period Oct-December 2015 to Oct-Dec 2016 shows a reduction of about 33% with a total of 1718 grants of funding. However the number of applications lodged in the Upper Tribunal in judicial review claims (that may include some age assessment claims) was said to be down to 1000 per month, from an earlier number of 1200 per month. This figure does not include cases lodged in judicial review cases filed at the Administrative Court (citizenship challenges, detention challenges, and challenges to refusal by UT to grant permission). Therefore on a conservative estimate this means that less than 20% of the claims lodged are by individuals that have the benefit of public funding, but are likely to represent a client group that may be significantly greater that are in need of assistance but who cannot afford to pay.

The workload in controlled work has dipped unsurprisingly since the changes in 2013 but of significant concern is the fact that the figures are continuing to dip with new matters starts down by 24% compared to last year.

**Perception of the client experience**

The needs of clients have not significantly altered over the last two decades, however the complexity of the field certainly has. I recall being told by the then most highly regarded practitioner in the field that in

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6 See fn 5 above, p 32.
7 Reported at meeting of Administrative Court Users Group 21 November 2016.
discussions with the forerunner of what is now Legal Aid Agency, the department was of the view that immigration doesn’t really involve any law.

Legislative changes over the last decade (with likely further changes shortly to be announced) affecting not only the mechanism for an appeal, the availability of the appeal from within or outside the UK, and changes made to the immigration rules (establishing eligibility under various categories and which changes have run to in excess of 200 pages earlier this year) mean that navigating the process has become increasingly difficult.

Some years ago consideration had been given by senior civil servants within the Home Office to a major consolidating piece of legislation but there has been no such initiative and at present any practitioner will need to have a familiarity with:


The complexity is increased when considering the various commencement orders for statutory instruments and establishing which piece of legislation takes effect and when, and the relevant transitional provisions that may determine, for example, whether an individual has an entitlement to pursue an appeal at all depending upon what sort of application was made and when.

The immigration rules were last consolidated on 23 May 1994 and have been added to, subtracted from and multiplied many times over, often at very short notice.

The regulations made under provisions of the legislation spawn litigation in the higher courts on a regular basis as do the operational policies operated by the Home Office that do not have any parliamentary scrutiny.

In an editorial from the Los Angeles Times earlier this week on 25 April 2017, unsurprisingly perhaps, it was noted:

*Having a lawyer can make all the difference in the world to someone facing deportation in federal immigration court, where the law is dizzyingly byzantine. Yet only 37% of potential deportees have one. Part of the problem is a lack of attorneys trained in immigration law, and part of it is money — immigrants, unsurprisingly, often lack the resources to hire lawyers.*

*...immigration codes are civil, and there is no constitutional right to an attorney during civil proceedings. If you can find one on your own, good for you, but the government does not supply one.*
Forcing someone — often a person without even a rudimentary understanding of English — to navigate this complicated legal terrain with no idea of what the law says, or what remedies might be available, is Kafkaesque.

The plethora of legislative provision in the UK is likely to be no less complex in the UK as reflected by a recent observation of Lord Justice Jackson:

The rules governing the [Points Based System] are set out in the Immigration Rules and the appendices to those rules. These provisions have now achieved a degree of complexity which even the Byzantine Emperors would have envied.\(^8\)

The client experience in navigating the way through potentially labyrinthine legislative and regulatory provisions, immigration rules and a variety of policies is no easier today than it was pre-April 2013. Understanding and keeping abreast of the volume of judicial decisions emanating from the higher courts as well as the specialist tribunal represent a tough challenge for many practitioners. How individuals who cannot access lawyers (and for whom many English will not be their first language) can be expected to manage this, is difficult to imagine.

If the availability of funding is withdrawn then simplifying rather than complicating these provisions would ensure a greater level of clarity and ensure that those affected by such provisions have a greater chance of securing just and appropriate outcomes if they are unable to access legal services due to a lack of resources.

**Practitioner experience**

Most practitioners would be likely to agree that it is harder to survive doing solely legally aided work. Two large organisations which were reliant predominantly if not exclusively on legal aid funding (Immigration Advisory Service and Refugee Migrant Justice (formerly Refugee Legal Centre)) both went into administration.\(^9\)

A number of firms that have traditionally undertaken legal aid work in this field have stopped undertaking legal aid, reduced the legal aid caseload or have ceased to trade. Although there are a number of large firms operating under legal aid contracts, pressure on billing and low rates of remuneration may mean that corners are cut, with more experienced fee earners being encouraged to do a higher proportion of non-legally aided cases.

**How things could be different**

If ECF is to operate as a bulwark against denial of justice then at the very least funding the process of making an application (in all but completely unmeritorious cases) ought to be remunerated as an

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encouragement to firms to devote time and energy to ensure a higher proportion of individuals are able to access justice.

This would involve a cost for the fund but the alternative would be that access to justice may depend upon the capriciousness of which firm, which geographical region and which billing pressure an individual lawyer is under - completely regardless of the extent of the needs of the client who is out of scope but who would have been able to secure funding a few years earlier for a problem of the same or level of complexity.

There is a clear tension between ensuring that as many people as possible are given representation but then restrict the level of service that is available, spreading the butter rather thinly, or providing the best service available to meritorious cases (see above for the statelessness example involving at least 4 separate sets of proceedings). To some extent the mechanism that provides a minimal level of assistance is arguably money poorly spent, as the impact of poor or restricted quality advice is not value for money for government spend and does not necessarily achieve any more than token justice for the individual who is being assisted. The first level of service lends itself far more readily to “robot law” solutions but as the SRA has recently observed,\(^\text{10}\) good practice in asylum does involve face to face interactive meetings to gain the trust of individuals, many of whom may be in crisis. One imagines that this applies across other legal fields where the automated solution is ill equipped to necessarily gain the trust and confidence of individuals who may be traumatised through previous experiences.

Better decision making by government departments across the board in public law areas in theory would result in fewer challenges, but generally this has to be against a backdrop of accountability.

In the immigration field, the removal of rights of appeal in a variety of categories and extending that to cases where an appeal is available only after removal has taken place\(^\text{11}\) has not necessarily resulted in decisions that are inherently fairer. It is likely that the absence of judicial independent oversight whether by the removal of appeal rights\(^\text{12}\) or the absence of funding for a challenge where an appeal right is still available may decrease rather than increase or maintain better decision making and accountability.

The fees payable for Home Office applications at present are significant. This is a form of direct “taxation” on those making applications. Arguably a percentage of the fee charged exceeds the costs to the relevant department. If the surplus were available to be utilised for the payment of legal aid fees for the unsuccessful applicant then this may be a part way of funding this service. At appeal before the First Tier Tribunal (Immigration and Asylum Chamber), if an individual is successful in overturning the decision challenged, they are able to recover costs, but generally this is limited to the costs of the court fee for pursuing an appeal.


\(^{11}\) Extended further by Part 4 Immigration Act 2016 as from 1 December 2016 to apply to most human rights appeals.

\(^{12}\) In some cases by replacing an appeal with an Administrative Review enabling a challenge to be pursued to a different caseworker within the Home Office (not necessarily of any greater seniority).
If the costs recoverable were extended to the legal aid sums expended on the appeal then this might encourage better decision making, though that may make decision makers wish to pursue appeals beyond the FTT.

Another possible idea would be that the costs incurred under legal aid for pursuing a successful application/appeal might operate akin to a student loan, recoverable if and when the individual who has had the benefit of the legal service is in a position to repay the sums provided, where they have received a tangible benefit.

PART II: Summary of Oral Evidence
27 April 2017

Answers to questions by Commissioners

The recent experience of a small firm specialising in immigration law

We are a relatively small firm, but most of the work that we tend to do is in the immigration field and interestingly, I was looking at some figures within the last month or so which demonstrate that 43% of our fee income is now from non-legally aided work, whereas I suspect that 10 years ago that figure would perhaps be 4.3%. So, there has been a very radical change in the way in which we’ve looked at survival and I think for lots of practitioners, probably across the piece, the need to find alternatives to the removal of legal aid has meant turning more frequently to private client work. Sometimes, that will be attempting to service the same client group, but on reduced remuneration rates, or sometimes it will mean looking at a different client cohort.

It may mean trying to attract work that doesn’t necessarily have the same degree of vulnerability as the firm has traditionally dealt with, looking at small to medium sized enterprises, for example, to supplement the remainder of the work. There are now nine lawyers that are practising with the firm. Five years ago, I would say there would have been 13. So, there’s been a small, but not significant, in terms of numbers, but in percentage terms, quite significant, change and a lot of that is about the ability for us to continue to deliver publicly funded services at a price that means that we can remain in business. In the process, we’ve had to say goodbye to some very good individuals, but who did not have the ability to convert time into cash when the bankers came calling, as it were.

That’s a rather long introduction, but hopefully that gives you a flavour of some of the changes that have happened to us over time. In terms of changes as a result directly of LASPO, it’s quite difficult to say what happened when, because as with lots of firms, we will have looked at planning for those changes in advance. So, it won’t have been that there was a ground zero day on which we rebuilt the firm, because we were looking at trends, we were looking at how to survive in a post-LASPO world long before the cuts took effect.

When the cuts came in, if it’s my bank manager asking me, then no of course they didn’t surprise me at all, because we had these all planned as part of our business planning, but I think that from the perspective
of understanding quite how hard they would bite, I think that we are still coming to terms with that to some extent. One of the examples that I’ve given in my paper relates to an individual who has gone through three separate legal challenges regarding the legality of decisions regarding statelessness. He is an individual who, when his next appeal came around, was somebody who was out of scope on funding, notwithstanding the fact that he has had three successful challenges against earlier decisions that were aimed at depriving him of a right of appeal prior to removal. He has that right of appeal, but he doesn’t have funding for the purposes of it, and given the amount of documentation that exists in his case and given the complexities involved, that is a case where if it were not for the existence of exceptional case funding, he would be in great difficulties.

Of course, he knew about the availability of exceptional case funding because he has the benefit of representation today. If he were somebody that was picked up as a client tomorrow or was unaware of the availability of it tomorrow, then he would not be in that position. So, yes, for him, it’s been a saving grace, but if you look at the numbers of exceptional case funding cases, which I’ve also gone into in some detail in the paper, it’s such a small number and with the agency themselves predicting that it would help about 5,000 cases per quarter that were in scope pre-LASPO and now, in their words, just a few per quarter, is quite a good indication of how seismic that shift has been.

What remains in scope

Essentially, asylum remains within scope, and trafficking victims remain within scope, but only where there is a reasonable grounds decision, and victims of domestic violence remain within scope. Detention remains within scope, but that leaves deportation entirely out of scope, it also leaves family life applications and appeals entirely out of scope, and they would then be depending upon exceptional case funding, which is harder to obtain than the agency might tell us.

Exceptional case funding in immigration cases

I think that exceptional case funding has improved. I think that it does operate, not quite the silver bullet, but it does operate as a bit of garlic to ward off the vampires, as it were. So, it can certainly be used, but you need to know where the garlic is, and if you are an individual who is seeking representation and every organisation that you’re ringing for advice is saying, “Well, funding isn’t available, you’ll have to pay,” exceptional case funding is not necessarily the first conversation you’re having with someone. So, I think that’s why it’s a bit more problematic. Once you’re within the system, once you’re already represented, once you’re already past that point where someone has already taken on your case, then there’s a greater chance that that application will be made. The Public Law Project and the Coram Children’s Legal Centre have been running projects to try and fund the making of those applications, which are quite complicated and time-consuming.

I would say that at the present time, in my firm the number of grants of exceptional case funding compared with the number of applications is probably about 100%. But there have only been about 10 to 15 applications overall.

The clients of an immigration solicitor
There may be the individual who is seeking asylum, who is still protected under the scheme. There may be the individual who, having succeeded with his or her application for asylum, is then wanting to bring family members to the UK, but the funding for bringing family members into the UK is no longer in scope. So, applications that used to be funded by the agency through family reunion are no longer within scope, and therefore appeals against the refusal to bring family members in for persons recognised as refugees, to whom international obligations are owed, are nevertheless now not able to get funding within scope, other than by applying for exceptional case funding. So, that’s one cohort if you like.

Another group might be the individual who has lived in the UK for 15-odd years, came here as a child and has now found themselves the wrong side of the law having committed an offence, which may be a relatively minor offence. It may be one that has resulted in a term of imprisonment, which may be of a relatively finite duration, but they are nevertheless now ripe for deportation, and that individual, notwithstanding the length of time they’ve lived in the UK, would not be entitled to legal aid funding for the purposes of contesting what could be a particularly complicated appeal. There’s a relatively new initiative that is operated between the Home Office and the Metropolitan Police called Operation Nexus where information regarding individuals who have been acquitted, but where there is evidence of naughtiness, for want of a better word, then ends up as being part of the case against the individual.

So, it may be that the individual is serving a very short custodial sentence, is then served with a deportation decision and is then facing a mountain of paper, produced by the Metropolitan Police, utilised by the Home Office in connection with justifying the removal. There are all sorts of questions about disclosure, there are all sorts of questions about the legality of the reliance on that material. There is no funding for any of that, other than through exceptional case funding and if you consider the numbers of individuals that might be in that situation and the capacity of individuals, whether as a result of intervention by the Public Law Project or others, to obtain that funding, that’s a small drop in the total number of those individuals that are affected. We also have the removal of rights of appeal from within the UK, not only in relation to criminal deportation cases, but also extended to family life appeals, until the individual has been removed from the UK.

That change took effect in December of last year, or the extension took effect in December last year and the only challenge then available is a judicial review to challenge the legality of the decision denying the in-country right of appeal. So, again, that’s another cohort of individuals who, theoretically, could seek funding. Again, that would be subject to retrospective costs. None of the initial work would be capable of falling within scope. So, there’s quite a lot of work that would be needed to demonstrate the illegality of the decision in the first place, even before speculative funding could be applied for.

We are all social animals, and the chances are that most of us know somebody from overseas. Most of us know somebody from overseas, we are related to people from overseas, we have friends and neighbours that are individuals from overseas. Or we have been migrants ourselves.

There have been two cases recently that hit the press. One 80-year old lady up in Scotland, who has been here for years, was found to have breached something when she was here, was arrested five o’clock in the morning, taken to a detention centre and flown out later that day. She doesn’t attract funding.
person that’s been resident in the UK for 20 or 30 years, but has done nothing to regularise their residence condition within the UK, technically they are here unlawfully. Funding is only available in the event that they are making an application for asylum, which, undoubtedly, they’re not, or that they are the victim of domestic violence or trafficking, which is unlikely. There may be the opportunity for limited funding to challenge the legality of their detention, but not the underlying decision. So, although it may be possible to make an application for bail under legal aid funding for that individual, it wouldn’t be available for pursuing a challenge to the decision giving rise to the removal.

Another example was a family based in Scotland where I thought that there had been some question of UK ancestry at an earlier stage, but I may be mistaken, and that may have resulted in a failure to have submitted an application in time or on the correct form and the rules on validity of applications are now quite carefully measured and it is quite possible to make an error in filling in an application form or getting the right fee or paying the right surcharge in advance. If the consequence is that you then end up with an application that is out of time, then you are an over-stayer from that moment onwards, and you are therefore liable to detention from that moment onwards.

If detained, you may have representation, limited to the question of the legality of the detention and no more.

[In the absence of a transcript, a note of other points made by Mr Luqmani in oral evidence follows]

**Accreditation**

- A proper accreditation system, with the Law Society issuing accreditations, is needed in the sector. In immigration in particular, organisations that are not accredited are often giving bad advice for lots of money in an underhand manner. Not as bad as it once was but it is a “menace to the market.”
- Some bad, unaccredited firms even pride themselves on their ‘independence’ from government.
- The existing accreditation system is good\(^\text{13}\) but it could be moved to a near-universal system instead.

**Who pays now?**

- At present, relatives, demographic communities, churches, etc. come together to pay for legal services. It is invaluable but not every case can be funded this way and need continues unabated.

**What should be in scope?**

- There is a need for prioritising according to a finite budget. But scope does need to be expanded; ECF is not a viable long-term solution.
- Statelessness should be brought back into scope, an easy win.
- Family reunion with vulnerability should be, too.

• Deportation is a trickier one, harder to justify bringing it back into scope. But you could, for example, bring it back into scope for those who have lived here over 10 years where they have been arrested for only a minor misdemeanour.

What is the solution?

• A polluter pays system, where you get a costs order against your opponent.
• Savings can be found in a way less disadvantageous to justice. For example, a student loan-type system could be instituted whereby if you received tangible benefits from legal aid you pay back if/when your income reaches a certain level.
• Public legal education for immigrants can be part of the solution but it is very tricky because “so many live in shadows.” There are existing community organisations and individuals within a particular demographic community which do some good work. But lots of community set-ups are preyed on by “unscrupulous black market legal advice.”
• Other than conventional PLE, there could be leaflets at the border encouraging people to seek proper legal help.

Other points:

• ECHR Article 8 is tricky. If you codify everything you do not allow for exceptions and there is a “need for pragmatism.”
• ‘Robot law’ is already in place but brings with it big downsides, such as failures of accurate translation.
PART I: Summary of Evidence

I qualified in 1992. I’ve been in legal aid practice for over 25 years. I’ve run my own firm since 1999, and since 2011 as a sole practitioner in London. We specialise in mental capacity and community care work, which is a mixture of legal help, advice, and proceedings in the Court of Protection on the welfare side. My background is in mental health and homelessness. I started off representing psychiatric patients at mental health review tribunals, as they were then, and also challenging decisions of local authorities not to provide a client with housing.

Pretty quickly I started to question why there was such a mismatch between the work that I was doing before mental health tribunals and the homelessness work, and I started to read up some of the older welfare statutes going back to the advent of the welfare state, of which there are many (not least the National Assistance Act), but also other statutes which have been passed and implemented in a pretty piecemeal fashion, depending on the different client groups who have needed services, whether it be older people, younger people, people with learning disabilities, or people with physical disabilities.

I want to talk a little bit more generally first about legal aid practice and how I think it has changed and then go onto the particular work that we do. I’ve lived through pre-franchise work in the 1990s when Legal Helps or Green Forms (as they were then) were a means of providers providing initial legal advice to anybody on a range of topics if they were eligible for it. The Green Form scheme included a provision for a contribution from the client, which I thought was a good thing, although it was difficult for the provider to get the contribution from the client, unless the client was expecting it at the first interview.

What I have seen is that the whole legal aid system, including eligibility calculations and the evidence that is required, has moved from no evidence being required to completely the opposite end. They now require, in my view, unreasonable and unrealistic levels of evidence, such that this in itself has become a barrier to access to justice for clients who are within scope, and also for providers who are prepared and willing and want to provide the client with a service at legal aid rates of pay. So, I have seen it move from a too simple, unaccountable system to the complete opposite.

In the 1990s we had the introduction of franchising, which was the first attempt to develop quality standards in different areas of law, and a move away from generic advice into specialist advice. There used to be regional directories, paper directories, of all legal firms, including the firms that would be willing to offer a legal advice service in particular categories of law. Of course, those were the days before computers, but you could look up any particular firm and you could see which categories of law they purported to offer a service in. So, it was accessible. Those directories were in libraries and so forth, and
there was a general structure of advice agencies, voluntary agencies, faith groups, community groups and a large number of solicitors’ firms who would be in contact with one another. It wasn’t particularly coherent, but to a large extent, in my view, it did work.

Although people did fall through the net, I think that the network of advice providers and solicitors’ firms that were there was significantly better than we have now. There was more coverage, there was less specialism. I happen to think that specialism is a good thing, because I think it enhances the quality of the advice given by practitioners to the clients. Of course, once you start atomising areas of law, you then get into problems. If a client presents with a particular problem, because of the very rigid franchising rules and the contractual rules since 1999, the client’s particular problem may fall outside a particular category, and this may result in the client having to go to a different provider to get that advice, and that may not actually work for the client. So, the danger of specialism and the danger of compartmentalising legal areas is that often clients present with more than one legal problem.

In the late 1990s, contracting was introduced. My firm brought a judicial review of this change, because we were particularly concerned with the artificial quotas which were placed on the number of cases that we could undertake by the New Matter Starts scheme. I still remain of the view that the New Matter Starts scheme is not a mechanism which works. It is a notional idea about how to ration and control cost of legal services, which does not actually result in any controlling of the budget for legal services and provides an artificial barrier from the client’s perspective, and also from the practitioner’s perspective.

Being given a quota or an artificial limit on the number of cases of 20 a year, what does that mean when you reach the 20? You have to ask for more New Matter Starts from the Legal Aid Agency. Will you get them? Possibly. Is there now a relaxing of that quota? Yes, but I do question: what is the point in having the quota system at all? At the moment each unit of legal help or advice is paid at a fixed fee, or three times over the fixed fee at an hourly rate. So, I think there’s a mismatch between the New Matter Starts scheme and the ability to control the budget. I just don’t think it works. If you went over your quota of New Matter Starts without getting authority, you wouldn’t get paid for it even if you did all the work.

My area of law, which is community care and mental capacity, remains within scope under LASPO. The significant change for us was the eligibility test. Clients who were previously eligible under the old scheme are not now eligible. And because mental capacity in particular is a relatively new area of law (the Mental Capacity Act 2005 came into force in 2007 and is therefore a very, very new law) which applies to hundreds of thousands of people. My clients are all disabled. They are all disabled adults. I act for people with dementia, with autism, with learning disability, with head injuries, with cancer, with any illness which affects somebody’s ability to live without support, or where they’re particularly vulnerable. That’s my client group. Because the means test has changed and because the administrative requirements which are placed on us have also increased, it means that a large proportion of the clients who were previously eligible are now not going to be eligible, and we are having to charge clients for legal help if they have more than £8,000 capital even if they are on means tested benefits.

On a legal aid certificate, although you will be eligible if you have below £8,000 capital, if you have over £3,000 capital, anything between £3,000 and £8,000 will be taken by the Legal Aid Agency as a one-off
contribution towards your legal fees. Now, for somebody who has got learning disabilities who has £7,500 in the bank, whose parents have put money into that person's bank account in order to pay for their funeral, or to pay for the additional services that they might need because of their disability, that's a pretty hard contribution to have to make. We have to ask: “Can we have a cheque for £4,500, which is your payment towards your legal fees?” That's pretty tough. We're also seeing clients who are on means tested benefits who have up to £16,000 capital. So, the capital test for means tested benefits doesn't match the legal aid eligibility. This means that we are having to charge people privately to get them down to the level where they are eligible for legal aid.

I want to talk a little bit about the number of people who are disabled, and the fact that disabled clients are, by definition, more likely to be eligible for legal aid, and more likely to be in need of services than other client groups. By definition, people who are disabled from birth are nine times out of ten unlikely to have had a job and unlikely to be able to get a job which pays sufficiently to be able to support themselves. They are much more likely to be in need of services: this means domiciliary care, help with washing and help with personal care, but also help with going outside the home, access to motability vehicles, access to day centres, access to society. What I have seen with the austerity cuts is that we are now dealing with cases where housebound clients have been unable to get out of their flat or their house for one, two, three, four, five years.

If they are lucky they will have a neighbour who will bring their shopping to them, but they will not actually be socialising. They will not meet another person and the level of need is incredibly high. At the same time, we have the introduction of the Care Act, which was supposed to be a consolidation Act. In fact, it has removed a lot of the rights which disabled people used to have prior to its implementation, and it has set the threshold for the eligibility criteria for access to community care and health services (particularly community care services) at such a high level that many people fall below that level. As a result people are being left without services, and they need advice. They need a mixture of advice from advice outlets, but they also need hard legal advice. Community care is a very difficult and complicated area of law, and local authorities and NHS agencies have become quite good at it.

In the 1990s when I was one of the only community care lawyers that there were, because it didn’t exist, NHS bodies and local authorities were not used to being challenged. Now, they are, and because there is sympathy towards a local authority or an NHS body saying “Well, really sorry, we don’t have any money. We’re entitled to take our resources into account,” it’s become even more complex to challenge their decisions or omissions.

On the mental capacity side, as I’ve said, it’s a very new area of law, and we have hundreds of thousands of people who are in care homes and who are in hospitals. We also have hundreds of thousands of people who have been moved from their own home or from a hospital or care home into supported living, particularly those in the learning disability group. People with learning disabilities are a more fortunate client group than, for example, the mental health client group in terms of there being a philosophy of independent living, in which support is provided to help people to live independently in the community with their own flat, with their own tenancy and a support package.
People with mental health needs and older people are right down at the bottom of the pile so far as that is concerned. So there’s almost a hierarchy of priority, even between the different disability client groups. You have probably heard of the Deprivation of Liberty scheme. This is a new scheme for authorising the legality of a deprivation of liberty when there has been a detention in a care home or a hospital. It doesn’t currently apply to people who live in their own flats. For them, any deprivation of liberty has to be authorised by the court. One of the quick wins would be an adjustment or an amendment to the primary legislation to ensure that all the people who are in a supported living environment could have their deprivation of liberty approved or authorised through the same route as those who live in a hospital or a care home. This is a client group for whom the telephone gateway really does not work.

You heard Jawaid Luqmani talk about the need to foster a relationship of trust in the immigration sphere. In the disability sphere – particularly in relation to mental incapacity – every single client whom I represent (and I am usually representing that person via the official solicitor as their litigation friend) has a different level of need, a different level of ability to communicate, and different methods of communication. For example, some of my clients are able to communicate verbally. All of them need face to face contact, and all of them need non-verbal communication skills and the potential for developing that kind of communication relationship. Some clients need interpreters, some clients need Makaton interpreters or British Sign Language interpreters and other disability interpreters.

What is absolutely crucial in mental capacity law is that the odd nuances in a person’s presentation are picked up by the legal advisors. This is why, whilst a telephone advice system will work very well as one of the tools for different areas of law or initial advice, it does not work for this particular client group where face to face advice is needed, because it’s also us assessing the client. The types of cases which we deal with are abuse; neglect of people who are disabled; deprivation of liberty; residents’ disputes; sexual relations cases; sexual abuse cases; physical abuse; and financial abuse, and I cannot think of a case concerning a client who lacks mental capacity where he or she is not being financially abused, either by a member of their family or by statutory organisations who are charging them incorrectly for services which should be free, etc. etc.

As I have said, the cases are mainly in scope, but one of the areas which is particularly difficult is eligibility and the evidence which is required, particularly in relation to people who are not mentally capable of producing paperwork and who don’t have passports and don’t have a driving licence because they have never been able to drive and they will never be able to drive.

If government really wanted to, they could easily find out what benefits somebody was on and their driving licence details. If the will was there, they could do it.

One of the other things I wanted to say was about the need for high quality standards to protect this particular client group. I think that this fosters confidence by the statutory agencies (in particular the Ministry of Justice) and the taxpayers that taxpayers’ money is being spent properly by having high standards of providers.

I think that one of the difficulties which David Gilmore has quite rightly brought up in his paper is audits. I have had three audits in the last month. I’ve had a legal aid audit, which is a super-audit really, looking
at files, looking at every aspect of my firm. I’ve had a Solicitors’ Accounts Rules audit because we hold some client money, and tomorrow I have my Lexcel audit. The level of auditing is very, very high for legal aid practitioners.

I do question whether sometimes the audit process is actually focused on the things it needs to be focused on. While I readily welcome an audit of the firm, meeting quality standards and so forth, I am concerned that the audit process did not, for example, pick up fraudulent activity in a particular mental health firm. So, is the audit system actually being geared towards those organisations which it might reasonably be focused on?

On the deprivation of liberty side, there is a new scheme which I think will be proportionate when there are enough representatives to be appointed by the court to do an initial investigation. This will involve going to see the person, going through their records, checking whether the deprivation of liberty is going to be controversial or not. Is the person opposing it? Are they objecting? Are they trying to leave the care home? Is it something which the court needs to look into in more detail or not? At the moment there is no filtering system, but when that scheme comes in, I’m hopeful that it will serve clients and the court system well, because it will enable this filtering system to take place.

In my experience, local authorities are very happy to spend money on legal fees, and it baffles me why CCGs, NHS Trusts and local authorities are able to spend vast amounts of sums on legal fees, not on important precedent-setting cases, but on other cases. I’m not sure that they have to under their insurance policy, because I’m not sure that settling a particular individual case is going to set a precedent for them which is going to result in them having to provide services for others.

At the moment, what is happening is that there is no enforcement mechanism for those services to which disabled people are legally entitled, well because there are no practitioners. One of the things that I would like to see is some consideration of “polluter pays” or “misconduct by a public authority”, which is already in the Court of Protection Rules - I should declare that I sit on the Court of Protection Rules Group - so that there is a new provision in the Court of Protection Amendment Rules that misconduct by a public body may result in a costs order. Non-compliance with court orders may result in a costs order, because I think we need to move away from a philosophy and practice that court orders are just there as a bit of guidance and not to be complied with.

I want to see the simplification of the legal aid scheme, both for providers and also for the Legal Aid Agency or whoever is administering the scheme. It must meet the requirements of the National Audit Office (NAO), and I’m keen to know what the NAO actually requires. At present there is a lot of smoke and mirrors, I think, about what the NAO actually requires of the Legal Aid Agency, and therefore what burden is then put on practitioners.

Simplification is the key, so that there isn’t unnecessary bureaucracy and administration, and the money is actually spent on the clients and the provision of advice.
Evidence: Bill Waddington, Joanne Cecil and Andrew Keogh  
Date of session: 27 April 2017

PART I: Summary of Evidence  
Bill Waddington

I qualified in 1980. I have done Criminal Law since the date of qualification.

I moved to a firm: it was a High Street practice, mainly legal aid, strangely enough it didn’t have a criminal department. I was taken on on the basis that I open one and start from scratch. I am very proud to say that within five or six years we got a fairly substantial department, which grew to be the biggest in the area, and indeed remains so, even though they are a different firm.

That was achieved, in those days, really through hard work and not taking on holidays or anything of the sort, working seven days a week as all legal aid practices do. I qualified pre-PACE, so there was no pay for going to the Police Station, and indeed, you could be kept out of the Police Station in fact. I made a nuisance of myself for the four years before PACE by always being at the Police Station, forcing my way in and so on, and it was a way of impressing, if you like, the clients and making sure that they were properly represented.

The firm I was with then merged with another firm in about ’93, oddly it was a much bigger firm that did an awful lot of commercial work and so on, and strangely enough in those days, the criminal department was the most profitable department in the firm. That wasn’t necessarily because of the high fees. It was, I think, probably because other people who were there weren’t working as hard as they ought to have been. Those were the good years if you like.

In 2000, in the firm I was in, by then a fairly big commercial firm, big licensing practice and so on, it was clear that the poor relation was crime - legal aid crime - and the writing was on the wall, in the sense that we were being subsidised by all the other departments, and so it was either a case of retraining and doing something else, or moving off with my department, which is what I did, to my present firm.

In the 17 years since I have been at my present firm, when I first went, crime was responsible for about 35% of the gross fee income [GFI] of the firm, and provided about 25% of the firm’s profit. Nowadays, it provides about 10% of the firm’s GFI and about 7% or 8% of the firm’s profit. The sad reality of the situation is that, as I think I mentioned to the Commission last time, if I wasn’t the senior person there, I would imagine that there would be pressure from other partners that we really don’t need to do crime because it is costing more in overheads for very little return.

If we were a standalone crime practice, then I am not sure that we would be surviving nowadays. We survive (a) because we are supplemented by the rest of the firm and (b) because we also supplement our legal aid crime with as much private work as we can possibly do. So, in real terms, without giving away too much about the firm’s income, in 2000 we were paid about £1.2 million each year from the Legal Aid Fund. Nowadays it is about £700,000. The rest we make up from private funding. Ironically,
our staff has increased because work takes a lot longer than previously. So, expenses go up, income goes down.

My department consists of seven solicitors. Two of them are part time. I have four Police Station representatives, one Crown Court clerk, and six support staff. So, there are a lot of mouths to feed. We call that a skeleton staff, that is as true as it can possibly be. The salaries aren’t good for people. Criminal defence solicitors probably start on salaries of about £24,000 a year, and after 5 to 10 years may have reached £30,000 to £35,000 a year, with very small increases, if any, in the last decade.

That sets the scene really, but big is not always good. We are still the biggest in the area, but as I said, probably as a result of that, we attract a lot more private work than other firms. I imagine they have greater difficulty than us in making ends meet.

What works and what doesn’t work in the current legal aid scheme? Well, what works I think I can answer in one line which is that the defence side of things works. I am not sure that anything else actually works in the system at the moment, and I am not being too cynical about that. I think that is probably fairly accurate. What doesn’t work? There isn’t enough time in the rest of the year for me to talk in enough detail about what actually doesn’t work in the system. I think the experience of everybody here who is in the criminal justice system would probably say about much the same thing.

The Prosecution side fails, I think, almost completely in everything they try to do. That isn’t because of the quality of the staff, but I think it is lack of resources, I think it is maladministration, I think it is constant imposed changes upon them and so on. The Court system is probably at the lowest ebb, I think, that I have ever seen it at in all my years, in that it’s slow, it is cumbersome. Much the same with the Crown Court although I think you, Chair, will be able to tell us a little bit more about that. Listing in the Crown Court is just a complete and utter farce. It has never been very good, but nowadays, it is absolutely appalling. It is all geared around box ticking, because cases have to be listed within a certain period of time and if they are listed - that means “put in the list” - then the box is ticked. It doesn’t matter if they subsequently come out of the list, because the box is ticked, because it was listed within the specified time frame.

I can give you examples of cases. I think the worst one I have is an arrest in 2014. Bailed for further interview in April 2015. Eventually charged and appears in the Magistrates’ Court in January 2016 and Crown Court February 2016. Listed for trial July 2016. Adjourner on that day due to lack of Court time. Listed March 2017 for trial. Adjourner again until Jan 2018 (but since brought forward to October 2017). Like 50% of the cases in the Crown Court, it is a historic sex case. So, twice the complainant and the witnesses have turned up and twice it has been put off, and it is going to be three and a half years if it gets on next time. Three and a half years since the client was first arrested before the trial is actually heard and everyone will have then appeared three times.

That may be an extreme example, but it is an indication of the delays that are faced. The barrister in that case sets aside a week each time it is listed, probably doesn’t have any other work to go back to, loses a week’s income and the whole thing is very catastrophic.
My perception of the client experience and how it has changed over the years? By the very nature of the job, I suspect that a lot of the clients we deal don’t really notice any changes in particular, and those whom we represent on a regular basis really aren’t too bothered about any changes that may be made, as long as there is somebody there to look after them, then that is fine.

What I have found over the years is that people who are appearing for the first time and the only time in their lives come before the courts, are absolutely horrified at the experience. That is from the moment when a friendly Police Officer either knocks on the door or rings them up to say we would like you to come into the Police Station for a chat, which happens in most cases nowadays because it is cheaper for the Police to get people to come in voluntarily, rather than for the Police to go out in the car and arrest them. So, they ask them to come in for a chat. Most people think it is a chat, and they get to the Police Station at a pre-arranged time and the Police get them into the Police Station, they say we are not arresting you but we are going to interview you. You are under caution, here are your rights.

You can have a solicitor, it can be free, but we are ready to go now and it will be hours before we can get a solicitor here and you’ve got nothing to worry about, so shall we crack on?

Now we hear that, day in, day out, from client and so, we can assume from that, that it is actually true, and that only the very, very wise, who think for themselves after the police have rung them “Well, maybe I ought to ring a solicitor and see what the situation is.” They then take somebody along with them. Only the very wise have somebody with them at that first interview.

If it is domestic violence, or an assault, or something of that nature, it is terribly easy for somebody, even if they are not guilty, to accept responsibility in some way for perhaps overdoing the self-defence part. “Well, I appreciate he may have been going to attack you, but do you think it was necessary to hit him quite as hard as you did.” “Well, probably not”. “Do you think you maybe overdid it?” “Yes, I probably did.” So, the chances of succeeding on that at a trial when he gets representation are limited. So, the police have done the job that they set out to do, which is solve a crime, tick a box and get a conviction. Tick another box. For that first timer, who is wise enough to have a solicitor, what horrifies them is, first, of the way they are dealt with by the police because they are not just voluntarily attending, the police have them in their sights, and they treat them as the guilty party.

The delay that follows an arrest before a summons is issued can sometimes run to many, many months. We don’t have the continuous bail-backs now, which isn’t necessarily a good thing as we are finding out, because people just get lost now; but we had these continuous bail-backs whilst the police supposedly continued their investigations or liaised with the CPS about whether or not there was a charge. The reality, I suspect, was that the file stayed on the officer’s desk and never moved until they were pushed to do something. People are just left dangling until one day a summons arrives in the post, and then those who haven’t been represented will perhaps go and see a solicitor and those who have been represented will contact the solicitor.

There is a court date four to six weeks away. The solicitor is left saying, “Well okay I’ll take instructions from you but I don’t know what the prosecution case is because we weren’t at the interview, and strangely enough, even though it was six months ago, I can’t get hold of the prosecution evidence until a
maximum of five working days before the first court appearance, in theory. In reality, I can’t be told of it until the morning of the hearing because my email to the CPS requesting the initial details of the prosecution case (IDPC) won’t be answered until the morning of the first hearing, when it’s mayhem at court, because courts now funnel people, not into five-day court sittings, but in our area - it could be different in others - but in our area Monday and Thursday are the dates when first timers are funnelled into court.

So, all your clients are turning up there, some of whom you have not seen before and didn’t know were even appearing. Some of whom you have seen but you haven’t been able to discuss the evidence with them and then you start emailing, from court, to the prosecution hub to get the evidence sent to you. When the evidence arrives, the initial details of the prosecution case should mean “Well we will have a summary of the facts and we’ll have a summary of what the client said in the interview and we might have a statement or two.” A statement from the complainant we would expect, or something like that, and if there was a medical injury, a statement of what the medical injuries were, that’s what you ought to get. What you actually get, in most cases, is probably a page, or a page and half, a very sketchy summary of what is alleged and what your client has said in interview. You can’t get an adjournment, adjournments simply don’t happen in the magistrates’ courts because it delays the justice system. It’s very ironic, considering your client has been on bail for six or eight months, but you can’t get one, so, it’s either guilty and full credit, or it’s not guilty and lose your credit.

In our area, and I suspect it is the same in most areas, we have what is called robust case management which means that generally speaking anybody who dares to plead not guilty, or any solicitor who dares to advise his client to plead not guilty will have the case moved from the lay justices’ court, where you just enter your not guilty plea, into the District Judge’s Court. He will have seen all the evidence, we haven’t seen it and he would say “Do you want to have another word with your client, it is probably best he pleads guilty because he will get maximum credit. If he insists on pleading not guilty, I will do the trial myself and if he is convicted, I think he is looking at custody. If he pleads today, it is probably a financial penalty or a conditional discharge.”

I am giving you examples of what we hear on a daily basis. So, you will say because you are already geared up for it, you have said to your Client this is what is going to happen, blah blah blah, “No, no, I am still not guilty”. But when a client hears a judge say that and witnesses it himself, perhaps the client might call you back and say can I just have a word and in some cases, a client will change his mind and plead guilty. It puts us in an invidious position really, because we are there to represent the client’s interests, we are obviously there to ensure that he gets maximum credit, provided he is guilty. We have got to ensure that he is not bullied into pleading guilty.

I think, as Jo will tell you, the same thing happens in the Crown Court, in cases that are sent up there at the PTPH hearing, which lawyers call the “pressure to plead hearing”, but it is actually the pre-trial and preparation hearing because judges do exactly the same thing. So, Section 51, and indictable only... and it goes up to the Crown Court. The judge is there within two or three weeks of the case appearing in the Magistrates’ Court. “I have read the paperwork, he is going to be better off pleading guilty. I can
envisage imposing a custodial sentence if he has a trial, whereas I can probably deal with it in some other way if he doesn’t and pleads today.” Hence the pressure to plead hearing.

Bear in mind, the prosecution has everything on their laptop. The Judge has everything. The defence, even at that stage in the Crown Court, have very little information.

Joanne Cecil:

Case summary and key statements, typically, if you’re lucky.

Bill Waddington

I suspect that the judiciary thinks that we actually have the full paperwork because we should have. That is what the criminal procedure rule indicates, we should have, and the judiciary just think we are messing about if we say “Well, we haven’t had all the paperwork or we haven’t seen it or whatever.” So, that is the situation that we face on a daily basis.

The perception of the practitioner’s experience and how it has changed over the years? Well, I think morale is at the lowest ever. I am not sure about the age of the Bar, but we did a survey recently on the age of criminal practitioners around the country. In Hull, we surveyed 7 firms: 21 solicitors and the average age was 54.5. We also surveyed 13 firms represented on the Committee of the CLSA: 13 firms, 85 solicitors, average age 45. These are the average ages of just those solicitors engaged in criminal work.

What that indicates is there simply aren’t any youngsters coming into crime, not on our side anyway, they may be on yours, Jo. But if they do come in because it is all very nice and ideal and very interesting when you first leave university and go into a training contract and do a bit of crime, but after two years of fairly low salaries, very hard work going out as well. You have done the day in court, and then you are on call from 1700 at night until 0900 the following morning, which may mean one telephone call or it may mean you’re out all night long at the Police Station. It takes its toll and I think people think “Actually, I would rather do conveyancing and go home at 1700 or something like that.” So, there is definitely going to be in the future a real recruitment difficulty. I think we have got considerable recruitment difficulties on this side of the profession.

How can things be improved? Well, there was a big change that came about when means testing was brought into the Magistrates’ Court. There are certain urban areas where means testing makes no difference whatsoever, because the clientele has never worked. It will never work and it has all been on passported benefits, so it is no problem at all. There are certain areas, and Hull is one, where there are an awful lot of self-employed people. The minute a self-employed person walks through the door wanting representation in a criminal case, you know you are in for a hard time trying to get legal aid because a window cleaner, a taxi driver, somebody who works three day a week for his builder friend, just does not have wage slips, bank accounts, books of account, and so on and so forth.

So, you either do something that is extremely foreign to the criminal lawyer and say “I’m really sorry, we won’t be able to help you on this occasion, so just go next door and see whether they can help you”, or
else, more than likely, you will say, “Look, you are never going to get legal aid, but I will help you out. We will do as much as we can,” and so on and so forth. There is no point in saying “Give me some money in my account or I will send you a bill”, because you will never get paid and you just cannot waste time messing about trying to get legal aid in the short time that it is available to you. So, it causes all kinds of problems.

In the Crown Court, it is not quite so bad, because there is a different financial test in the Crown Court - a joint disposable income of £37,500 a year. Above that, you won’t qualify for legal aid. Below it, you will qualify for legal aid but with a contribution. I don’t even know whether Andrew understand the contribution system. I don’t think anybody understands the contribution system, but the sort of thing you have and I had this the other day - the joint income in the household was about £2,500. They have a mortgage, they have a dependent child and he qualified for legal aid on a section 18 charge, and he rang the other day to say that he’d got a monthly contribution for six months of £950 per month and was saying “how can I pay that?” The answer to that of course is that I have no idea, and fortunately I don’t have to collect it from him.

But how anybody calculates that, I just don’t know. People are treated terribly by the State in that way because they are not given any explanation as to how it is calculated. That is the figure. So, we are happy because we have got legal aid, and counsel is happy because we have got a legal aid order. We just crack on with the case.

The document that the client gets from the LAA says “You have to pay £950 a month over the next six months”. It doesn’t tell him where to pay it, or who to send it to. The first thing that happens is that a Rottweiler firm of debt collectors come around to the house, knocking on the door to say “We are here because you haven’t paid your first month’s contribution.” “I didn’t know when I was supposed to pay or who I should pay it to.” “We are here now, so have you got a sofa or something we can take away.” That is how it starts and that is the way the State treats these people who are Defendants in a case who the State has said should pay this money towards legal aid.

Of course, from the client’s point of view, he thinks that he is paying you £950 a month and it’s all to do with us. We have to explain that it is nothing to do with us at all, it is the State. If he is acquitted, he will get his £950 back, two years after the case.

David Gilmore:

If he is lucky, plus 2% interest.

Bill Waddington:

Of course, for clients who don’t qualify for legal aid, those above £37,500 who are successful and are acquitted will get their costs back at legal aid rates which means they have employed a Solicitor and Barrister privately against the power of the State, they have been acquitted, and they will recover less than 25% of what they have paid out. So, they are out of pocket by 75% plus, depending on what private rates they agreed with the firm of solicitors.
Appendix 4: Oral Evidence: Second Session

Which came to some surprise to the MP Mr Evans, who was very critical of the system in the papers until it was pointed out to him that he had actually voted for it, though he didn’t realise he had.

It is a gross injustice. That happens in the Magistrates’ Court as well. A privately paying road traffic person for example, who is never going to get legal aid for it, pays for a private defence and is successful and gets paid less than 25% of what he is paid out, which of course, results in many cases in people saying “I have got to look at the financial position. If I go to Court, I will just plead guilty and I will get a fine and save £1,000 or £1,500”; whatever it may be. So people go along to Court and just plead guilty, which isn’t a very good system at all.

My suggestion for improvements? Well, I think the whole system of means testing for legal aid needs looking at. We put forward a suggestion - I can’t give you the date of it, but Grayling was the Lord Chancellor - to say “Well, take away means testing, and instead, when somebody is convicted or pleads guilty in the Magistrates’ Court, impose a levy upon them equivalent to the Category 1 guilty plea in the Magistrates Court, I think £170-something, and put that back into the legal aid fund, so it is almost self-financing. He categorically dismissed that and said I would never get that past the Treasury and it will be far too complicated in terms of collection.

But within three months of rejecting it, he brought in the new victims compensation scheme which was not a dissimilar kind of thing, except it doesn’t go back into the legal aid system. So, that is something you could do and it would save on an incredible amount of admin, it would save on people representing themselves, it would save on delays, administration and so on. In the Crown Court, I would probably do away with the contribution system during the currency of the case, but it is something that could be addressed at the end of the case. In fact, I think, Andrew, before the contribution system, the Judges were encouraged to make defence costs orders against the Defendants.

Andrew Keogh:

They then changed the statute. A few Judges were very proactive with it. But it is an anomaly, it is actually still survives in the Court of Appeal (Criminal Division) today. It is fascinating, because you see some Judges will spring it at the end, before Counsel addresses them and they get savage, but it still quite rare. I read almost every single judgment out of the Criminal Division and I maybe see it 20, or 30 times a year, which is a small percentage. Even at that appellate level, it is still not consistent. It is quite bizarre. Can I just add something to the means testing?

One of the problems, and I will do it in my own presentation, but we don’t have a lot of evidence on means testing. Means testing came back in the Crown Court in 2010. If legal aid [...], costs for collections etc., and I got an answer. I don’t recall what it was, but the punch line was that it was probably too early to ask the question. So, it was premature. I forgot about it, until about four months ago I asked the same question and I asked them to go back to 2010 – what contribution orders were made, how much was enforced, how much is outstanding, etc.

The answer that came back was “We can’t give you that information, because it would cost too much. There is a limit on freedom of information and it would cost more than £600 or whatever to collate the
information.” The thing I find quite baffling about that is therefore, no one had apparently pressed the button and seen how much is outstanding. That, in just accounting terms - assuming it is a true answer and I have my doubts - that in itself is quite staggering. There is no evidence that legal aid should ...

It just seems to be basic accounting information. Money owed is an important piece of accounting information. I haven’t had time to get back on it. I am going to break it down into chunks, but I suspect there may be some measure of truth in it.

It is a political thing, because every six months or so you would have the same headline. It would always be a rich footballer that would be in the Crown Court who gets legal aid because he was entitled to it, and that was the tabloid story. That seems to have stuck, and I am absolutely convinced that is why we got means testing back. It is a highly political thing. But the means test thing is just devoid of any policy basis.

Bill Waddington:

Just following on from that, the irony of course, about the Maxwell brothers who also got legal aid, is that given that they ended up being acquitted, all the taxpayer paid out was the legal aid. Had they been acquitted and not had legal aid, then in those days under the defence costs order 25% didn’t apply, they would have cost the taxpayers about four or five times more than it actually did, because they had been paying back on what they had actually paid out to their own solicitors. It was a non-argument, wasn’t it, from the Daily Mail’s point of view?

I am nearly at an end now, but I just wanted to give specific examples that were given to me yesterday by one or two of my colleagues. Just on Transforming Summary Justice (TSJ) and Better Case Management (BCM) and what really goes wrong with it. We all know that the government has problems with IT projects that do not really work and never have and I am not sure they ever will.

So, all the courts are of course using a digital system and all those people here were giving examples. If it breaks down and isn’t working, the court just comes to a standstill. More often than not, it seems to be the CPS side of things that isn’t working and may not have all the information they should have because somebody can’t send it to them - and so it goes on. We have a digital system for applying for legal aid, which has replaced the old hand-written system. It probably took an experienced criminal practitioner about two minutes to complete a legal aid form by hand in the old days.

It was a four-page form, pretty straight forward. It now takes, even for somebody on a passporting benefit - it will take 30 minutes to complete it online, when you can get on. The portal breaks down. Once a day it will break down, I would imagine. Which means that nobody in the country can get on the portal and make an application for legal aid, which is extremely frustrating. Do bear in mind, you are often doing all of this when you have gone to that busy Court, when you have got these ten new clients to see and when you have got ten lots of evidence to go through with them and when you are also trying to apply for legal aid to ensure that we get paid for your day at Court.
So, certainly the erosion of disclosure of evidence brought about by TSJ and BCM places some undue pressure on the defence to advise on plea in very difficult circumstances. The CSLA is always warning people “Look, you have to be extremely careful to just not succumb to the pressure that has been put on by the Court, because tomorrow the Defendant who has pleaded guilty might wake up and decide I don’t think I was advised properly” and you certainly find that you have been advising them on a piece of paper when in fact there were 20 other bits of paper that you didn’t have, that would have given your Client a perfectly decent defence. And you would be the one that is responsible.

In terms of examples of London Courts - and you may know something about this, Jo - a colleague of mine said yesterday that in some London Courts the CPS are declining to serve any IDPC unless a request is sent to a centralised CJSM account. There are examples of no reply being received to such requests. If the Defendant is in person, there is no CJSM account. All the while the full file is actually on the CPS laptop and he is in Court with it. But he won’t show it to anybody. Don’t ask to see it, because the reply is that that is not the system in the Court.

Initial details of prosecution case which comprise an MG5, that is just that brief summary I was telling you about and the antecedents of the Defendant only, whilst there is a full file, including statements, on the CPS electronic file in Court. Now this is no longer about cost. One of the reasons for taking paper out of the system was to cut the cost of photocopying by the CPS. But now we have moved from cutting cost to actual secrecy: “This is the case against your Client, but we are not going to tell you what it is. Just advise him on the basis of that little bit of stuff that we have given you.”

At a recent liaison meeting with the resident Judge, it became clear that the Crown Court Judges think that we are served all the evidence, including statements and exhibits, before the first appearance in the Magistrates’ Court. The reason they think that is because that is what the practice direction on better case management is all about. That is why they are so unsympathetic when we argue at PTPH about the lack of papers. They think we have already had them. The CPS failure here is delaying the work of the Crown Court.

Then a Kent prosecutor is telling us that material will not be served because it is sensitive, but it is neither scheduled as such nor the subject of a PII application. The Police have decided it was too sensitive for the CPS to see. In fact, some of the material was plainly not even remotely sensitive because it was the Defendant’s medical records. But in any event they decided to usurp the role of the Courts and PII and just decided for themselves that they would sit on the material.

Those are four examples of the CPS working often by a system that operates in a way contrary to the rules without any discussion or debate. And that is what we face day in and day out. I have absolutely no idea what unrepresented Defendants do in this kind of situation: it would be absolutely terrible for them. All of this, of course, leads to incredible injustices.

**Joanne Cecil**

I am just going to pick up on the point that you made. I was very recently instructed to go down and deal with a murder in the Magistrates’ Court on a first appearance, and one would expect that there
would be a file, because there are already other co-Defendants in the Central Criminal Court, so there was a file in existence for those Defendants. Certainly, the Crown had a file. I had the same difficulty. It was a virtual Court, which meant that the Client was supposed to be at a Police Station, being linked up on the video link to the Courtroom where I was and where the Court was sitting.

The system was down that morning. So, the plan initially was to bring them to Court but they couldn’t, because the cells were full. The initial approach was “That is okay, we will wait until there is some space in the cells”, which seems to me to be a little bit a) optimistic and b) pre-judging various other cases that had to be heard that morning. Those cases were obviously going to take priority but only after other cases, which were on bail strangely, for some reason. In the event that case got transferred to another Magistrates’ Court, at 1350 in the afternoon, with the defendant appearing on videolink to that Court. Throughout the entire course of the day I could get no papers whatsoever. I was told I had to email the central email list. So, I did that and the response I got was “We cannot find any case with that name, we know nothing about it. We have no file.” So, the whole day proceeded very much on this basis.

I eventually arrived at the other Magistrates’ Court at about 1530 after travelling across London. It transpired that there had been a complete breakdown because that Court had offered to take it at 1000 that morning, but the original Court would not release it because they wanted to wait. That is just a classic example of a hearing that really ought to have been dealt with - and was dealt with - within about two minutes because nothing can happen in the Magistrates’ Court on a murder (you can’t even make a bail application), so it just gets sent to the relevant Crown Court, and often you don’t even get a date because that is notified by the Crown Court that it is being sent to. That took, effectively me being in Court from 0900 until about 1550 that day, just for that brief hearing. This is what they would say: the rationale would be an efficiency saving because you don’t have to bring the Defendant from the Police Station to the Court, so you are saving effectively on that transportation and the service that is being provided by G4S or Serco, or so on.

In reality, what that means is that the burden of cost is shifting onto the defence, and this was not an unusual situation. It happened in the three previous weeks at this particular Magistrates’ Court on all their virtual Court days, so it is effectively anticipated to a large degree. Instead, you have a number of defence counsel or solicitors or advocates running around all over London trying to get between courts to try to deal with a case. That, as I say, in reality, is a formal technicality now. You can’t be sent to the Crown Court without the defendant being present. They have to be present; the defendant does, but in reality, you are just sending it off to get a new date for the next court. And that’s an entire day, for which there is a very low fixed fee for litigators designed to start with.

Bill Waddington

None, because it’s tied into the Crown Court, supposedly.

Joanne Cecil:

And if this hadn’t been one of those types of cases, presumably, it would have been a very small fixed fee because in the Magistrates’ Court the fees are just completely underfunded, from what I can tell.
Which, again, is something for reversal, when one considers the whole process of better case management, where the emphasis is supposed to be on front end loading, effectively - proper advice in the early stages to ensure that cases which can be resolved quickly, are resolved so that no further time and resources are spent on them and in others, effective and efficient case management.

But that’s an example of just one of the inefficiencies in the system. And, unfortunately, time is lost time and time again either because you do not have video links that work or you have double bookings of video links. Video links are seen as very major efficiencies. A lot of the time, they simply don’t.

Alternatively, when individuals are brought to court, they are not brought to court on time or the particular van that is collecting them has to go and do a circuit of different courts. So, though they may have left at 6:30 that morning, you still don’t have a defendant at court for the start of the court day at 10:00 a.m., and you could be waiting until lunch time. And of course, we all know how much it costs for a court to be sitting, and so on and so forth.

But in addition to that, it also impacts upon the individuals who are actually representing them because, obviously, at the present time, there are fixed fee situations, so you’re not being paid for your waiting or anything like that, and that time is increasing and accruing.

But perhaps it is an incredibly serious case with an individual who has never been arrested before. He finds himself arrested on charges of murder and being dealt with in the Police Station by a solicitor who is going to represent him the following day. He has none of this communicated to him at all by the Police Station, in the cells, or anything of that nature. And then, effectively, he has a five-minute video link conference with somebody on the other end, who has to explain to him: “You cannot get bail, okay”, and you are stuck there, and this is the process.

This seems to me to be an unacceptable situation. Regardless of guilt or innocence, it just shows no respect actually for the situation they are in. So, I am afraid the situation that your colleague was describing (and I am never in the Magistrates’ Courts, as a general rule) is completely borne out by my very limited experience with the Magistrates’ Courts.

I realise I haven’t really introduced myself in the same way that you did, Bill. Just so that everybody understands my experience, I am on the other side of the fence from Bill in that I was called in 2005, and have practised at the Bar since then. I cut my teeth (as it’s known) really in the Magistrates’ Court and the Youth Court, which I’ll come onto later. Since then, I have spent the vast majority of my mixed practice doing Public Law or Criminal Law. Criminal clients mainly in the Crown Court, and Public Law work is mainly in relation to criminal justice related issues or to children.

Just a point on that level of practice. It’s very difficult, actually to have a practice that spans more than one practice area because of the competing demands on your time and the different ways in which the court systems operate and the practice areas operate. This is just the purely logistical issue, let alone the actual knowledge issues.
The difficulty that you have then is in providing a service to our client base, who have competing needs and competing issues. We don’t have any knowledge of mental health law, for example, and prison law, at the same time as criminal law, or of community care aspects when it comes to children. The various courts are almost expecting you to have that knowledge, not having the knowledge themselves. At whatever level we’ve experienced this.

The funding streams do not take any of these aspects into account. As a result the cases that require a huge amount of time on both the litigation side and the advocacy side are typically, in my experience, very poorly funded, despite the fact that they are often some of the most complex and certainly time consuming.

So, that’s the nature of my practice. It spans through the Crown Courts and the Court of Appeal - predominantly the Criminal Division of the Court of Appeal, and then the civil High Court – [Administrative Court] and QBD. So, that’s where my experience is derived. I have limited experience on the litigator’s side of things. But from that aspect, it seems to be that the overarching position of both sides of the profession is that the litigation side is very much underfunded in the early stages, at the Magistrates’ Court and the Police Stations.

That’s where (a) the real efficiencies could be made, and (b) where the real expertise is needed in criminal work. And there are real issues, as to the adequacy of individuals represented within the Magistrates’ Court or Police Station, in terms of time, efficiency, and demands, because of the low income that is paid for this work.

In respect of the delay in the Youth Court - and I still do Youth Court cases - at the present time what we’re seeing is a pressure, you can speak to this, Andrew, to keep very serious cases involving children in the Youth Court. And then, yes and no: is that a good or a bad thing? But then, to retain the ability to send them to the Crown Court for sentence at the conclusion of a trial.

In theory, the Youth Court should be a better place for a young person. In reality, my experience is that it is less effective. There are specialist prosecutors that are brought in for some cases but not for others, and there need to be specialist defence advocates to some degree brought in as well, with appropriate funding in place. And when I say advocates, either solicitors or counsel, depending on the skill set.

I don’t really subscribe necessarily to this whole quality issue between the professions, and certainly not in the Youth Court, where you’ve got a huge body of experienced solicitors. But what you do find is that because it’s so woefully unfunded, the disclosure rate is appalling and the manner in which cases are litigated is just incredibly poor. Practices are accepted that would never be deemed acceptable in a case involving an adult in the Crown Court.

And the quality of representation is entirely different. This is because in the Youth Court, and because of the funding situation, basically, there is a huge body of very junior practitioners dealing with trials. So, if you just take one of the middle cases - putting, for example, sexual consent cases to one side for a moment - take robberies, if you’re an adult, you’re immediately in the Crown Court. And if it’s a knife crime or something like that, I’d say, generally speaking, you are looking at an advocate with several
years’ experience, as opposed to a second-year tenant. In the Youth Court, the child is being represented by pupils in their second six months or a junior tenant. It is very rare to find experienced counsel in the Youth Court. There is a difference, obviously, when solicitors are representing them. Many of them have a Youth Court specialism, in terms of practice.

But the quality of representation is markedly different, purely by virtue of their age, before taking into account the fact that the client base often presents with a variety of complex needs - certainly, in terms of cognitive ability and so on. The Youth Court should in theory be set up to handle all these things.

In my view it simply isn’t. It’s not resourced sufficiently to do so. There are wider issues in terms of principle as to whether or not children should also have the right to be tried by a jury, for example, versus the quality of the experience and their effective participation in the right environment. But I think there is a very big concern in terms of legal aid delivery in allowing the Youth Court to retain jurisdiction but then have the power to send the defendant to the Crown Court for sentence.

I would like to believe that all of this was some sort of promotion of the children’s best interests - creating a better environment for youth justice. But frankly, the only thing that I can see coming out of it is an attempt to save costs. It’s all being driven by efficiencies and costs, and that is simply not an acceptable way to treat some of the very most vulnerable individuals within the criminal justice system.

Turning to fees, long gone are the days when the Criminal Bar could be said to have been paid well. The current situation, is one arrived at following a series of cuts to the fees structures which have resulted in the erosion of fees to what they are now.

This has had, generally, an impact upon quality and retention of talent at the criminal Bar. The fee structure has resulted in the demographics of the Bar changing quite considerably. I think over the last 10 years, I’d say, there’s been a 30% decrease in individuals under five years of call coming to the Bar.

This is in crime. I’m limiting my comments to crime for today’s purposes. I’m not to discuss the civil side of things. In terms of my chambers, I’m at Garden Court. It has one of the largest sets of criminal barristers in the country. We’re a mixed set. But none the less, we’ve got a very large crime team. And crime makes up a huge proportion in our income and our work.

What we are finding in terms of recruitment is interesting. We are a legal aid set, if I can put it in those terms, because we predominantly undertake publicly funded work across the various sectors or areas of law. But the individuals that are applying to us, often don’t want to do crime. The ones that do initially want to do crime, then want to move into other areas. In the first couple of years of practice, we see a diversification taking place, with individuals who, perhaps, would have just done crime, now moving away into other more lucrative areas of work or supplementing their income in this way.

We’re also seeing a change in terms of recruitment at the next level, which is the junior tenants. We would have had “third six months” pupils initially, but there are effectively none any more. It used to be that there would be a pool of “third six” pupils, because there were large numbers being trained at the Criminal Bar. That’s just not happening anymore.
Those individuals just simply do not exist. And we’re seeing that contraction in the size of the Criminal Bar effectively at all levels. More and more people from the Criminal Bar are generally diversifying into different areas, and leaving legally aided work behind, because of the cuts, and also because of the incredibly low morale.

For criminal barristers about 4 or 5 years after call an income (net of VAT and expenses but before tax) of under £25,000 is fairly standard. I will find the detail because the Bar Council have done a research paper. I should have brought it.

Andrew Keogh

I think from memory, even getting to ten years call, for a very high percentage that net figure was below £50,000.

Joanne Cecil

In terms of those breakdowns - and there have been changes very recently in terms of fee income across the board and across the different practice areas - it was the criminal junior tenants who were really very much under that threshold, which comes as no great surprise, given what Bill has said.

That’s not to say that certain individuals are not paid well at the Criminal Bar. I don’t think you could say that. I think we’ll have to just bear in mind that, ultimately, it’s publicly funded. So, individuals don’t expect the sums one would hope to be paid in a commercial law firm. I would say the average Barrister simply does not fall into that category at all.

This has an impact when one considers the type and nature of the work that is being undertaken. Plus, effectively, the need to be on call almost all hours, because when it comes to working practice, the reality is that you may be in court until about 4:30. But your work very rarely ends at that point, and you’re still working late into the evening. There’s an overriding pressure from the court to get things done overnight.

The issues that are being raised by Bill in relation to the CPS, and the inefficiency there, continue from the very beginning all the way through trials. It is not unusual for the Crown, midway through a trial (whether it be a three- or four-day trial, or a six-week trial of some significance) to serve forensic evidence that they’ve never said they had before.

Or they’ve only just obtained telephone evidence that they now say is essential to their case - all sorts of different types of complex evidence or DNA evidence (involving very complex issues as to mixed profiles and so on). Not necessarily even before the trial starts. In the middle of the trial. I have had cases where there has been fingerprint evidence served mid trial. This was a large-scale drugs importation conspiracy at the Central Criminal Court, where one would expect best practice to be upheld. It wasn’t.

Some of this evidence has never been even mentioned before. It doesn’t exist on the papers that we have or even that Crown Counsel has, and then it comes up at a much later stage. Some of it is
considered to be unused material, presumably as a cost saving exercise, and it then later becomes used material midway through the trial and gets served upon you as a consequence of this change.

It would sometime have been listed as unused material, but not all the time. I’ve had schedules of unused material with nothing recorded on them at all when that’s been raised in the Magistrates’ Court. And when this has been raised as an issue with the CPS, the answer - and this is from the advocate who is presenting these cases at trial - is that they have reviewed the MG6C and we have the schedule, and there is nothing to be disclosed on it. But clearly there would be something on it, because if there is nothing on it one knows that it’s not complete because there would never be an unused schedule with nothing on it. You’d have, at the very minimum, custody records and crime reports and so on.

There is a quality issue about training. The disclosure regime, I think, is a very dangerous one right now. It’s completely underfunded and misunderstood, certainly within the Magistrates’ Court. I don’t know if you found that, Bill, at all, but I certainly see a difference between the disclosure regime in the Crown Court and the Magistrates’ Court.

At the Magistrates’ Court it simply doesn’t exist, notwithstanding the disclosure review that was conducted and the papers that were put out. These issues are still arising time and time again. And it leads to real potential miscarriages of justice for obvious reasons, because this is where, often exculpatory or undermining material actually lies. So, there are real difficulties with that.

Andrew Keogh:

I think in most cases it’s a fault in the review system. It’s not that the evidence has been obtained late. The evidence is there.

Joanne Cecil:

It’s the communication.

Andrew Keogh:

But whoever has been looking at it hasn’t seen it or hasn’t reviewed it properly. And somebody has just not done the job properly. That’s usually the case.

Joanne Cecil:

And there are real issues within the disclosure process in the Crown Court in terms of whether it is counsel reviewing the items or a disclosure officer reviewing the items or a CPS reviewing lawyer or paralegal reviewing the items.

The quality of the review varies quite dramatically. Even in the most serious cases, in one I’m aware of at the present time there are some huge disclosure issues. So, the disclosure process is key and it’s an incredibly serious case. In that case I’m aware that the Crown, including leading and junior counsel, have not reviewed the material themselves. And as a consequence of subsequent issues there is more and more that is being disclosed.
I’ve been, myself, in a case where both individuals were convicted on conspiracy to murder charges and appealed to the Court of Appeal. Their conviction was quashed on the basis that the case presented by the Crown at trial could not be factually right and accurate, and there were issues that were being raised throughout that trial and in the Court of Appeal over disclosure of certain material. They ordered a retrial.

We began the retrial with, I think, disclosure request No 56. And three weeks in, the Crown offered no evidence. We still do not know why. We have a suspicion as to what that material was but no confirmation. The case was referred to the Attorney General by the High Court Judge in an extremely unusual step. The Attorney General has declined to review it. He simply took the report from the Crown and said “We see no further need to review the case and consider the position.” We still do not know what the problem was, but we believe it must have been within the disclosure process. And so, that is a case involving very experienced Queen’s Counsel for all parties, junior counsel, disclosure officers, a joint police force operation, and with profound ramifications, involving life sentences for these individuals.

So, it’s a problem that still flows through the system. Another example of this is the funding of the disclosure process. This is obviously a difficulty for the defence. We are not entitled, necessarily, to see it, or we only get what is disclosed, and there are then these problems. Another case, which was a terrorism case I’m aware of, was where a forensic service report from the Miscarriage of Justice Unit within the Forensic Services team itself was never served at all on the defence, notwithstanding the fact that it undermined the key aspect of their forensic evidence in the trial.

These are ongoing issues. The Forensic Science Service is another aspect I’ll come to later because I think this has a real impact in the way that we prepare cases and what’s going on there and when it comes to pleas and credit issues.

In terms of my perception of client experience and how it’s changed, I do think that there has been, to some degree, a decline in quality. When I first began to practise at the Bar, the level at which you would undertake certain types of cases, I think, was much, much higher, so you would be more senior than you necessarily would be now when it comes to certain types of cases. Serious sex cases, for example, and complex ones were still often being prosecuted and defended by Queen’s Counsel and a junior. That is exceptionally rare now.

The reality is, I would say that the vast majority of rapes are conducted by individuals with about five years’ call and over. And so, over a 10 to 12-year period there has been quite a dramatic change in the quality of representation that individuals are receiving, notwithstanding that the actual complexity of those cases in terms of evidence is actually quite different now. We’re seeing far more historic cases, which in the past would have received those types of representation orders, not receiving them at all.

Frankly, you’re lucky now if you have somebody of ten years’ call representing you in those cases, as opposed to how things used to be. This is notwithstanding the huge increase in paperwork and the increase in the evidential foundation of those cases before the courts. One can see that this is obviously a direct cost issue, as opposed to a principle or policy issue. It can only be in relation to cost.
There is the limiting of those representation orders. I’ve already dealt with it with the Youth Court. I think the Youth Court is something that this Commission has to grapple with. Funding in particular at the Youth Court really does need to be a key part of this because of the pressure to keep things there, and the significant and long term impact that involvement in the criminal justice system and convictions for serious offences can have on children.

In terms of building on something like this in relation to the client experience, the way in which the courts operate in crime is very different to the way in which the courts operate in practically every other area of the law. It is not unusual - in fact, I’d say it’s more usual than not - that where the court utilises the warned list system, the individual defendant often ends up with a barrister for trial that they’ve never met before, for the first time on the morning of the trial.

This is because of the listing system. It’s nothing more, nothing less, because in the warned list cases can come in for trial within a one-week or two- or three-week period, depending on which court you’re in front of. Or, they may not actually be called in for trial at all. So the reality is that, unless it’s an exceptional case, a practitioner simply cannot justify keeping an entire diary free on the basis of a case that may or may not actually even come into the list, let alone be effective, and we’ve heard the problems that Bill has referred to.

That has a real impact on the client experience, because you have individuals who throughout those proceedings may well have never been represented by the instructed Barrister who is due to do the trial. It may have had different Counsel instructed at various stages, because of the nature of the hearings and the complete refusal of listing officers, generally speaking, to take into account counsel’s availability, regardless of any particular aspect or complexity within the case.

Often we find that if you request a 10 a.m. listing instead of an afternoon listing, one gets an afternoon listing as a matter of course, or vice versa, notwithstanding the fact that the court is there all day long. It is a perverse set of circumstances. I’d like to say it’s rare, but it’s simply not.

I know that many chambers simply do not ask for listings, because the concern is that you get the opposite to what you request. That’s not an urban myth, it’s founded in some level of reality, I don’t know if you have experienced that as well, Andrew.

**Andrew Keogh:**

Years ago, we used to have listing meetings. Barristers’ clerks would go around the Crown Court centres and they would sensibly carve it up: “Miss Smith’s in court for the three cases, can we move the case she’s got in Court 17 across to deal with it?” It was done largely by consent and mutual co-operation and it was a warned list system which worked remarkably well.

It’s not, I think, that the warned list system itself is a dead dog. It’s more from the mental approach - just a lack of cooperation, caused by the things ...

**Joanne Cecil:**
As I have said, it has a real impact upon the quality and accessibility of justice for the individual, which is a bigger issue, when looking at access to justice issues and the individual’s confidence in the system.

It also leads to inefficiencies when it comes to the actual case in front of the court because you have a new advocate that has stepped in, who has had to deal with reading the papers, coming to grips with the case, typically overnight, whereas in the past warned list cases used to be reserved for two to three-day trials, with no real complexity.

Now, the reality is – it is certainly in terms of London. Other parts of the country with very large court centres don’t utilise warned list systems at all, and yet manage to make the system work quite successfully. Now, all sorts of cases are placed in the warned list including high volume cases in terms of paperwork, which a practitioner simply can’t get to grips with overnight, even if they try and are up all evening.

We should have some sensitivity in relation to serious cases. So, in rape cases I’ve known there to be problems, even if the witnesses are very vulnerable, going above the normal category of vulnerable witnesses. This type of case is very difficult when one then looks at the drive for better case management and early engagement of the defence and the crown which requires case ownership.

Defendants - depending on the type of defendant it is - can often become quite difficult, understandably, when they’re presented with a new advocate for whom they’ve had no choice of input before. They can become very difficult in front of the court as a consequence.

And there is a loss of time element, too. There has to be a conference of some length at Court. Issues have to be determined, and often trials don’t necessarily start on the day that they are due to start. That’s not unusual in any way.

It can be a prosecution change, too. This is something that is definitely not limited to the defence aspect. I would say that the Crown is less likely than the defence to have case ownership from counsel or their advocate.

The defence at least, try most of the time to make an attempt to maintain continuity in the way the Crown don’t. It’s an even worse situation in the Magistrates’ Court, where the prosecutors are given a court list with four or five trials in the day. They are provided with the paperwork in the morning, if they’re provided with any paperwork at all. I’ve had trials where I’ve had to hand over my paperwork, just so that we can get up and running, which is absurd.

So far as witnesses are concerned, my experience more recently has been that the Crown has a witness care team that notify witnesses. Strangely, this has worked better more recently than it has in past years. Whether that’s true of everybody’s experience or not, I don’t know. But there are certainly cases where notifications are not sent out. Then witnesses are not at Court, and days are lost while trying to track them down and see if they are deliberately not attending Court or have simply not received a notification.
Witnesses and complainants often become very distressed, as you've heard, or frustrated, or disengaged from the system. This threatens the integrity of the justice system by virtue of the fact that they can attend court and there is no court available to try the case. Floating cases are not unusual. Judges being only available for a week or so: not unusual. Cases over-running: not unusual.

I have got many examples of the types of cases that Bill was talking about: one that dates back to 2014, at the Crown Court, which is being pulled repeatedly from its listing. It began life with a six-week listing and it is being pulled repeatedly over the last three years. It is due now to take place in July on a date that I simply cannot do. At the present time we are fully anticipating that it is going to get pulled again, probably a week before the actual trial date because it's simply not a priority case. All the individuals are on bail. It's cannabis cultivation albeit large scale. There are clearly much more pressing cases, from a prioritisation point of view, in terms of the sexual offences cases that are overwhelming the criminal courts at the moment. I imagine that's why.

On that point, in relation to capacity, the MOJ is currently running a pilot, effectively adopting the Maxwell hours approach again, with a Court sitting in the morning and a Court sitting late in the afternoon and one in the early evening.

In the Magistrates’ Court I understand that the proposal is to run courts up to 8 p.m. in the evening now. Capacity, in my experience, has never actually been the issue. Most courts, certainly in London, are never sitting at capacity because they do not have the judges to sit in the courtrooms. So, the courtrooms themselves are not being utilised. There’s absolutely no need to have this whole split shift system. What they need to do is to use the courts they have and obtain the judicial resources they need.

I’ve also been involved in a number of cases where there’s just simply not been jury panels available. As a consequence, we are waiting for a jury to return, in order to try to create a jury panel, ...

I genuinely don’t know why they proposed night courts. I think it is that people that just don’t know the system? My understanding of the MOJ is that there’s a higher turnover of individuals at policy level, with the consequence they are constantly reinventing the wheel and not understanding the actual issues in the criminal courts. For example:

“We’ve got cases that can’t be listed until 2018, so let’s try and deal with that problem by running two trials at the same time, and we should have the time.”

**Andrew Keogh**

Just trying to think, was there anything else really? I think just as a broad over-arching consideration, there are reforms, obviously, taking place in relation to the various fee schemes. That’s a separate issue and I think means testing is a huge issue in terms of access to justice. But I think there does need to be quite significant reform, actually, of the schemes because at the moment, they are very unbalanced. They make it something of a lottery. The type of work that most criminal solicitors’ firms do is very under-remunerated. There are some cases that are extremely well paid. But that, in turn, drives bad practice in my experience, with fixers arriving at court and so on and so forth, and legal aid transfers.
But I can’t help thinking it was also an act of malice to erase the title Access to Justice. It was a spending Bill. And we’ve seen that because they couldn’t cut enough from civil, what we see in criminal terms is cuts to remuneration in crime. And that’s what criminal practitioners have spent most of their time talking about, which is not actually what this Commission is about.

It’s not about whether legal aid lawyers are necessarily paid enough, although there does come a point in time when that issue is important, because if there is a collapse to supply, then there is a danger to access to justice. So, what we saw with LASPO is really a direct political interference with rates, and using a political policy of austerity - whether it was right or wrong is neither here nor there - as a tool to achieve financial aims.

So, when we look at some of the things that we’re talking about - the point about witnesses, for example – well, the most frustrating point about the way witnesses are treated is not that we’ve arrived here for the first time. We’ve seen the problem and we’re looking at how to fix it. The irritating thing is that we’ve been here before, and we’ve actually taken steps to fix it, and we’ve gone backwards again. So, just taking witnesses for example, it’s virtually impossible, I would say, that you could say to someone, you must turn up at Manchester Crown Court at 11 am, and you will be in the witness box at 11.14 and you will be out of the witness box by lunch time and you will then be back home. It’s just impossible for lots of reasons.

What they invented about a decade ago was a scheme that was sophisticated in its simplicity. They said, why don’t we give witnesses pagers, so that when you go to Manchester Crown Court, you sign in as a witness, you get a pager, you can wander around town, you can have coffee, you can do the shops and things, whatever you want. And an hour before we anticipate you’re ready, we’ll page you, and off you go. Simple as that, you know? A simple idea. This doesn’t exist any more.

When we look at delays in the Crown Court the idea, for the courts that run a warned list, that a rape case would be on a warned list would simply be a joke. A Judge would have recoiled at the idea. In fact, you don’t have to go back many years. I don’t think you have to go back ten. There were protocols for sex cases involving children.

These cases would be charged quickly and then appear before a court quickly. And to be fair, they still do. There would be a trial date highlighted at that point and these cases would be tried quickly. A fantastic response to cases involving vulnerable witnesses, vulnerable defendants, vulnerable complainants. And that’s disappeared.

When you look at criminal procedure and disclosure, there was a massive disclosure review by the then senior presiding judge and the senior district judge, Howard Riddle, at that time. An absolute work of genius on disclosure, everything that is wrong, going back to the 1960’s, going back to the Guildford cases and the Birmingham cases and the Judith Ward case, etc. revisiting all of that, looking at everything and giving the blueprint, and that’s disappeared.

It’s gone, it’s been erased as if it never existed because the pressure now in better case management is to steamroller the cases through the system. And the reason why you can have a serious trial and
produce forensic evidence in the middle of it and get away with that is because if a Judge took a decision
to exclude evidence, which collapsed a serious trial... if that was going to be the consequence, then a
massive number of cases would actually collapse.

My clear view is that the Judiciary have no choice but to throw out every good practice ever devised
because the alternative would be to throw out a massive number of cases. That would cause, in itself,
massive injustice because rapists, thieves, all manner of defendants would go free, so guilty people
would go free.

And this, I think, is where we ended up. There is a system post-LASPO that is an absolute revolution in
what has happened before criminal courts in the last few years. It is good that the old practices that
were allowed when I first qualified have gone. I was taught 20 years ago that you could go to a court
and come up with any creative obstructive argument to stand in the way of a defendant’s conviction.
Provided you didn’t lie or cheat your way through it, not only could you do it, but you would have been
a poor lawyer had you not done it.

That had to be tackled. So we have the Criminal Procedure Rules. We look at an overriding objective of
convicting the guilty and acquitting the innocent, dealing with cases proportionately, and taking into
account the interests of everybody, absolutely fantastic. Identifying issues, but unobjectionable. What
we see is a violent swing the other way. I suspect that before spending constraints we would be at a
stage now where criminal procedure had started to rebalance things a little bit.

So, with a move away from these horrid, bad practices, we’ve got the violent swing this way, and we
defend our ... And it is austerity, it is this pressure of spending that is pushing that. And that is going to
be the biggest problem for this Commission because to cure a lot of this would perhaps require money.

The other thing about LASPO that I wanted to mention: defence costs orders. That is that to someone
who has been denied legal aid, the government says, well, if people will work for £50 an hour for legal
aid cases, they will do private cases at £50 an hour. This hasn’t been shown to be true.

I think there is some truth in it in the Magistrates’ Court. But I don’t know any criminal firm in this
county taking on private criminal cases in the Crown Court at £50 an hour. And therefore there is a tax
on innocence to the tune of about 75% of the fee, or whatever it is. And that just strikes me as
repugnant. The state, in my view, should either pay the market rate, and we do have a market rate - or
we did, at least until 2010. The civil guideline rate. It was a good bench mark. It has been explored
recently by the Court of Appeal in R v Evans. So, we’ve had a recent examination and as a broader
starting point, it has stood the test of time. That should be restored.

Alternatively, everybody should get legal aid. And we’ll live with the occasional headlines of a
footballer getting legal aid when perhaps they otherwise would not.

The third change created by LASPO - and LASPO really was the cherry on the icing on the cake for the
 politicisation of the justice system, as far as the Ministry of Justice was concerned - was legal aid. And it
started, I’m pretty sure, with Jack Straw. Jack Straw said, I can’t believe that the Legal Aid Board or
whatever they were at this particular time, has gone into policy. They have no right going into policy and therefore there was a land grab. So it stopped being the Legal Services Commission and became the Legal Aid Agency and everything moved across.

That was quite significant in my view, because it led to a lot of people leaving, because you had a Legal Services Commission, a legal aid agency which was an arm’s length body. That was important from the management point of view and suddenly overnight, it became a civil service body. Whilst it might not seem very important, there were even little things. I would once or twice a week email the press offices at the Legal Services Commission with a question and a few days later I’d get an answer. I would be able to email directly to senior policy officials and ask them anything. They might not give me the answer, but more often than not, they would. Now, you can’t communicate. The reason that’s important is that it is creating this horrible barrier.

So, when we look at night courts - just as an example, and we can pick any - I look in horror at the reporting of it because what you see is that members of the Bar, in particular, are very vocal about this, like Mark George QC a few days ago:

“This is terrible, and it would be a backwards step. There are female barristers with child care responsibilities, and you would be expected to work all day and work all night.”

These are all legitimate points. But I do wonder whether night courts themselves are a problem because you can see what they’re thinking across the road. Because you’ve got the court estate, and the court estate is under-utilised, by and large. For over 50% of the 24-hour day, it lies dormant. And why? Why?

If you can actually have two shifts of criminal justice, if you can have a morning Judge and an evening Judge, that makes sense to me, because otherwise, you’ve got prisoners in the Police Stations. It would just be hell then, nothing’s happening at 3 a.m. Because we’ve been wedded to this old idea of the court estate, you know? All these buildings. Now, I don’t know whether in reality, it is good to have a culture like that. But what I do know, I think there are some Barristers and some Solicitors who would like to work a night shift or would like to work weekends, because their husband or their wife is a nurse, or a doctor, or a police officer, or a fireman, or they want to work nights?

It could open up all kinds of opportunities. We’re not having that debate. As I say, I’m not saying it is a good idea. I’m not convinced it’s a bad idea. The reason I can’t reach a conclusion on this matter is that we’re not having a debate. And we’re not having the debate because the defence community are not part of the conversation and we never have been. Therefore, they come up with ideas and they will get you participants. They have to. Because they have to volunteer. And they have to volunteer because they’re unionised. I mean, you can’t go into the CPS and say to a Prosecutor, right, you’re working at the City of Westminster Magistrates’ Court today where you’re doing 5 p.m. to midnight.

You can’t do that. The union would have a fit. And this is the same with the Courts Service and it’s the same with the prison service. So, like any good pilot, it is funded. So they chuck the money at it and see whether people will volunteer. But when it comes to the defence, they will just do it, and the reason they will just do it, they will hang onto the idea that enough people will volunteer. And maybe they will.
Maybe they won’t. But they are actually so gung-ho that they will try it without knowing, and it is because of sheer arrogance, it’s a civil service arrogance towards the defence community.

This isn’t the really important flow of what’s going on because that would involve starting a proper conversation as to what’s best for criminal justice, what’s best for victims. We’re in a perpetual state of war now, where we can’t actually be grownups.

That for me is the post-LASPO landscape. It’s pure politics, which is driven by saving money. But there’s no easy answer to that. I’ll come back to that in a second. What works and what doesn’t? I agree that it’s amazing anything works at all. But the remarkable thing, at the moment, is what we do have, we still have by and large, a fantastic quality judiciary, and we’re still able to feed a judiciary from members of the Bar.

We’re still able to supply very, very able practitioners. Yet, what we do know, in other areas, we aren’t, for whatever reason. Apparently, there are six High Court vacancies on the family bench. I do wonder how long that will be the case. I do wonder if there’s no money to be made in crime, whether we will be able to attract decent people.

It’s going to hit crunch point. But these cases go through the system. It’s difficult to say whether it works or not because it’s actually hidden. They produced the latest criminal justice statistics this morning. We don’t know. We can trade anecdotes all day about different things.

I’ll give you just one of my own, because you don’t know whether to laugh or cry. A posh city firm (an international law firm) rang me up, would I go to a certain Magistrates’ Court in a careless driving case. Why are they involved in this? Because the said driver has allegedly knocked over a cyclist and caused catastrophic brain injury, so that five or six million pounds worth of civil liability is tied up in this. So, will I go to the Magistrates’ Court to do it? This solicitor is apologising to me that he can’t pay more than £5,000 for this 90-minute trial. I will live with that and disguise my disappointment.

So, we roll up with these three posh solicitors sitting behind me, and they watch this case unfold. A very serious case, much ado about nothing. There’s no paperwork because the agent who prosecutes has only just got the case. It was on his laptop. And the only piece of evidence that the prosecution had, if the prosecutor was able to spot it, and he did, was that there was blood on the road, if he could actually, first, prove it was blood.

Second, there was the victim and as for the location he probably had a case to answer that his collision occurred at a point where there was at least a case against my driver. But because there was no paperwork and the case didn’t start in time, he’s only got the laptop at the bench. The solicitor behind me writes a note to me. It says, what the hell is going on? And I write back and say, no, this is good and hand it back. The bench is saying we can’t see it. The prosecutor says, I’ll come up. And he walks towards the bench. I’ve never seen such impertinence in my life. It’s not a precious place, the Magistrates’ Court. You know, it’s not the Supreme Court. But I have never in my life seen someone, unannounced, just thrust a laptop in the face of the Magistrate. The Magistrate goes mental, as you would quite imagine. He refused to look at it.
So, the Magistrates never saw the evidence because they can’t see it. It was the only piece of evidence which might have convicted the defendant, and of course, he gets acquitted. It’s a laughable story, except that a man has got catastrophic brain injury and will probably now not get a settlement in relation to that.

The bench know nothing, of course, about his insurance settlement. They don’t know why I’m there. They don’t know why people are sitting behind me. And it’s good they don’t know. And that’s the state we’re at. Those are the things which you’ll never be able to measure with any accuracy. Did anything go wrong that day? Did it actually matter? Is it just an entertaining little anecdote? Or was that a major miscarriage of justice? I know that that man knocked him off the bike because those were my instructions. The instructions were, you defend this, you put them to proof.

I don’t know about client experience, how much it has changed. I imagine that if you were an old bloke 20 years ago, and were still in the system today, you would be horrified. You’d feel it was a poor criminal justice system. You wouldn’t like the pace of change and all of that. You used to enjoy sitting down with your committal papers for 12 weeks, and pondering through them and highlighting things. You would enjoy all the prison visits and the cigarettes you would get and the things like that.

I imagine an old criminal would have a lot to say about the deterioration in standards. I don’t see a drop in standards, surprisingly. I don’t see that at all. But you see some things which are quite striking. And due to specialisms and Jo touched upon this. You see very little judicial review activity out of crime. You see very few of these people taking these challenging cases. You still see it in civil, it is still alive and well. But in crime it is not. If you go back to the 1980’s, you’ll see the law reports were full of criminal cases, along with a lot of traffic nonsense, by and large.

A lot of it nonsense, but it’s more or less disappeared in that, and it was down to individuals. In Liverpool, there was a chap called Rob Broudie. He had a brilliant intellect and he was always an obstinate man, but a brilliant one. He wanted judicial review of the Magistrates’ Court over whether he was going to pay £5 for a duplicate legal aid certificate] and of course, Rob Broudie wouldn’t pay £5. He would have just paid tuppence because he thought he was in the right and he went, with his own money to be fair. He went to the High Court and it was that kind of thing which changes boundaries.

Before Christmas I had a massive list of the ills of the criminal justice system. I think now that the points have been whittled down to very few things. I think we set ourselves too big a task, but it’s something that we can’t resolve in one report, but I’m convinced there are a very small number of important points.

[Lunch break]

**Andrew Keogh:**

Dealing with improvements, I think there is a fundamental problem if we just look at what is wrong at the moment and seek to fix it. I think this for two reasons. Firstly there is a massive list of things and it
would be an unwieldy report, but secondly, what we do know is that problems change over time. So, we might fix one set of problems, but have no lasting legacy from the report.

I would like to propose four things for consideration. The first one involves going back to how I started with the title of LASPO. When you look at section 1 of LASPO, you will see that the Lord Chancellor’s only duty is to provide legal aid services within the context of what is allowed for in the Act. There is nothing in LASPO that requires that the Lord Chancellor or Secretary of State is to provide access to justice - reasonable access to justice.

I took a look at the Constitution Reform Act, where I am less confident in my ability to interpret the statute, but I don’t see it there either. I see the Lord Chancellor’s functions in protecting the independence of the judiciary, and when you look at the Lord Chancellor’s oath, that is to uphold the rule of law and it is clear that access to justice is part of the rule of law. What I don’t see is any real accountability for that. Therefore, I would like to see a recommendation that something be inserted either into LASPO or probably more appropriately, the Constitutional Reform Act, that the Lord Chancellor has a clear constitutional duty / accountability to provide reasonable access to justice.

It might be seen as a token thing, but it ties in with what I would see as a second recommendation, that in order to provide a safeguard, there should be a body, call it whatever you want, an Access to Justice Council or something like that, which has independence, resources and a responsibility to report to Parliament. When you look at different organisations, you see they achieve things. A very good example, although it makes slow progress, would be the Howard League for Penal Reform. It does not have a statutory responsibility as far as I know, but they do a lot of good work. They produce very powerful reports, and I think over the medium to long term they change opinions and they get results for the better.

We see the National Audit Office which does have some interaction, and we see various criminal justice inspectorates - and some of them are very powerful: so what used to be the CPS Inspectorate produces very powerful reports - and that has some impact, but what we don’t see is anything looking at the justice system overall. We don’t see anybody that considers, for example, what does local justice mean, does it actually matter whether we have local Magistrates’ Courts? I don’t know that it does, personally, but I just don’t know the answer. Does it matter whether there are video links or not, do we have to have a person appear before a court to receive punishment? I personally suspect not, but I would like to see some research on it.

A longer-term plan: I don’t understand why courts are not attached to prisons. I don’t understand why we transport tens of thousands of prisoners a year between prisons, police station and courts. That is madness. I know why we can’t solve it today, because we have separate buildings, costing many millions of pounds on private finance initiatives with 50 year contracts etc., but just because we can’t solve it today, that doesn’t mean we can’t have someone deciding the next time, in 30 years, when we next get the opportunity, that we don’t build a justice system on three separate sites, we build them together.
The work that began with combined courts all just dissolved years ago. A lot of that hasn’t happened because of separate computer systems and separate buildings. So, we still have a process where they produce prisoners in a Magistrates’ Court to be sent to a Crown Court. I don’t understand the purpose of that. There might be a good administrative thing about it and it might be more appropriate for people to turn up randomly at a Magistrates’ Court and then at a Crown Court Centre, but if you were designing a criminal justice system from the ground today, I don’t believe you would design anything like what we have got.

So, an Access to Justice Council with some measure of independence and resources and reporting responsibility, so that these reports would at least land in Parliament and people will debate them, and people would be able to use the evidence base to hold Ministers to account. Because that is not happening at the moment.

I have been looking at the debates on local court closures. As far as I can see, there was an opposition debate in Westminster Hall about it, but when you read that, it was just centralising on what had happened over the last six months. A MP from a particular constituency would ask a question about his or her court. Whether that is just a purely self-serving question, I don’t know, or whether they had a wider interest in justice, I don’t know. But they have no evidence really as to whether it was a good or a bad thing.

We have seen some awful concessions quite recently, didn’t we, about travel times. They said in a Parliamentary answer that they hadn’t actually calculated travel times correctly, so they haven’t used Google maps or anything. So, we need a body to do that, a watching body that instead of this Commission being frozen in time today, looking at a collection of today’s problems, we tempt a political party to create a watchdog, a justice watchdog. That is the second.

The third thing I would like to see is defence minimum standards, defence representation minimum standards. That would act against the government wanting to steamroll through what it wants to do. So, defendants’ rights. Poor disclosure: at the moment, the problem is that if I go to a Crown Court and a Judge tells me to do something, I have got to do one of two things. I have either got to do it, or I have got to appeal it and very often I have got to do it and then appeal it. I rarely get to stay it. I can scream to the rooftops as Bill and Jo have today about things happening in a trial and defendants’ rights, but there is nothing. I have been looking at - it’s not widespread across the United States, but in a number of states - the local Bar (their local equivalent of the Law Society, I suppose) or the Bar Council have minimum attorney standards. They would not even act in a case where disclosure isn’t given. There is a professional body to regulate this. I don’t know how we have got here. I don’t know why we are not screaming from the rooftops. It is because we want the work more than we want the standards, that is the truth of it because we can’t pay our mortgages on standards. That is the problem. It is this erosion by stealth.

There is nothing I would like more than to stand up in a court of law and say this case isn’t proceeding because the law says these are the minimum standards and they are enshrined - and I would like to explore that as a concept - in minimum standards. It can go wider than criminal defence. I don’t know
what the problems are in housing, I don’t know what happens to people facing repossession proceedings or an employment or benefit tribunal, I don’t know whether their experiences are the same, but there has to be a bottom line for what we find acceptable. So, I would like to see that.

The fourth, which is really urgent, my colleagues have already mentioned it: urgent reform of the legal aid structure. That doesn’t necessarily mean more money. I am not convinced it requires more money, I can’t put my hand on heart and say that £750 million isn’t enough. That was Lord Carter’s problem over a decade ago. He said we just don’t know how much money you are making, but what I do know is, the scheme is no longer fit for purpose.

The old swings and roundabouts is a basket of cases. Whilst I think it did work, and I think it worked for a long time actually, longer than most people might have anticipated, I don’t know anybody today who says that it works any more. This needs urgent reform because there is some evidence that that itself is causing access to justice problems. It is depriving other parts of the system. Jo is concentrating on youth cases. Jo says the money isn’t sufficient in the Youth Court and that, I think we can be clear on. The amount of money you would get for defending a 13-year-old in a Youth Court on a rape case is quite frankly a joke. I would be surprised if it is much more than a minimum wage on a crunch-down hourly rate, and that is indefensible.

On the other extreme, very large paper cases: are they worth £90,000? I don’t know whether they are not. I suspect they are not, but at the moment, there is no research. All that we are doing is juggling around a pot of money with not a lot of insight into what we are trying to do and what we are trying to create, whether it is a good thing or bad thing. So, I don’t think the Commission can actually, as far as crime is concerned, do a lot apart from say there is a lot more to be done and try to put in place the structure and the bodies before actually doing it. Those would be my four recommendations for urgent reactions, something manageable.

I would like to hear a Justice Minister’s response to not having a statutory responsibility to uphold access to justice, to not having a body which actually does examine whether Magistrates’ Courts locally are good or bad, whether night courts are good or bad, telephone hearings good or bad, I don’t know. I would love to hear the argument against that.

Defence minimum standards again: what would be the argument against? Fee reform: I actually don’t believe anybody is against fee reform. At the moment, it is just about vested interests, but it needs to be wider in order to look at access to justice, not the interest of individual lawyers within the justice system, and that is what the debate is about at the moment. This Commission was not set up to look at the interests of lawyers. They are important, but it is not the primary purpose of it to look at legal aid rates. It is where structures affect access to justice.

I think at the moment, the legal aid structures are affecting access to justice, where the right advocates are actually chasing fraud cases and things like that instead of doing rape cases. Jo thinks five-year call barristers are doing rape cases: is that a satisfactory quality level? I don’t know. I am sure there are five-year call barristers who are better than thirty-year call barristers. There are always rising stars. But
I suspect five years is not the right pitch for that kind of lawyer. So, we need to look at remuneration. Those would be my four ideas for a report.

**Henry Brooke:**

More generally, we have heard evidence from people who are on the front line about how awful the situation is, and very occasionally politicians go into courts and see for themselves how awful things are. Michael Gove on just two visits to the Crown Court was appalled by what he was seeing and hearing. Angela Eagle MP the other day gave a description of her experiences as a juror called for jury service, knowing nothing of Crown Court work. This is just generally not understood by those who are taking decisions. How can we combine what our Secretary will need (which are very short pointed recommendations for reform: what should they be?) with ensuring that in one place we have brought together what you have been telling us so that those who are interested can see authoritatively why the Commission says this system is so broken.

**David Gilmore:**

I think one thing was a theme this morning, and it is exactly the same with my own experience of the legal aid system. It is that you would think from an independent outsider’s point of view, why don’t the government use some of the people in this room or proper experts and use their knowledge and experience, rather than bringing a new set of civil servants every few years and starting from scratch.

When I was at the LAA, one of the things that was always lost was that whenever senior management left, there was never any handover, unlike in the private sector: if you were an M & S Store Manager, you would always have a week’s handover to the next store manager. At the LAA, it would be “Right, I’ll take my knowledge with me” and nobody was interested. So it is a real shame that with the redundancy programme at the LSC, in my opinion, all the brightest people went and the people that would struggle to get employment elsewhere remained. I know that sounds cruel, but I am afraid it is true. So, I would like to see something in the paper saying

“Look, the Ministry of Justice really needs to take on consultants, and use your experience and knowledge and skills to come up with more sensible recommendations about how the system should work.”

**Carol Storer:**

I was going to say I think the difficulty with the dialogue with the MOJ as I see it (albeit it has got a little better I think recently, to some degree) is that it always focuses typically on remuneration of the advocates or litigation solicitors and various legal aid schemes. It never really focuses on the underlying issues of the criminal justice system or the justice system more generally. The interaction is always with competing sets of interests, typically on a battleground over fees. It is always putting out fire; it is that sort of relationship. As Andrew said earlier, we do feel like we are on a permanent war footing, effectively, which is unhelpful across the board and very damaging for morale, I think.
Henry Brooke:

In political terms, it is creating entirely the wrong picture. It is alleged to involve fat cat lawyers wanting to have more pay from the hardworking tax payer, ignoring the awfulness of the system in which they are supposed to be earning their living.

Carol Storer:

I think so. I think you’re right, I think they could benefit if they actually utilised that experience a little bit more.

Bill Waddington:

Yes, I agree, and I agree with what has been said about almost being at permanent war. If I can just briefly tell you this: in 2011-ish when I was Vice Chair of CLSA and we started having meaningful discussions with the MOJ in place of the Law Society because we wanted meetings separate from the Law Society, because we thought the Law Society was simply selling us down. Well, we didn’t think they were selling us down the river, they were selling us down the river.

We got on reasonably well, but unfortunately we got to the stage where we had to JR the Law Chancellor over some consultation and I remember well that when we started the proceedings, I got a telephone call at 5.30 p.m. from one of the senior advisors saying you do realise that by taking these JR proceedings, we will now cease communication with you. I thought he was joking. Like a schoolground spat, isn’t it? So, for the next 12 months, we had no communication at all. They just cut us out of everything because we had the audacity to JR the Pope - and win, by the way.

We got over that and then we got on a better footing with Michael Gove, whom we found quite accommodating. He listened and we had two or three meetings with him and his advisors.

Henry Brooke:

That was the time Zoe Gascoyne gave evidence to us. She said the climate seemed to be better.

Bill Waddington:

Yes, and then Zoe took over in the meetings, again continuing this in this constructive way and we thought they were sort of listening. Then we had the next election and a change of Lord Chancellor and ...

Henry Brooke:

The change was when Mrs May came in.

Bill Waddington:
Liz Truss came in but nobody has ever met her at all. There have never been any meetings. With Liz Truss came a whole new MOJ staff, so that every single person that we had been having communications with left.

**Henry Brooke:**

All the staff have left?

**Bill Waddington:**

They were reallocated, redeployed, wherever they went, probably on Brexit I would imagine and so a whole new tranche of people came in who knew nothing about the system. That is the problem and I think that is why we have got this flexible court thing again. As I was saying to David, someone will have come to an empty desk, gone through it, “Oh, flexible courts, why don’t we have a look at this again?” even though it was rejected five years ago when they last looked at it. So, there isn’t any communication now and hasn’t been.

**Carol Storer:**

There were one or two people in the old LCD - Lord Chancellor’s Department. There was a guy who legendarily usually fell asleep in meetings. Longevity wasn’t always a good thing, I think. I think the lack of institutional memory in the MOJ, the idea of a rather amateur civil service who are moved around a lot which is good for their careers, but not when you are dealing with quite a complex system - I was wondering whether you would add a fifth point about the LAA and the MOJ and what we are going to do about the policy operation split and the LAA now being in with the MOJ. I think that is a massive issue for knowledge as well.

When we have meetings, there is an awful lot of “Oh well, that is operational and that is policy”. So, you start discussing something and then you’re fobbed off because whoever you are talking to ... Here is an example. Yesterday I was at a civil meeting and someone from the MOJ was very good: David Martin was there. To be honest, the whole hour and a half was on stuff that would have been of no interest to him at all, yet we as representative bodies have demanded that MOJ staff come to meetings so that we aren’t fobbed off. I think there are real issues about knowledge and lack of knowledge in the MOJ and in the LAA.

[A discussion about the form of the final report then followed]
Evidence: Law for Life
Date of Session: 21 June 2017

Law for Life is an independent information and education charity. We serve over a million people in England and Wales via the Advicenow service, through online provision of multimedia legal information and learning tools. Our curated information service brings together 1600 pieces of public legal information from over 250 UK websites.

We are delighted that we have increased our reach to vulnerable users: 29% identify as low-income workers, 46% identify as disabled, and 48% have a household income of below £1,100 per month after tax. We increased help to litigants in person or potential litigants in person (accounting for 75% of all survey respondents).

The online service is often used by intermediaries and helpers that might be advisers, but also community workers and family members. 10% of our survey respondents say they are using Advicenow to help someone else to deal with a problem but are not an adviser.

Law for Life delivers community-based education and training aimed at building knowledge, skills and confidence in dealing with legal matters. We cover a range of topics with a cross-cutting curriculum aimed at building foundational legal concepts and skills. We often work through trusted helpers in community settings, be they migrant and asylum groups, social workers, teachers or faith leaders. In some cases we also work directly with vulnerable people, for example social housing tenants and, more recently, women

PART I: Written Submission
Developments since the PLEAS Task Force 2008

The 2007 Task Force recommended the need for a centre for PLE and set out some priorities for the development of the sector, along with much of their fact-finding work. These recommendations are still relevant for us today. The Task Force suggested that we need to:

- Create a coherent focus and identity for PLE
- Create a practitioner network and online knowledge bank
- Develop and spread good practice including evaluation and quality frameworks
- Securing sustainable funding
- Work to establish a statutory remit for the development of PLE

In the last 5 years we were able to achieve the following:

- To set up and grow a dedicated PLE charity in the face of contracting public sector and charitable revenue.
- To merge the Advicenow service with our charity and protect the very substantial information provision to the public.

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• To implement and test a PLE evaluation framework and use the conceptual building blocks of legal capability to design curricula and assess whether we are able to show outcomes from a variety of interventions.
• To share research and tools with PLE sectors both in the UK and overseas.
• To innovate, with the help of Trusts and Foundations. For example, interactive digital tools such as our Personal Independence Payment Tool, which attracted 70,000 visitors this last year to help them to challenge DWP decisions.
• To develop e-learning tools that can be used by vulnerable groups, and to expand and refine a range of community based curricula in the most pressing areas of law affecting poorer communities.
• To contribute to the Litigant in Person Strategy, now in its third year of operations, which offers a coordinated response to the needs of people using the courts without the help of a lawyer.

Legal need, legal capability and public legal education

Legal aid cuts in England and Wales since LASPO mean that many people who used to be able to access advice and representation have been left without help in areas of law that have traditionally been associated with poverty and social disadvantage.

These cuts, as the Commission well knows, have eviscerated swathes of the advice sector, and they had an enormous impact on the informational ecosystem that was available to the public.

Organisations which offered good and up-to-date information on immigration and asylum matters, like the Immigration Advisory Service, also closed, leaving a complex and fast-changing area of law with very little in the way of good information for the public.

It should be noted, however, that the scale of the unmet need was evidenced long before the reductions in legal aid cuts were effected by LASPO, as the Task Force report revealed.

Lack of knowledge about laws and legal systems is pervasive, and findings on the lack of access to legal advice and representation have been mirrored in studies ranging over a period of 30 or more years across 26 national surveys in 15 different jurisdictions. While caution is needed when comparing studies around the world with very different methodologies and designs, certain commonalities can be

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17 For example, the primary source of funding for the AdviceNow services (formerly run by the Advice Services Alliance) disappeared when the Legal Services Commission was abolished.

drawn out. Every survey in the *Paths to Justice* tradition has pointed to the peripheral role of legal services and legal processes in relation to many types of justiciable problem. The use of lawyers and the use of the formal legal system is incredibly low when compared with the prevalence of legal problems. The use of legal services does, however, vary across problem types. For example, family matters tend to attract higher levels of lawyer and legal process use, whereas welfare benefits and consumer matters have traditionally attracted far less.

In the United Kingdom repeated population-wide studies in England and Wales have shown a substantial legal knowledge deficit. Most people lack effective knowledge of legal rights and processes, and many people misinterpret or misunderstand their rights. People often fail to recognise the legal dimensions of problems. This means that they are limited in their actions, in their choices and in their ability to access appropriate help. They are also hindered from using digital help effectively because they struggle to frame their problems in a way that enables them to search for what they need. If they do find information, they are often unable to assess its quality and veracity properly. In addition, they cannot always correctly identify whether the information they have accessed applies to the relevant jurisdiction (for example, a user may be applying US law unknowingly to a UK legal problem).

Alongside these major gaps in knowledge, there are also broader capabilities or competencies that people need when they are faced with legal issues. Three attributes (or attitudinal characteristics) - knowledge, skills and confidence - form what has become known as legal capability. Legal capability is a key indicator for the effective use of legal services. People with low levels of legal capability are less likely to act and less likely to sort things out effectively on their own. They are also less able to solve legal problems successfully, and are twice as likely to experience stress-related ill-health, to experience damage to family relationships, and to lose their income. Low levels of capability are not limited to the most vulnerable, although the impact of the absence of knowledge is not evenly distributed.

There are strong correlations between susceptibility to legal problems and the presence of disability, single-parenthood, the receipt of welfare benefits, unemployment, and minority ethnic grouping.

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20 In England and Wales, findings from the 2010 Civil and Social Justice Survey indicated that respondents obtained help from a lawyer for only one problem in every fifteen, and only one person in twenty had any involvement with a tribunal or a court. The responses, however, ranged from between 28% (lawyer use) and 15% (court/tribunal involvement) across family problems to 1% (lawyer use and court/tribunal involvement) in the case of consumer problems, and fewer than 1% (lawyer use) in the case of problems concerning welfare benefits (ibid, 2013).

People with low levels of legal capability have the same characteristics as those who are at greater risk of experiencing legal problems, a fact that compounds their risk of becoming socially excluded.

Research into legal capability continues a tradition that marks a crucial turn in helping us to understand more about how more people can be helped, and how to craft solutions that are fit for the future. This seam of research entails a shift in attention away from the tip of an iceberg (which is what happens from the perspective of the courts and legal professionals) in order to look at how social conflicts occur under the shadow of the law, to see how people can deal with them better and respond to the law in their lives.\(^2^2\)

Although the study of legal capability is now attracting more research attention, *Law for Life* advised the Commission in strong terms that more investment is needed in those research opportunities, and that this investment should focus on multi-disciplinary research opportunities, including health, education, psychology as well as socio-legal research.

It said that the challenges we face in the United Kingdom are not unique, and solutions need to be tackled in concert with others. Innovation in delivering justice for the poor, in particular, has increased since the report of the *Commission on Legal Empowerment of the Poor* was published in 2008.\(^2^3\) Overseas programmes in middle income and developing contexts (particularly the growth of paralegalism, community based education and so on) mirror our efforts in this country.\(^2^4\) Despite all this activity, much more needs to be done to bring those with limited means under the protection of the rule of law. More also needs to be done at a transnational level to share investment in innovation, and also in research on how to tackle the needs of what are increasingly mobile populations.

*The links between legal need and law-making*

Alongside a better understanding of the characteristics and competencies that make up legal capability, the links between legal need and law-making\(^2^5\) need to be better understood. Legislative complexity and accelerated legislative activity impact disproportionately on vulnerable people. These people are reliant on the welfare state\(^2^6\) and are the least well equipped to cope with the regulatory demands which unfold in their lives.

Given the continuing and increasing demands on the public to understand and make use of new legislation (often without the intervention of lawyers, and often in areas of law which are sensitive to political fluctuations), the need for a better grasp of the interrelationship between law-making and legal need is one of the challenges that we currently face.

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\(^2^3\) UNDP (2008) *Making the law work for everyone.* Accessed September 2017

https://www.unicef.org/eca/Making_the_law_work_for_everyone.pdf

\(^2^4\) A more recent success is marked by the inclusion of access to justice in the *UN Sustainable Development Goals.* Accessed September 2017:


\(^2^5\) Sometimes described as “juridification” in this context.

*Law for Life* believes that law-making ought surely to carry with it the burden of responsibility for the costs arising from new laws. As a proportion of expenditure, the costs are unevenly distributed at the very top - towards courts and legal institutions, and towards the fight against crime. There is a direct correlation between the legislative function and the extent of legal need experienced by a population.

It also believes that from a pedagogical point of view it is critical that we take seriously the challenges posed by “juridification” in our teaching, and in the way in which we manage and curate legal information for the public.

**The Legal Services Act 2007**

It is obvious to the Commission that as things stand the cost of legal assistance is beyond the means of many, if not most, people.\(^\text{27}\) The Legal Services Act 2007 recognised the challenges presented by the need for access to justice more generally, but it also charged the new Legal Services Board with the objective of promoting people’s knowledge and understanding of their rights and duties. While progress has been made in taking forward the objectives of the Act in the areas of competition and diversity,\(^\text{28}\) it remains to be seen how the objective of increasing public understanding of legal rights and duties will be taken forward by the Legal Services Board.

*Law for Life* was therefore keen to see a coordinated and forward-looking response by the Legal Services Board, the regulators and the profession as a whole to fulfil that objective, taking into account the research that already exists into the needs of vulnerable populations, and in a spirit of tackling the problem in collaboration with the third sector, with a genuine emphasis on user voice.

It also believes that benefit would be gained by looking at the lessons learned in associated fields, most notably in the field of financial capability, which also had to tackle the problem of underlying exclusion arising from people’s lack of knowledge and skills. In that area it was possible to take the lead in designing a national strategy,\(^\text{29}\) leveraging funding for financial capability strategies as a partnership between the financial services sector and Government.

*Law for Life* also strongly believes that there is also a need for innovation in the manner in which legal services are offered to the public. Traditional models of end-to-end legal services are expensive and


\(^{28}\) Although there have been about 700 registrations under the Alternative Business Structure regime, in practice innovation has been limited. See Competition and Markets Authority. (2016) *Legal Services Market Study* Accessed September 2017: https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf


In his introduction the Chairman of the Money Advice Service wrote: “It’s worrying that levels of financial capability are still so low across the country. One in six people can’t read the balance on a bank statement. Approximately 40% of the working age population are unlikely to have adequate income in retirement. Over 50% of people say that they are ‘making do’. And more than 80% of over-indebted people do not seek free advice that could help them escape from the problems they face.”
out of reach for most individuals. Only around 6% of people on average access a lawyer when a legal problem occurs. Public legal education and information are key components in developing flexible and cost-effective solutions in which expert advice can be secured. There is an increasing need to offer more flexible arrangements for fixed-fee parcels of work which are supported by effective information and learning bridges.

For this reason it urged the Commission to look at what needs to be done to improve informational asymmetries to help people understand what services exist, as well as how they can use parts of the system in a cost-effective and empowered way. Technology will be a crucial part of that mix. However, in the last resort disseminating and targeting high-quality, impartial and independent information and learning to help individuals understand and navigate their problem is a solution in itself.

The new online court

Many of these issues were considered in the context of a move towards the launch of an online court, initially in the areas of family and civil money claims, following Lord Justice Briggs’s broad recommendations. Law for Life provided input into the consultation process at interim and final stages.

A broader, ‘digital-by-default’ intention will see a wider trend in the growing use of the internet as a way to solve legal problems. Internet use is on the rise - about 25% of the population uses the Internet to solve their legal problems now. This figure marks a 20% increase from a decade ago. However, not everyone is able to use online provisions effectively. While a great deal can be done online by individuals helping themselves now that there will be such a significant shift in the way justice is to be delivered, Law for Life is convinced that there will be a continuing need for people to have access to legal advice while they are on that journey.

It therefore welcomes the emphasis on the ‘assisted digital’ elements of the online court to ensure that assistance will be available to those who are digitally excluded, or who are struggling as a result of their health, poverty or literacy needs. It believes that the design of the system needs to be cognisant of patterns of legal capability, and that it also needs to understand problem characterisations - how they link to effective and early action, the role of confidence, and the patterns of behaviour we see in legal needs studies around the topic of problem resolution. It considers that these issues should be up front and central in the thinking behind the design of an online court.

PLE and the rule of law

The LASPO reforms also raise pressing questions about the role of PLE in the context of the rule of law. PLE sits in a somewhat uneasy position with regard to the formal requirement that rests on

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government to promulgate the law. The need to promulgate or publish law as part of the law-making function of any state is critical, and PLE is now increasingly filling the vacuum that was left in the wake of the demise of advice services, whether general or specialist. The provision of the information estate to help the public navigate legal issues may well fostering include their ability to challenge the State or individual public bodies.

Law for Life believes that there must be a thoughtful engagement with the way in which information and education is funded and delivered, with a constant awareness of the motivations of those who are providing legal information and the potential for conflicts of interest. It urged the Commission to take into account the need for high-quality, independent legal information that the public can trust, and to ensure that this is achieved through funding models that work at arm’s length from government.

Replies to the Commission’s questions in its Interim Report

On page 20 of its Interim Report the Commission posed these two questions:

a) How can basic knowledge of fundamental legal entitlements become universal?
b) How can public legal education reach typically hard to reach groups, such as older and disabled people?

Law for Life answered them both together. It said:

1. Community-based work with trusted intermediaries was showing every sign of being an effective and scalable mechanism for reaching those groups who are least likely to be able to access justice effectively, and it should be capable of developing levels of knowledge and skills among people in vulnerable groups. Early Law for Life pilot projects, in which its representatives worked alongside advice and community sector groups, showed the potential for substantial impacts. For example, data that was collected over two years through the Early Action Advice project it undertook with Community Links, in which 46 community champions from across the Newham area were trained, showed that:
   a) Confidence in understanding of rights and obligations increased from 44% before the course to 88% at its end;
   b) On the topic of people’s ability to identify legal problems in everyday issues, the response rate during the course rose from 53% to 91% of those who took part;
   c) The community champions went on to support others in their community with their legal problems. 90% of the clients evaluated who were subsequently supported by Advice Champions said they felt more confident about dealing with their problems because of the support they received.

2. In the area of offline teaching, more needs to be done to reach priority groups in regional

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32 Teaching has largely been focused on those groups who both experience multiple legal problems, and often have the lowest levels of legal knowledge and skills to contend with them. They include refugees and
settings by segmenting and targeting vulnerable groups and focusing on areas of law which have left people struggling to cope.

3. Linking (and embedding) community teaching with updateable online resources that provide more detailed information about rights and duties is a cost-effective mechanism for reaching more people. Teaching the granular details of any area of law is largely pointless, since that law will inevitably change. What can be taught to good effect are concepts and skills that can be read across and that are adaptable to different areas of law.  

4. There is a need to build on and maintain a diverse provider base; both for legal information and to teach in community settings. There are too few practitioners and too few writers who can translate law in accessible and empowering ways. There should be a focus on growing a body of practitioners and ensuring there are accredited routes to jobs and training. To that end Law for Life has begun to embed public legal education in clinical settings which aim to teach undergraduate and postgraduate law students about the theory and practice of PLE. For law schools, this model offers an innovative part of the curriculum, embeds the core legal skills of research, legal processes and legal systems, and provides insight into real life legal problems as well as how to tackle them. For participants, lawyers become less distant. Students of law both in the community and from law schools come together with the recognition that law can be learned and need not be a mystery, and that problems (and clusters of problems) can be unpacked and worked through collectively. A wider training programme for aspiring practitioners also needs to be envisaged as part of an advice model with accredited training routes. Ideally this would be fostered at some remove from casework and one-to-one advice.

5. There is a need to think about plurality and independence in the PLE provider base. The PLE sector recognises that some of the best information and education is delivered by those who are close to the communities and users that they serve. It also recognises that users need to be able to trust the quality, impartiality and independence of legal education and information.


35 Public Legal Education and Information.
help cuts right across the work of other sectors whether that is in social care, health or housing. If people cannot access services or fail to be able to protect their interests, the impacts fall on other service providers. *Law for Life* receives requests from social workers, youth providers, tenancy associations and even letting agents to join our training programmes. They lack budgets to be able to pay for PLE. A subsidy-based model needs to ideally bring together budgets in priority areas.

7. We need to build on clever delivery mechanisms. For example, after identifying that private renters were struggling to find accessible information, *Law for Life* designed a combined project with the aim of developing skills-based information on s21 evictions and disrepair. This was published nationally and distributed to target groups, such as London-based food banks. It then designed training sessions around those areas of law and provided them offline in London and Birmingham. An ‘information and education’ model, such as this one, that brings together key stakeholders embedded in both community settings and in the field of wider social and health provision, is urgently needed.

8. Building more interconnectivity in services is one of the ways to help users manage complex pathways through services and help. This can be achieved by training staff and volunteers and instilling legal capability skills in key access points. A broad awareness-raising campaign on key topics would also help to drive people to the quality resources that already exist.

9. An element of embedding on-and-offline solutions involves targeting non-legal helpers who have an awareness of the boundaries between legal advice and broader information and support. *Law for Life* relies heavily on intermediaries to reach the most vulnerable groups currently left without access to legal advice. Helping people understand how to avoid the risk of straying into legal advice is crucial. It teaches those boundaries by considering the difference between information, support and legal advice. It also gives examples of how to deal with the sort of questions people would ask that could push them over that boundary. Good practice standards should include an awareness of the difference between information, advice and support, with an agreed framework that provides concrete guidance for community helpers.

10. The PLE sector needs investment. All these recommendations can be brought under a broad umbrella of innovation funding, which would support new interventions alongside good evaluation to assess what works best. An innovation fund should be regarded as an investment that would save money in the long-term. Dedicated PLE funding is needed to reduce both the long-term costs on the public purse as well as the devastating impact legal problems have on individuals and their families.

PART II  Responses of Lisa Wintersteiger to questions from Commissioners

**Funding**

Most of the funding for AdviceNow is secured through the Litigant in Person Strategy, and this funding was largely able to save the service. However, over-dependence on this one source of
funding is unsatisfactory because although LIPs have huge needs, others have needs, too, which we are not able to satisfy. It is also “year-on-year funding”, which means that we are not able to plan ahead.

On the back of this grant funding, which constitutes about one third of our total income, we have been able to secure a fair bit of work for individual pieces of information provision, and also for information consultancy, and this leads us on to making applications to trust funds and other grant-making bodies for key pieces of work. This is how we funded the development of the PIP tool.

Because our funding is so insecure, we have now started to test “paid for” models, because it is so important that we look after the information estate we have created. This initiative is based on the premise that some people are able to pay for some of our content. This fosters our ability to maintain the information base free of charge for the very poor.

A recent experiment, developed with innovation funding from the Legal Education Foundation, involved testing a premium model in which higher paying users are able to subsidise vulnerable users. Very early results suggest that people have been willing to pay the largest sum we suggested, largely on an honesty box basis. This helps to subsidise the people who are paying a smaller sum, and also those who ask us for a free vulnerable user guide. As a result of this initiative requests for these guides have increased, which is all to the good. We are developing this model as a way of attracting cross-subsidy for those areas of our work where we know we are not attracting sufficient funding, to the detriment of our poorest users – developing ESA\(^36\) help, for instance. But more needs to be done to put things on a stable basis.

**Our relationship with Government**

The Ministry of Justice probably does not know how good we are, but this is one of the problems of institutional memory at a time when they have been experiencing so many staff contractions over such a short period of time. We brief one civil servant on what we do, only to be told “it’s fantastic” but then he/she moves on, and we have to brief another, and another.

Government bodies also create great problems with links. Whenever we are told by a user that one of our links has died, the answer usually lies with HMCTS\(^37\) and not with a private sector information provider.

We work very hard to try and build up a relationship with government – to show them the importance of the interrelationship between their traffic and ours, and of establishing links. We have been particularly successful in the family law field. This represents our largest user base, and we do remind government of our resources. As a result traffic does come across.

What government has not managed to do so well is to understand our model. They don’t understand that the business of creating information is highly skilled, and that it has huge value as such. You do

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\(^{36}\) Employment Support Allowance.

\(^{37}\) Her Majesty’s Courts and Tribunals Service.
not want to create a monolithic information site. They keep suggesting to us: “We need another website – we need to expand people’s choices,” but we really don’t. The best information is often designed by the people who work closest to our users and who know their needs. Yes, we need a plurality of information services, but we also need to help people get to them, and this is a job in itself.

On the LIP engagement groups, the civil servants say, “We don’t really understand LIPs’ needs”, and we have to refer them once again to the reports on the topic we have produced in past years. We work closely with LIPs on their information needs, so that this failure of institutional memory is a product of the speed of change, but I do bother when I am asked so often “What do you mean by that?”

*Relations with Citizens Advice (CA)*

We know that CA workers at their local offices use our AdviceNow service a lot. They rely heavily on our information, and we get great feedback from them. And when there is good information on the CA website Advice Guide we are delighted to link to it. There is no need for us to produce something which is already there and is really good. This is, however, not always the case with Advice Guide material.

This relationship with their local offices means that they have some of their own information, but they can also use ours, and go elsewhere, too, where it’s better. From our perspective we don’t see this as competition, because we exist to fill gaps: we are not there to take over the world, and we don’t have local service providers. Our model is different from theirs. Inevitably when major reforms are introduced there is some sense of competition. It would perhaps be good to achieve better liaison and combined strategies at a national level in order to make sure we are meeting the needs of all our users.

The support we receive from Citizens Advice workers is generated locally: it is not driven by advice from senior management.

*The arguments for and against a central portal*

I agree that there are now so many different organisations offering different products and different information in different ways that it can be really confusing. There could be some merit in raising the profile for a central portal, and this is an issue I have come across when I study what is going on abroad. But if you try to homogenise through one portal there is a real danger that you would lose the plurality of the ecosystem. I think there are strengths and weaknesses in a model of that kind.

At present we don’t focus on the different mechanisms that need to be there to raise the public’s capability levels. Perhaps we should ask “What are the key bits that help do that? Would it be through a central portal?” I don’t know the answer.
At the moment we provide advice, but people come out at the other end without having improved their capabilities in any way. Research\textsuperscript{38} tells us that in the commercial market repeat players in the system do brilliantly. They learn how to use the system at the pre-litigation stage, and also during the course of proceedings, and their interests are looked after. Repeat players in our civil system, on the other hand, are individuals, and we are not building their capabilities to cope as individuals. What we are seeing is a declining impact for them in the sense of empowerment, so we are not even helping them on their journey. I think we’re getting this badly wrong.

The reason why I am reluctant to discuss the question of a central portal is that it always tends to detract. It pushes funding off, and as a result it loses some of the really clever things that are going on.

\textit{Work with disadvantaged groups}

What is nice about the AdviceNow model is that we are delighted to be showing people what is good elsewhere. We don’t want to be taking over the world of information ourselves. We would, however, like to do more targeted information work, and this is where we are now getting more commissions. For example, we are now looking at the hugely difficult topic of consent in young people considering gender transitioning. Some groups need information and learning designs that are really tailored to their needs.

We want to do more by way of being commissioned to assist these groups to do this work. We have worked with Roma communities in the past, and we are now looking at working with them again. Nothing generic works for group like these. You have to work hand in hand with users and with the people supporting them and create information and learning solutions that are utterly tailored to their needs. If you get this right, you get change, and you can scale within these groups, but what you provide must be really carefully tailored.

I cannot lay enough stress on how expert this work is. It takes years and years of ability to build to this scale, and I have been successful in holding on to my team. It is really hard to recruit people to do this stuff. But it certainly can be done. Part of the solution for vulnerable groups is good information and learning design. Their needs won’t be met by \url{www.gov.uk} work. Intensive design interventions are needed, and funding pots have to be there to support this work.

\textit{Innovation overseas}

I am not aware of any large pot of innovation funding in the PLE field overseas. I have worked a lot with an organisation in Ontario which has managed to bring together quite a nice model. They are helped because their federal system is quite good in bringing together research funders, government and the broader advice and PLE sector to pool their funding to come up with some solid solutions. The Law and Justice Foundation did a systemic review of PLE and PLE interventions in order to

\textsuperscript{38} Why the haves have come out ahead. Marc Galante. (1974) \textit{Law and Society} Accessed September 2017: \url{http://jan.ucc.nau.edu/~phelps/Galanter%201974.pdf}
discover work that was seen to have impact. They found only two major interventions which could form part of their ultimate study, because of questions of rigour. This is not to say that none of the other interventions they looked at didn’t show signs of success.

Some of these innovations spread right across from community-based teaching on the one hand to in-court work helping with family settlements and managing to reduce conflict in court settings on the other, and there has also been some good work looking at some of these interventions.

The picture of what we have seen in this country is mirrored elsewhere, as legal aid has largely decreased during times of financial crisis. Sadly, there has been no investment in those areas of work where it is really needed.

A national debate about rule of law issues

I think that at the moment there is some sensitivity to questions more broadly about the rule of law. The last Lord Chancellor, Liz Truss, talked about the challenge that judges should be taking up in educating the public about law and order in order to fight off public perceptions about their being enemies of the people. There is genuine concern about a real lack of understanding about the broader justice system, and what this does to the rule of law in this country. I think there is a conversation going on here.

I think there is also a real conversation going on about the online court, and it was great to see Lord Justice Briggs placing PLE in his review. However, during my conversations with HMCTS I have yet to see evidence of his ideas being put into operation.

I worry because we are focusing on the moment of litigation and the need to produce information about this alone. PLE forms part of the information bridge, and if you really want to be successful in early resolution and avoid people being driven to the courts, step ten paces back. This means PLE, and it is a cost-saving proposition.

I think there is partly a concern about the fact that the commercial legal sector is a huge part of our GDP, and we want to be seen as a world leading player in the realm of law.

On the other hand, we are now seeing some challenges because people are unable to access the justice system, and I think this is also an important narrative for us to be pursuing.

How the financial capability strategy was developed

I had a really interesting conversation with someone who was leading on the financial capability strategy. I asked her “How did you operationalize the objectives for the Financial Services Authority that underpin lack of knowledge and skills?” What was remarkable about that journey was that there was a sense of leadership between the professionals and the regulators. They both said that they needed to take the area seriously and do something about it.
They came together with a strategy, initially for a five-year period, to look at financial capability mechanisms, and they were able to leverage the sector. There were already bankers doing pro bono work in schools and so on, but the financial services sector saw that their reputation depended on undertaking pro bono work as well as investing (and imposing a lev for this purpose), and this levying then brought levying from the Cabinet Office, too, which created meaningful funds with which to move forward.

We should create a journey and ask ourselves: “If we take on something with this scale, how do we work to do it, and what are some of the models we can look at?” So far as financial capability was concerned, I asked which single programme stood out most, and I received the answer “Catching people at key moments when you can make a difference”. Working with the Royal College of Midwives introduced them to key teachable moments.

So you must make sure that the investment you bring in and the narratives that sit behind it are really about the areas where you can see the impact with the right policies. There are good models to follow. Although it is such a big problem, and concern is always expressed on the question “Where on earth do we begin?” there are always places to begin, and there isn’t just one narrative. I think there are different pieces of that.

*The Legal Services Act and PLE*

As things stand, it would certainly make sense to bring people who are enthused about PLE onto the Legal Services Board. But we have seen no movement by the Board to take PLE forward, and there seems to be a sense now that “We don’t quite know what to do with tis. What we want is more empowered consumers of legal services in order to access a latent legal market.”

There may be some truth in this, but it can’t be right that the only solution is one about driving business. This is not good for the reputation of the profession, and it is certainly not good for the public.

The more I look at the forming of the Legal Services Act and the motivations that sit behind that piece of legislation, the more I question whether this is the right place for a statutory objective to achieve something like PLE. I think there is a conflict here.

There is clearly a need for people to understand how they use the services of the legal profession, and clearly a role for the legal profession there. But I do worry because information and education sits in the category of reserved activity, and what do we do with standards then? At the moment anyone can design information for the public about the law with total impunity, and how is the public supposed to trust this? There is a potential conflict when a law firm is producing information.

I think this is a conflicted space. Maybe we need to make the best of what we have now, and do this collectively (including civil society). But there remains a question in my mind about whether this is the right place for the statutory objective for our work.

*The new breed of advisers and trusted helpers*
We are seeing a change in the career paths. Since the start of the liberalisation of the market we have already seen a growth in paralegals in this country. Overseas I see organisations like Namati in Sierra Leone and a number of other jurisdictions where plainly one of the solutions is to build a cohort of paralegals: barefoot lawyers, if you like.

I am worried that it is completely pointless to have a sector which is too heavily regulated when it is barely out its infancy. This is just going to stifle innovation and it flies right in the face of deregulation’s direction of travel. I don’t think there is any ambition to do this.

I do worry about quality, however. I think the answer is to talk about good practice standards which we would want to achieve as a sector and which the profession would also want to be aiming towards. This is a carrot, not a stick. Of course we want to protect the public and the particularly vulnerable public, and I deeply understand the concerns about unregulated practice of law.

It is interesting to look back at the first legal needs study, conducted by a Harvard professor in 1939. The worry at that time was that there were unregulated areas of law competing with the work of the Bar. This was the first study that found that it wasn’t that everybody was competing for it: in fact, nobody was serving these people. The journey started then, and we do a lot about helping intermediaries to understand the boundaries around information, giving support, and what legal advice is.

It can’t be right that our anxieties are placed in the realm of risk for the public when in fact 90% of the public is doing it on its own, or with somebody helping them who has got absolutely no idea.

I think we must balance the problem of risk and quality with the facts on the ground: the fact that we know from legal needs studies that most people are on their own. We teach people and say what you can do and where you will overstep the mark, and why that is dangerous. Where people are willing to help – it may be just a vicar helping someone, for example – we explain what is legal advice and what isn’t. We explain what you can do until you reach a point where the risk goes too far. I think it is all about having that emphasis and that balance.
The Advice Services Alliance is the umbrella body for the social welfare legal advice services across the UK. Founded in 1980, ASA works to promote better cooperation between advice organisations and to improve the quality of advice offered to the public. ASA also encourages research and undertake projects which address issues which relate across the advice sector. The organisation has eight membership organisations who are themselves network bodies and who together represent about 1,400 advice giving organisations. These are:


The Advice Services Alliance is a very small charity (income less than £80K, one FTE member of staff). It carries out an ambitious programme by working in partnership with members and other organisations where objectives overlap.

Examples of recent work:

**Advice Quality Standard**: The ASA owns the AQS which is held by about 700 separate advice organisations across England and Wales.

**Health Outcomes of Advice**: with the Low Commission, produced a report in 2015 on how social welfare advice can improve health, with forward by Sir Michael Marmot.

**Advice Services Transition Fund**: provided support to 226 advice partnerships across England as part of a Cabinet Office/Big Lottery initiative to promote better, more sustainable local advice provision (2014-2016).

PART I: Written Submission

June 2017

Written evidence submitted by Lindsey Poole, Director of ASA, covering:

- The role of voluntary social welfare legal advice services in access to justice
- The threats and problems currently facing the advice sector
- Advice Services Alliance – what can be done to address issues (and what is less promising)

Poole’s evidence draws from specific projects, from the evidence produced by the advice networks and from the experiences of local AQS holders.³⁹

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³⁹ The ASA inherited the Advice Quality Standard from the Legal Services Commission. This is the only sector-owned, independently audited standard that focuses on advice. It is awarded to organisations that give advice to the public on legal issues. Organisations are audited every two years and have to demonstrate that they are accessible, effectively managed, and employ staff with the skills and knowledge to meet the needs of their clients. Most of the Alliance’s work is devoted to delivering the standard to about 700 organisations and to its general oversight of how the standard is working. This gives it direct contact with all the organisations involved, who include all Citizens Advice offices, about 80 AgeUK offices and various independents.
The role of voluntary social welfare legal advice services in access to justice

The advice sector history spans over 70 years, slowly expanding throughout that time until the last 5 years when the impact of austerity and LASPO started to take effect. Originally seen as a temporary measure, the sector continues to exist because of two failures of government:

a. Policies that fail to develop public services to meet the needs of all members of our community
b. Poorly resourced administration and delivery of the policies that do exist

Failures fall on those with greatest level of need and least resource to challenge.

Access to social justice

The advice sector’s primary purpose to give access to social justice to people who are experiencing ‘problems’ which have a large legal component and remedy. We help clients assert their rights and carry out their responsibilities. We provide first line legal advice to people with high needs and little access to other sources of legal advice. We prevent legal problems escalating and assist with accessing more detailed legal advice for individuals, linking with the pro bono community and with legal aid providers where appropriate. Where no legal aid providers exist, we may be the only source of advice available. We identify system-based problems effecting groups of clients.

Our client group typically is from lower income groups or close to the poverty line and experiencing multiple problems (including health and social problems) and live in communities where others have similar problems. However, we also help others (‘Just about managing’) and with social media and web based advice, increasingly reaching a wider audience (e.g. Citizens Advice web site).

Our success is based on the confidence of the community we serve, our accessibility and reliability. We represent extremely good value for money, provide many opportunities for volunteering and whilst most of our income is drawn from local government, some income is self-generated and/or accessed from charitable trusts and foundations.

Threats and Problems

Local Authorities and core funding: the reduction in local authority funding from central government and increased delivery responsibilities has resulted in year on year withdrawing of core funding for advice. Core funding is the most difficult funding to access and local authorities providing this has allowed advice sector to access charitable funding for more project based work. Some local authorities pulling advice in-house but only to provide advice on debt, homelessness prevention and some aspects of welfare rights. Concerns that may not be ‘independent’ i.e. over emphasis of paying council tax arrears for example. Local authorities increasingly ‘hard-nosed’ including with clients collecting minimum 10% council tax (passing to debt collection agencies early for example) which also increases client need. (Professor Laura Bear at the London School Economics- the ‘Monetarisation of Government Debt’)

Commissioning being used as mechanism to limit spending: some shockingly bad commissioning practices including restricting services provided, reducing funding post commission, forced restructure of services,
setting unachievable targets. Results in charities subsidising services from their reserves and/or staff taking 20% pay cuts in order to carry on delivering services to the clients. This is neither moral nor sustainable.

**Loading of the admin burden onto advice services:** Funders (and others) are placing increased responsibility on advice organisations to ‘demonstrate’ their worth and to be subjected to quasi regulation. In particular, the plethora of quality frameworks and standards (example of Reading) and the focus on the ‘outcomes’ culture. Both require considerable often repeated effort and whilst ‘a good thing’, placing a disproportionate burden in terms of time and resources.

**Digital by Default and the Digitalisation of the Court Processes:** Government drive towards online services including court services likely to further exclude many of our clients (although may accidently increase their access). In short term, likely to increase work for the advice sector and we have a legitimate role in this work. We are concerned about how digital by default is changing relationships between the public and public services and the lack of human agency may well cause other unforeseen consequences.

**Ability to be adaptable and to change:** Many advice organisations locked into contracts or funding arrangements that make change difficult, others are wedded to a delivery model which may not be the most effective for clients. Transition Funding which meant to test sustainability was fairly prescriptive and whilst many partnerships seemed to become more effective and/or efficient, this did not produce cashable savings (for example referral processes).

**ASA Considerations on what could be done in the context of austerity**

**National Government**

1. National Advice Strategies - identify what level of need is and where it is found so that services can be targeted on the greatest level of need.
2. Central funding provision with a local funding tie-in as per Advice Services Transition Fund
3. Introduce targets through NHS England and Public Health for CCG’s and local authorities to fund advice services to address the social determinants of health, particularly in relation to mental health.

**Advice Sector in partnership with others**

4. Establish a review across the advice sector, student clinics and pro bono organisations regarding more effective ways of linking together, utilising the expertise in the best interests of the client and to meet the client demand. Review should also look at a) protocols on bidding and contracts, particularly where danger of small organisations unfairly pitched against larger ones and b) arrangements for supervision.
5. For public sector and other funders to recognise the importance of maintaining quality by including the cost of undertaking quality monitoring their commissions and awards.
6. Better understand the size, shape and funding of the sector by working towards collecting data on our network members.
7. Test out the ability for advice services can be delivered at the same level of quality for less overhead cost based on the evidence from the Buurtzorg Neighbourhood Nursing model.\textsuperscript{40}

8. Collect evidence to challenge the ‘outcome’ measurement culture amongst funders and to develop ‘output’ measures that give meaningful information regarding different communities’ access to justice.

Local partnership level

9. Develop services to incorporate client and community involvement at every level, recognising the opportunities to develop and to share expertise more widely through community networks.

10. Re-design services to access those with the greatest need where they already go- take advice to health care settings, to the courts (including criminal) and to local non-advice voluntary organisations.

11. Develop continuity business plans which incorporate alternative funding scenarios, including delivering services with very little resources.

And Finally…..

Referral Systems- some partnerships have successful developed referral systems based on inter organisations protocols and possibly including data sharing through IT or web based systems. Key feature of success is the relationship between the organisations, the element of trust that will pick up referral and give a good quality service. Some referrals work well for the organisations but deliver a poor client experience. The human relationships and human agency are the key factors.

Move towards on line and web based advice- will work for some, but not for the clients we seek to serve. Web advice is like the 4\textsuperscript{th} lane of the motorway and simply fills up without necessarily meeting the highest need. Value of face to face advice is the human agency which is the component most valued by our clients.

PART II: Summary of Oral Evidence of Lindsey Poole

21 June 2017

(a) The current LASPO review

I would like to see an acknowledgement that more casework services are needed in the advice sector to meet the need. The impact of LASPO was that we lost a lot of funding on the casework side of what we do. It didn’t just take resources away from the centre. It changed the shape of what we were able to deliver. The knock-on effect is that more has to be done by the clients themselves to move things forward. This is fine for people who are more capable. They just need pointing in the right direction. But there are some clients for whom this is never going to be possible.

\textsuperscript{40} Buurtzorg neighbourhood nursing: Accessed September 2017. \url{http://www.buurtzorgusa.org/about-us/}
I think we have to have funding from somewhere, but not from the LAA. The LAA changed the way in which we viewed services. We became a part of a legal advice delivery service rather than an access to social justice delivery service. There are some services that found it difficult to break out of thinking in terms of delivering the contract, rather than meeting local advice needs. It became more of “Have we had enough clients at this time in order to meet the contract we have?” In the long term this changes our thinking slightly.

(b) Relationship with funders
Funders are quite demanding. We will be interested in meeting their objectives, and often we will be trying to find ways to fit our services in to meet their objective. This is understandable, because it is so difficult to get funding. But my question is “Does it meet our charitable objectives in helping the most vulnerable to access social justice?”

(c) Going to where the need is
We need to understand the points in people’s lives where they are likely to have a high volume of need. For example, going to prison or to hospital, especially for psychiatric services. All are points of crisis or change, when people’s advice needs are very high. We will find the people who need advice there. We will also find people who might not be in crisis, but who have great difficulties in other settings as well. I suppose we need to bring this kind of thinking to how we think about where we deliver services. Where will we find the people who need us? For example, a local community organisation in Oxford is really struggling to find funding. They have been providing services to families in their areas for about 40 years. Two or three generations of families have used this well-trusted service. It had lunch clubs and a children’s centre, and they provided advice as well. The whole service is under threat, and it is therefore more difficult to access these people. We need to think where people naturally go who are likely to be experiencing these problems in times of crisis.

(d) The pros and cons of receiving funding from local authorities
When I started working in the advice sector we were given grants to go out and do good work, generally speaking. Then gradually there were first service level agreements, and then commissioning and tendering, which are then very tightly controlled through outputs and measurements and so on. This broadly coincided with the rise of third way thinking: the third sector could be providing government services.

But we weren’t served well with this, because when times get tough, government makes cuts to the third sector, and we are lower in the queue. I don’t know if ring-fencing in terms of provision will help. I certainly think that target-setting in terms of provision would help. My personal preference would be to return to core grants being offered, because these gave organisations the freedom to do what they do well. If commissioners were to say “This is the pot of money. What can you deliver for it?” you would put the onus on providers to say what they can actually do, and it would be interesting to see how this might work in practice.

However, organisations have a tendency to try and continue as they are. As an organisation you either grow or shrink – you rarely stay the same shape, and so the context in which that sort of work would be
done would have to be very carefully thought through. This is where things like local advice strategies could help. You could have a co-production model, if you like, looking at developing the model with the advice strategy - in terms of where the needs are, what the provision is, and how the provision best meets the needs. In this model you have to accept there will be some organisations that will be more powerful and able to organise their corner better than others. And so there may be winners and losers in this scenario in order to meet the need.

(e) How to move forward if austerity is a bit lighter
I’m an optimist, and I always think that things are going to get better. If austerity is a bit lighter, we should move away from saving cashable money. With group activities, you can point out the systemic problems you could quite easily solve. This makes it better for everybody. Instead of looking at things we deliver in terms of how much money we can save or bring in to clients, it is about the social benefits that affect wider communities as well.

If you are in the office, the waiting room is always full and you are desperately trying to get through the clients and not keep anyone waiting too long. We should step back from this sometimes and think “How do we re-engage with communities?” In the 1980s there was much more legal education with communities. You worked with their leaders to say “Well, this is a problem. This is what you can do about it, and this is a legal education provision you could develop.”

(f) The importance of evaluating what we do
I see the benefit of evaluation. If you really care about the work you’re doing, you want to know it is having an effect and delivering what you think it is achieving. In a way, every time we have an interaction with a client in which we set up a new service to address a problem, we are setting up a mini-experiment to look at whether or not we can actually address some part of the problem. In lots of ways there are very good reasons why advice services should care about outputs. They should be putting effort into this.

This is a rather different thing from saying we should be helping organisations to demonstrate their worth with funders. I think there is an interesting conversation to be had around this. The question I always ask is “How good is the evidence we can provide?” We can produce lots and lots of outputs.

In the Advice Services Transition Fund work there were 226 projects that could have formed a wonderful natural experiment. We could have looked at all these different projects and how they impacted. But every single organisation had a different type of evaluation, and so we couldn’t get any cumulative knowledge out of any of this.

The dialogue with funders is about the fact that caring about the work we do and providing some evidence around this makes us better at what we are doing, in contrast to generating evidence for their purposes. I think the challenge for the advice sector is in becoming more confident in being able to say, “We are the experts in our work; we understand a lot about the way it works, and the way we can do things well, and here is our evidence to support this,” rather than always allowing the imposition of standards to come from outside.
Appendix 4: Oral Evidence: Second Session

*Impact bonds*  
Impact bonds don’t work. I can’t see a way they would ever work in the advice sector. They draw people up into relations with government that I don’t think are healthy. Once again, this is about delivering particular objectives, and not necessarily about where the public is and what their needs might be. There is no money in poverty. I can’t quite understand the way anyone thinks the model is going to work. If people are poor, where is the money going to come from? There are all sort of contradictions in some of these economic models for funding the sector which take us into places I don’t think we should be.

*(g)* *Did the sector become too dependent on legal aid funding within the context of diverse public funding?*  
I think we were a bit naïve about legal aid funding. It did an awful lot of good for an awful lot of people who were able to access very good advice, but it changed our thinking about the services we were delivering and how we did it. That part of it wasn’t so good.

*(h)* *How can we bring back the really trusted, experienced members of the community?*  
We have got to open up the conversation and start to talk more about the knowledge, commitment and trust that communities have in people. The advice sector should acknowledge we can’t just keep going in different directions and believe we are going to be able to go on doing things in the same way. I think there is a bit of a shift in thinking, and that following Grenfell Tower there’s a palpable shift in the way that people are talking about communities and their ability to raise problems. I think we should respond to this.

We have been having various conversations about how we can capture some of the experiences of the past. I have been discussing whether we can do something on film to capture those experiences, from people like me who were working differently 20-30 years ago. We might actually relearn some of the things we have forgotten we knew and remember them for a new situation. I think history can be a burden, or it can be something that liberates you. I think we ought to use it to liberate us.

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*Explanatory Note: A social impact bond is a contract with the public sector in which a commitment is made to pay for improved social outcomes that result in public sector savings. The term was originally coined by Geoff Mulgan, Chief Executive of the Young Foundation*
Evidence: The Citizenship Foundation
Date of Session: 21 June 2017

For more than a quarter of a century, the Citizenship Foundation has helped young people in the UK to be active, engaged and motivated citizens – able to make a positive contribution to their communities. Their work covers a range of activities designed to achieve this:

- **Mock Trials** competitions which help young citizens to experience the legal justice system first hand, so that they develop an understanding of the rule of law and how this helps underpin our democracy.
- **Young Citizens Passport** which provides a guide to the law as it affects young people, and has been distributed to millions of young citizens over the past two decades.
- **Make a Difference Challenge** programmes which help primary school children to take social action on issues they care about most, so they learn the skills of advocacy and the confidence of agency.
- Lesson plans on Brexit issues designed to help teachers to engage young citizens in the big issues about Brexit – citizens’ rights, negotiations, the role of Parliament and the courts, and the role of the media.

PART I – Written Submission
June 2017

The current challenges faced by our democracy – such as the polarisation of society, and the erosion of faith in the democratic process to effect positive change – means that this is not ‘business as usual’ for the Foundation. It is vitally important that all young people have the opportunities to develop the knowledge, skills and confidence needed to be active citizens. We have set ourselves four goals for the coming decade – each of which involves a significant scaling up of the impact and reach of our work:

1. Providing interactive, topical and relevant citizenship learning opportunities – used by more than half of UK schools each year, by 2027
2. Providing authentic experiences of being an active citizen – for more than 200,000 young people each year, by 2027
3. Working with intermediaries – upskilling teachers and involving professionals – over 10,000 each year, by 2027
4. Campaigning for the importance of young people having opportunities to learn what it takes to be an active citizen – with a national consensus, by 2027

The importance of Public Legal Education for citizenship

For the Citizenship Foundation, legal capability is an essential element for active citizenship. Public Legal Education (PLE) helps young citizens develop the ability to recognise when they might be faced with a legal problem or challenge. It then helps them develop their knowledge – such as how the legal justice system works; skills – such as being aware of what to do when faced with legal issues; and confidence – to make use of the legal justice system to protect rights.
Current changes to the legal system make the need for PLE especially crucial at this time. The restrictions to legal aid, the massive increase in litigants in person, and the digitisation of the courts system all mean that in future there will be an increasing onus on individuals to navigate the legal system on their own. Without the necessary knowledge, skills and confidence to do so effectively, people will be denied access to justice.

The Citizenship Foundation has developed a ‘Legal Capability Framework’, setting out the competences which young people need to possess in order to be able to exercise their rights and responsibilities as citizens. We are beginning to use this framework to measure the impact of our interventions – through means of a questionnaire before and after interventions.

PLE also plays a significant role in improving social mobility, by helping break down the barriers to the legal profession. There are many ‘alumni’ from the Citizenship Foundation PLE programmes who have gone into a career in the legal justice system as a result of their contact with lawyers and others.

The work of the Citizenship Foundation to support PLE

Our PLE work can best be categorised under four headings:

1. Learning opportunities
   - We provide resources on legal issues for use by non-specialist teachers – which are engaging, discussion-based, and skill-building.
   - Immersion days – we run conferences, led by leading barristers, on legal issues and the legal justice system for students, to help them develop skills such as advocacy and critical thinking.

2. Citizenship experiences
   - With the support of the legal profession and the HMCTS, we run Mock Trial competitions, based in real court rooms – giving thousands of students first-hand experiences of courts, and the justice system, with opportunities to meet professionals such as judges, magistrates and court staff, and to develop their knowledge and skills. Around 2,000 legal professionals are engaged in these experiences.

3. Intermediaries
   - We provide teacher training for non-specialist teachers – either through workshops, school twilight sessions, or in INSET days.
   - Supported by 40 corporate partners from the legal sector, we support legal professionals to deliver training to students on a wide range of legal issues of interest to young citizens.

4. Advocating for a national consensus on the need to help young people be active citizens
   - We are a lead player in the development of a PLE group, supported by the Solicitor General’s Office. This has been slightly delayed due to the General Election. This group is developing a set of shared goals for PLE operatives and the legal sector.

Citizenship in schools

An essential element in the provision of PLE for young citizens is to ensure that all schools have the support and motivation to teach high quality Citizenship. Citizenship was introduced as a statutory national curriculum foundation subject in secondary schools in 2002, and whilst it is pleasing that the subject of
Citizenship has been retained in the National Curriculum following the review under the Coalition government, we are concerned at the watering down of the support mechanisms for schools. For example:

- The great uncertainty surrounding the future of the subject in the last curriculum review led to many schools axing the provision in the expectation that this would be the outcome, including its specialist teachers. The revised curriculum content, whilst retaining legal education, has an over-emphasis on knowledge compared to the equally important components of skills development and experiential opportunities.
- Academies and free schools are not required to follow the national curriculum, and as a result many do not teach Citizenship. This – combined with changes to Ofsted inspection processes which means that Citizenship is no longer inspected as a subject – means that whilst many schools would wish to teach Citizenship, other subjects are prioritised because that is where the focus of attention has been placed. Citizenship has been squeezed.
- Support for training for Citizenship teaching has plummeted. The number of trainee Citizenship teachers has fallen from 240 in 2010 to just 54 in 2016. Training bursaries are no longer available.
- Support for intermediary organisations, which in turn support schools to provide PLE, has plummeted. The Citizenship Foundation is a case in point – our funding from central government has fallen from 60% of our income to virtually 0% - with us now needing to charge schools for our support. With the squeeze on school budgets affecting those elements they consider ‘nice to have’ rather than essential, this makes it very difficult to provide the support which schools need.

Measures which need to be taken

We believe that the following measures would provide the support to ensure that high quality PLE is provided for all young people:

1. Ofsted should be asked to provide a renewed focus on Citizenship, reporting on the standard of teaching, and highlighting best practice for schools. This would provide the space which schools need to give a renewed priority to Citizenship.
2. Government should renew its support the subject of Citizenship, including through support for teacher training – through bursaries and CPD for non-citizenship teachers. This would provide the clarity of leadership which is currently lacking.
3. Government should provide support to intermediary organisations, in order that they can in turn support schools. This would include the National Justice Museum, the Association of Citizenship Teaching, and ourselves. This would help those schools which do not have the budget to pay for high quality citizenship resources.
4. There should be clear lines of responsibility within Government for PLE – which we believe should ultimately sit with the Ministry of Justice, with support from the Department for Education and the Attorney General’s Office. This would avoid the current situation where PLE falls between different government departments, and so there is no clear lead.
5. Legal profession should continue, and grow, its support for PLE – with funding and pro bono support for intermediary bodies – and a wider range of options for support for different types of legal firms.

6. Multi-academy trusts, which in many cases now provide the support to schools which used to be provided by local authorities, should engage with PLE and help to support their schools in its provision.

7. Agreed collective goals for PLE operatives should be put in place, along the lines of those already drafted, led by Government, and be responsive to the changing needs of the public, to ensure the rule of law upheld. This would help identify gaps in provision and avoid duplication between organisations.

PART II – Oral Submission
21 June 2017
Citizenship Foundation represented by: Tom Franklin (CEO) and Ruth Dwight (Programme Director, Corporate Partnerships)

Our roots are very much in Public Legal Education, helping young people understand what the law and the legal justice system is all about. Our role as an organisation is to help young people become active, engaged and motivated young citizens who are able to contribute positively to their community and to make a positive difference.

We do this through a series of different programmes, many of which are related to understanding and taking part in the law. Their aim is to help young people to develop the knowledge of the legal justice system, the skills that they need in terms of critical thinking and advocacy, and the confidence to use their knowledge and their skills in order to effect change, to protect their rights and understand their responsibilities.

We do it through providing learning experiences. We will take issues such as Brexit and all the legal issues around it - what Article 50 is and who has the right to trigger it, and the separation of powers between the judiciary and the legislature and the executive - and we use these topical examples to help to bring the law alive for young people, to explain the different responsibilities of the different arms of government, and why these things are so important.

We are also involved in helping teachers. Many of them are interested in helping young people in this area, but they don’t have the expertise they will need to help their students with it.

We do our work through providing very practical citizenship experiences. We run a series of programmes around mock trials. We take over courtrooms at the weekend where, with the support of HMCTS and a huge amount of support from the legal profession, young people will take on the various roles in cases - as the prosecutor, the jury, or the defendant. They will act out cases, and in this way they will learn how the justice system works as well.
We also run programmes where we link legal experts with schools, so that lawyers can go into schools to run the sessions that Andrew Phillips\(^{42}\) started 50 years ago, taking aspects of the law that are of particular interest to young people. So, whether the topic is consumer rights or social media and other issues like that, we will help young people to understand the law as it affects them as well.

The reason why we do all this is because we believe that young people have a right to capabilities around their role as citizens, including a level of legal capability as well. They have the right to learn what it takes to be an active engaged citizen in the same way that they have a right to learn the basics in terms of mathematics and history and so on. It’s something they are not going to pick up by osmosis; they need it through the education system. Over the years and particularly in recent years, there has been a move towards making sure that this is very much part of what happens in schools.

For various reasons this tradition has been weakened over the last few years. With the changes that are taking place in terms of the undermining of the confidence of democratic society in the institutions that make it up, and the changes that have taken place in the legal justice system - and in access to justice as well - we believe there is a growing gap between what is needed for young people and what they are actually being provided with.

This is the picture at the broader level. One of the things we are doing is that we are starting to undertake a more rigorous examination of where young people are in terms of their legal capabilities, both at the start of some of our programmes and then as they progress through them as well.

The programmes we have been running for over 25 years now reach about 8,500 young people each year. As there are so many of them, and as we ask most of them to undertake some kind of evaluation as part of their participation in our programmes, we came to think that what we’ve got there is a fantastic opportunity to do a baseline study of young people’s legal capability of a kind that doesn’t really exist at present.

*Law for Life* will have told you about the results from the Civil and Social Justice Panel Survey and the work they have been doing with Professor Pleasence on that. Most of that work starts at the age of 16, so that there is still very little known about the legal capability of young people, and particularly about how that data might segment: for example, how young people from less advantaged backgrounds might fare in their legal capability compared with others. Our hunch is that you need to separate out all the different elements within legal capability. You might find, for example, that some young people who for whatever reasons have more experience of crime might actually have more knowledge of it. Whether it is correct knowledge or not is also up for question. This is at present all untested.

Because this is the sort of thing we wanted to test, we started to work with Professor Pleasence, using the legal capability framework that he and *Law for Life* have been developing over the years to build a set of questions that could ask young people about their levels of legal capability. This is a challenge because the Civil and Social Justice Panel Survey used people who had already experienced a legal problem and asked them how they dealt with it. A lot of people thought it was bad luck why these things happened to them, and they were asked if they could have been prevented, whereas most young

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\(^{42}\) Now Lord Phillips of Sudbury, former senior partner of Bates Wells and Braithwaite, but at that time a young solicitor practising in Suffolk.
people haven’t necessarily encountered a legal problem.

In our questions we ask people who haven’t had experience of a legal problem what they might do in certain situations. This is not as valid or robust as it could be, which is why this first stage of our work has a kind of pilot element.

We have just come to the end of most of the interventions in the programme. There are still a few sessions going on because we are coming to the end of the summer term, and we are just starting to pull some of that data together at an early level. One of the interesting bits of data we have got was that we asked every young person to define what a legal right is: “What is your right?” We hear on the news a lot of people saying that young people just bang on about their rights all the time, so we asked what a young person actually think their right is. 50% of them got it right and 50% got it wrong.

That was before the programme started, and it was quite a spilt. After our interventions - and we don’t go in and teach people this is what is a legal right is (it’s a bit broader than that) - the percentage of people who got the answer correct increased by 20%. So we are making some impact. This is early days for us, but it’s quite an encouraging and exciting bit of data. In due course we will have more, and we will be happy to share it as more comes out.

We have described in our paper a set of measures that we believe would help. We have been working with groups like Law for Life and others that we are very close to, to draw up a clear sort of framework in terms of objectives for PLE as well which we can all work towards. We have also been involved in helping to set up the group on PLE which will be under the direction of the Solicitor General’s office. We see this as a platform on which we can move some of these issues forward.

One of our big concerns is that PLE is an issue that falls between different government departments. We’ve got a very good advocate in the Solicitor General who has shown his personal commitment to PLE, but because of the nature of his position and the resources at his disposal, his influence is very limited. We believe it is important that it should be the MOJ that sees PLE as fundamental to the work they do. They should be given the very clear role of leading on it, with the support of the Attorney General’s office and the DfE.

The MOJ also has a role in making sure that the profession as a whole is playing its part, and this includes the various regulatory bodies. There is a statutory requirement for the different bodies in terms of PLE, and the amount of effort that they put into it presents a fairly mixed picture. This is another issue where leadership is needed from the government. This means the MOJ.

The regulatory bodies (the SRA, the Bar Standards Board and so on) have a duty to promote public legal education, and we haven’t seen a great deal of this. There is now a rising interest in it. The Legal Choices website they have produced collectively seems to be the first step in that direction. They are interested in reaching other audiences through this website. We have had some early conversations on the topic, although we think the way in which that website or that group can influence a younger audience will be quite a slow burner.
For the last 25 years the Bar Council has supported the Mock Trial competition we run. The Law Society has funded the Citizenship Foundation ever since its inception, and they also funded the very early Law and Education Project resources that went into schools. CILEx have started some conversations with us as well. This presents more difficulties because of the status of legal executives within organisations, but there are certainly opportunities there.

One of the things we are developing which we think will help - particularly with the larger law firms - are their corporate responsibility objectives. There are corporate responsibility budgets, and as a result our Lawyers In Schools programme (which places groups of lawyers from a particular law firm into a school) is fully brokered with resources, training and evaluations, which all cost money.

This possibility is really limited to the larger law firms or the larger chambers. But there has always been a lot of interest from the smaller firms and from individual barristers and legal executives. This is why we are developing a web-based matching service so that legal professionals can register their interest in volunteering in schools, and schools can register their interest. They can then find each other.

In addition to human resources, a lot of the cost involved is in getting on the phone and trying to get hold of a teacher in a school. Even though the interest is there, for obvious reasons the teachers are in school teaching, so that we think it will help if achieving direct contact is made as easy as possible.

Interestingly though, even at the big firms, although corporate responsibility objectives are now so much more strategic than they ever used to be, there are still no law firms at all as far as we are aware who have chosen public legal education as one of their strategic objectives. We think there is a huge opportunity there for leadership within the sector from the first firm which comes out and says it thinks this is one of the answers to access to justice. We are therefore prioritising this through our corporate responsibility campaign in the same way that the financial sector did pretty successfully with personal finance education.

We find it hard to understand why this hasn’t happened already, but there are a lot of other competing priorities. The “charity of the year” needs to be something that is understandable and client-facing and popular with staff. Perhaps PLE is still felt to be a poorer cousin of pro bono, but as the interest in it is rising at a policy level, then it is perhaps the kind of thing the corporates are set to follow. Just as there was some sensitivity around pro bono I don’t think it can be something that the corporate sector is told to do. It’s got to be more of a carrot than a stick. But I think there is a huge impact that the profession can make.

As for the Bar, the Bar Council has sponsored the Bar Mock Trial Competition for a long time. We also have a few chambers participating in our programmes, and I think 1,000 individual barristers each year support our Mock Trial Competition across the UK. But it tends to be a kind of one-off contribution. You know they’ll go in, and they’ll mentor a school to help it prepare for mock trials.

We have also started developing Mock Trial Conferences which are reaching out to young people who wouldn’t necessarily take part in the competitive element of a competition. The conferences are advocacy master classes with leading barristers where students go for £20 per head and they can learn their skills.
These should be open to a wide range of young people - not just those that are interested in becoming budding barristers, but also those who want things like advocacy and communication skills.

PART III Answers to questions from Commissioners

The need for a Government lead on PLE, and the role of the Department of Education

The results will be sub-optimal unless the Department of Education gets involved in joined up activity with the Ministry of Justice. This problem happens in all sorts of other spheres as well, where it can be very difficult for other government departments to engage the DfE in areas they are trying to promote through education.

Although PLE is not now being led by the MOJ, it certainly isn’t going to be led by the DfE, but there does need to be engagement from the DfE. We make a strong plea that the focus should be on Citizenship as the route to achieve this because it’s there in the national curriculum. It’s very clear that Citizenship covers legal issues and the justice system as well. The key role the DfE can play is to give more support to teaching Citizenship as such. In a sense, it’s there for schools, but what the schools need is the support to make it come alive, to use the mechanisms that are already there. It’s that which has been lost, and this makes it very difficult for schools to carry on with this.

At the moment it feels that nobody in government is leaning on PLE, so that although there was a time that the MOJ was starting to, the impression that we get is that this has gone, with all the other things that the MOJ used to do, because of other pressures.

We were quite pleased just before the Election when there was a promise in the Green Paper which included a commitment to PLE. This was probably the most promising sign we have had in many years. When Liz Truss was giving evidence to the Justice Select Committee she mentioned PLE happening. We had a joint All-Party Parliamentary Group meeting after that, when we were told that the Solicitor General, would be taking the lead, but the Attorney General’s office said this was probably not quite the case. I think no one is quite sure who is responsible there.

It is a promising step forward that the Solicitor General’s working party on PLE is now arranging its first meeting. We are pleased they have taken that initiative, but nothing concrete has come out of it yet.

The first meeting was due to happen the day before the Election, so we’ve had to postpone it. But I welcome the opportunity of bringing it under the Solicitor General in the chair.

Funding

Funding has changed dramatically over the last few years. In 2010 60% of our income came from Central Government grants. The bulk of it came from social action funding as the breadth of the Citizenship Foundation’s work covers more than just PLE. That is now virtually zero. A significant bit of the gap has
been made up through charging schools a higher level of fee to take part, and we try and cross-subsidise this through other means, through other grants, through support from corporates, particularly law firms and so on.

But we are asking schools to contribute more and more, and this is creating a difficulty, of course, because of the schools’ budgets. They don’t have a designated pot of money for this, and all the other pressures in terms of schooling as well make it very difficult. Even if their budget hasn’t yet been cut, they feel as if they are about to be cut, so they are holding onto everything and delaying the decisions.

When citizenship came into the National Curriculum, a ten year longitudinal study was conducted, and one of the things the government did was to make sure that there was also proper funding to research how it was being implemented. One of the findings was that where there was high quality teaching, you got high quality results, but where there weren’t specialist teachers - where the physics teacher was being asked to do it - not surprisingly the students didn’t learn very much and they had very low opinions of it as well. It was absolutely critical to ensure that it was imbedded that.

The numbers going into Citizenship training have now plummeted, but there is also the other issue, which has always been the case, that there will be a large number of non-specialist teachers teaching Citizenship. The ongoing support and training is not there, as it is not being supported by the DfE in a way that is the case with other subjects as well.

As a result, although Citizenship is in the National Curriculum, all that framework - the support scaffolding - has been ignored and neglected over these years. It is also the case that in more and more schools outside the local authority-maintained system it is being consistently ignored. The things that would mean that those schools would focus on it, such as the inspection regime, have also been emasculated.

Support for teachers

One of our largest programmes was our mock trial competition which by its very nature was held in criminal courts on criminal cases. Over the years, and probably much more over the last year or two, we have also built up resources for schools on a much wider range, and this links into supporting teachers who are able to teach this. Most of the non-specialist teachers we talk to say “I am terrified to do this, I don’t know how to do it.”

Whilst this should be within the Citizenship curriculum - and we need to build that up - there is also a cross-cutting duty called “SMSC” across all types of schools, be they academies, free schools or independent schools. SMSC is now Ofsted-inspected, and there is an element within it which is the duty to promote fundamental British values within schools. Within that framework there will be teaching about the concept of the rule of law, of right and wrong, and of morals and obligations, rights and duties.

So what we are doing also falls within that, and this has helped us to encourage schools to send someone from their school on teacher training. We say: “How are you going to deliver SMSC in your school? How are you going to ensure that you are able to get through your Ofsted inspection because if you are not

43 Social, Moral, Spiritual, Cultural.
doing this well you are going to fail your Ofsted?” This helps, but it is not as robust or as broad as the Citizenship Curriculum.

In order to help teachers with civil justice issues we have adapted a lot of the volunteer resources for our Lawyers in Schools programme into lesson plans for teachers. There is now a wider range of lesson plans available through our SmartLaw website\textsuperscript{44} and we’re selling these to teachers. Some of them are free as a kind of taster. For example, we did one that was published by the Bar Council about what Article 50 was.

We are also charging for resources on things like housing law or unemployment. We are currently - it’s not civil so much - doing a broader range of resources. So we are doing some work around displaced people and what it means to be a migrant, or what might be the reasons why people want to move from place to place. We have also done resources around social media and the law around defamation and things like that. So there is a much wider range now.

Civil justice activities

One of the things we are interested in developing is how we can use the mock trial model for civil - mock tribunals, for example. It would be great if we could. Where it’s brilliant is that we start to work together as a sector. We have shared goals with specialist organisations in those areas, such as advice agencies, who know where the biggest issues are - the biggest unknowns for people coming into these situations. By this means we can make sure that we are preparing young people to deal with those issues and situations as they arise or to prevent them in the first place.

The challenge of accessing every type of young person, and not only the highly competitive

There are always groups of schools that are more inclined to take up our services than other groups, and this is an issue we are constantly trying to address. By their very nature our mock trial competitions are competitions, and we also see the schools that are drawn to encouraging budding lawyers. A big secondary outcome of what we do is social mobility around the law - helping young people gain their skills by trying out being a lawyer - although this is not our main goal. It is not the reason why we do it, but it’s a big reason why a lot of young people take part.

Even if we get across to schools, are we getting to all the young people that we should be getting to? In the mock trials you certainly see that the students that come forward are often the most confident, capable or high achieving. How do get through to others? One way of doing this is by creating the resources, so that teachers then deliver them across their schools. How do we encourage teachers from schools that wouldn’t normally be prioritising this to do so? I think some of this has to come from up high as well as from our point of view, finding all the hooks that we can - for example, our mock trial conference or the kind of barrister advocacy master class we are currently pitching. This is great for young people as something to put on their UCAS form, for example, if they are applying for University or for interview preparation, even though that is selective.

\textsuperscript{44} Accessed September 2017: \url{https://smartlaw.org.uk/}
All our mock trial competitions are for state schools only, by the very nature of the way they are funded. We have started a completely separate independent schools mock trial competition because there was always an interest there, and it’s income generating for us, which enables us to subsidise others. This is why we are keeping it as a small part of what we do. But although the schools who take part are non-fee paying, a fair number of them tend to be grammar schools or some of the more high achieving schools. This is something we are working very hard to address. For example, this year we have a strategy for marketing the mock trials specifically to some of the areas where there are social mobility cold spots.

We have looked at the cold spots and thought: Can we do something, in terms of the whole range of different things that we provide, to give this added incentive: can we reduce the costs for areas where there are cold spots? One of the problems is that the government has got 16 cold spots, but there are others underneath the top layer. There are a lot of schools in those 16, but then there are the next 100 or so where there isn’t any additional support going in. We have been thinking: “Are there any other particular grants that we are not applying for?” We are focusing more on those areas as well.

It is really hard to tell whether of the services we sell, there are any distinctions between the schools that purchase our services because it’s early days now that we’ve started selling them. I don’t know if we can learn from the primary schools where we’ve been selling our resources, and from our subscription model, (which has a broader range of Citizenship education and not just PLE). We don’t know if we know the answer yet. The evidence so far is quite limited. One of the things we are working on is to identify the demographics of the schools that are buying our services and comparing them to those that aren’t. We hope that this will be clearer within the next year. One thing that does seem to come through is that schools that have more freedom because they are judged to be performing well through the inspection regime are more likely to engage than those that are struggling with more of the basics. You might say that the latter schools, and the pupils they have, could very well be the ones who would particularly benefit from the things that we do, so there is a sort of inverse relationship there.

Through our legal capability evaluation we are trying to understand where we need to target and what we need to target in some areas so we can be a bit more focused.

A lot of teachers are very enthusiastic about the type of things that we do. However, because there are pressures on schools in the way they are measured by the league tables - with the very narrow academic focus at the moment – we want to encourage anything that can be done that gives schools and teachers the excuse to focus more on the things we are talking about here and will encourage them to do something. It’s not that they don’t want to: it’s that they are driven in a certain way by the very, very narrow sort of tramlines they are on.

Other programmes involving schools

As far as we know there isn’t any co-ordination between programmes which involve the Supreme Court or judges or parliamentarians or other groups of people going into schools. There is probably something there - not just within the PLE area but in others as well - where more co-ordination would probably be
helpful for schools. We have had discussions with others - for instance the PSHE Association – about issues outside the schools’ narrow academic area, such as how we can help them with better sign-posting to all the different options that might be there. I think there is a need for greater collaboration across these matters.

We send other experts into schools as well. We provide financial experts to help young people understand how the economy works, and we are having conversations with the Local Government Association about getting councillors into schools to help young people understand how local democracy works. I think a greater level of conversation could help schools a lot.

Quite a lot of judges have wanted to go into schools. Some of them do a fantastic job and some less so, but not for lack of trying. I think it really comes down to “I couldn’t do their job,” and so putting a judge into a school takes some really great interactive resources. There is a huge amount of enthusiasm there, with a pilot project being funded by the Civil Justice Council a few years ago. We produced three resources that were piloted in a few schools in Leeds and evaluated. There is no reason why these resources can’t be made available, and we are already thinking about putting those up on our website anyway. And there are definitely other groups.

The new web-based matching service

We haven’t yet had an offer that was suitable for Legal Aid lawyers because our offer to get solicitors into schools is cost prohibitive. This is why we’re developing this web-based matching service. It has been a long time coming. We have been trying to develop something that enables smaller firms and Legal Aid lawyers to be able to participate in the work where there isn’t a nice big Corporate Responsibility pot but where there is a willingness and a day job that is probably more relevant to what they are actually delivering to the schools, than what Allen and Overy do.

It all costs money to bring this together without making it cost prohibitive, to keep the quality good, to keep the brokerage strong, and to try and evaluate it so that we can continue to monitor and improve it. Who is going to pay and how do we make it a model? Where we are heading is to try and take the admin out by using technological solutions. We are almost there with the technology, but we will need the help of the profession because we need to get a critical mass of volunteers in order to invite the schools to take part. We want to be able to promote what we are doing with bodies like CILEx, for example, because that’s the perfect group, and Legal Aid lawyers, and also with individual lawyers who show some interest in it.

The advantages of Citizenship education and the need to maintain quality standards

We can say that schools need to prioritise Citizenship more. We can recommend this from the top down, but from a teacher’s point of view there is only a limited amount of time in a school day. The teacher will say “You’re just throwing another thing at me that I have to try and fit in.” That’s not a very teacher-
friendly way of doing it. What we know anecdotally - and there is probably not enough evidence of it - is that good quality citizenship education can actually do a huge amount of other things for the curriculum than what is just within its four walls. So we are trying to join the dots and to say: “Well, if you do good Citizenship then your attainment levels are going to be better across the school, your engagement levels are going to be better, your students are going to have better skills to support them with general learning because they are going to develop critical thinking skills and communication skills and so on. They are going to be more employable and they are going to more become responsible citizens generally within the school and outside the school.”

Trying to draw those connections together, the other point that is linked to this was that when Citizenship became statutory in 2002 there was then a huge influx of other resource providers who said “Oh, this new subject, let’s make some resources for it because schools will love it, schools will buy it up, and it will be great.” As a result the quality of citizenship education went downhill. Exactly the same thing happened when personal finance education became a statutory part of the Citizenship curriculum. There was a huge influx of resources and Pfeg noticed the same reduction in quality. So, if a greater priority is given to citizenship education this also needs to be balanced with the importance of maintaining quality. We have developed a quality mark for third party PLE resources, because there are organisations like Save the Children or Amnesty that might be delivering or producing resources on a specific area of PLE. We can provide this kind of hub, and have this one place where all those resources come to. So, a teacher will know that if I need to find that information, I can go there, I know it’s trusted. It’s not all developed by us, it’s developed by lots of other people, but it’s to a certain standard, it’s accurate and engaging and so on.

Our four main needs

Our four main needs are:

- Support for intermediary organisations;
- Support for the teaching profession in relation to Citizenship training, including PLE;
- Leadership within government.
- The involvement of the legal profession and how much more of an impact they can have on the quality of delivery.

We need support for intermediary organisations like ourselves and the National Justice Museum and so on, because there isn’t support for them in the model we have at the moment. It all comes from schools, and it’s too much of a burden on schools to be able to afford these things. The only specific funder for PLE at the moment is the Legal Education Foundation.

The incentives for lawyers to participate in work in schools

Law firms are influenced by the objectives of corporate social responsibility. When they go to pitch for clients they are asked “What are you doing?” The way that corporate social responsibility is going is that

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47 The Personal Finance Education Group is the equivalent of the Citizenship Foundation in that area.
your strategy should link to your business goals, and so if at the heart of your business is the rule of law and justice, then supporting PLE links very clearly to that.

I think there are benefits to your employees because you’re providing them with good communication skills. You’re encouraging your solicitors to explain things in straightforward terms to a young person in a way that can be engaging, and to deal with quite challenging questions at times as well. This will help them in whatever cases they are dealing with, so there’s a developmental point in that. I think there is also a local community marketing potential from the smaller firm’s perspective. You know that if you go into your local school and it puts something in the newsletter which comes home to the parents saying that X from this firm went into my school today, then there’s a marketing value.