



Justice Committee

Oral evidence: [Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), HC 311

Wednesday 19 November 2014

Ordered by the House of Commons to be published on 19 November 2014.

Written evidence from witnesses:

- Steve Brooker, Legal Services Consumer Panel [LAS 12](#)
- David Holland, Institute of Paralegals [LAS 89](#)

[Watch the meeting](#)

Members present: Sir Alan Beith (Chair); Christopher Chope; Jeremy Corbyn; Nick de Bois; John Howell; Andy McDonald; and John McDonnell

Questions 203-244

Witness: **Lord Low of Dalston**, Chair, Low Commission, and **James Sandbach**, Campaigns and Research Manager, Low Commission, gave evidence.

Q203 Chair: Lord Low, welcome. We are very pleased to have you here. We appreciate the work that you have been doing in this area. To get this clear, it was, however, work commissioned by campaigning organisations who did not like the legal aid changes and wanted some kind of alternative proposals worked out. Would that be a fair description?

Lord Low: Commissioned by organisations that did not like the changes?

Chair: Yes.

Lord Low: Yes, that is the case. Our Commission was set up by the Legal Action Group, but it will be obvious from our report that we did not in any way simply adopt the LAG line.

Another issue that you might be interested in is why we did not simply recommend restoration of the cuts, which would have been the LAG line. I can expand on that at some point if you want me to, but it is quite clear from our report that we did not simply take a line from the Legal Action Group. Apart from one, all the commissioners were independent of LAG. We were actually funded by a number of trusts and foundations, not

by LAG itself, and we had an independent secretariat. I saw it as part of my role, as chair, to ensure the independence of the Commission and that we were not simply following the party line.

Q204 Chair: Was not recommending a return to pre-LASPO levels of funding a given from the start, or a decision that you took as a Commission?

Lord Low: We did not sit down and say, as a matter of principle, that we were not going to advocate simple restoration of the cuts. In the work that we did, the discussions we had and the recommendations that we made, it was clear that we did not think it was a credible stance in the current fiscal and political climate simply to recommend restoration of the cuts, particularly given the MOJ's budget settlement.

Another consideration that deflected us from going in that direction was our awareness that the pre-LASPO system was no panacea. Advice organisations found the old civil legal aid contracts too bureaucratic, and funding and the measurement of effectiveness tended to be on the basis of inputs rather than outcomes. Additionally, we did not anticipate that the next Government would be in any better position to return to pre-LASPO levels of funding. We thought, as a matter of realism, that we had to accept as a given that we were going to have to work with reduced levels of funding for legal aid.

Commissioners indicated that they were not interested simply in a knee-jerk rejection of the cuts but wanted to go back to the drawing board and look at the system as a whole, in an integrated way. From that standpoint, they took the view that it was better to spend what money was left in the system at the education, prevention and advice end of the spectrum, to prevent problems escalating to the point where costly lawyers and courts were the only resort left. In other words, it seemed more sensible to place a fence at the top of the cliff to prevent people falling off, rather than have to call an expensive ambulance when they got to the bottom.

This was not just a cop-out. We make it very clear in our report that LASPO is too restrictive in some areas. Housing was a particular case that we lighted upon, where it did not make sense to exclude earlier instances of housing problems from its scope and have to wait until a crisis developed before intervention was possible.

Q205 Chair: Was there any particular reason why family law was not included in your remit?

Lord Low: I was not party to those discussions, myself. I was invited to join the Commission on the terms of reference that we had, which were to consider a strategy for the future of advice and legal support on social welfare law issues. But thinking about your question, it would be true to say that family law has had quite a bit of air time since the Norgrove report of 2011.

Social welfare law is an area where there is considerable demand for advice. Citizens Advice statistics show that every year the largest number of inquiries contain welfare benefits, debt, housing and employment, but there was always a risk of those kinds of

cases being marginalised. I guess that underpinned the decision to make those areas the primary focus of the Commission, but I came on board at the point when that had already been decided by those who set up the Commission.

Q206 Andy McDonald: Good morning, Lord Low. How crucial is the National Advice and Legal Support Fund to the Commission's overall plan for social welfare advice? Why should a cash-strapped Government find the £50 million a year that it would cost?

Lord Low: The National Advice and Legal Support Fund is absolutely integral to our recommendations and the kind of strategy that the Commission was recommending. It is the main delivery mechanism of the system that we are recommending should be put in place. We do not imagine that it could be brought in overnight, but a quick win, we think, would be to roll forward the Advice Services Transition Fund, which is funded by the Big Lottery and the Cabinet Office. Much of it is lottery funded, so it would cost the Government very little to roll it forward. It runs out next summer, so the next Government will have to get a move on with addressing the problem.

As I say, we think that it would be a quick win to take the decision to continue the funding from next summer, when it runs out. It is about £20 million a year. Then, as resources allow, local authorities could be funded to produce local advice and legal support plans. These could be brought together with the funding that the MOJ has recently made available for court-based advice schemes, working with the pro bono sector to get greater value for money.

You ask why the Government should fund this plan. *[Interruption.]* Mr Sandbach has just arrived—he has been having travel problems.

We are asking that the Government find £50 million a year, which is half the proposed advice and legal support fund. We took the view that, although everything is costly, in terms of public expenditure £50 million a year is not mega. Even better, it splits three ways between three Departments in our reckoning—the Cabinet Office, which as I just explained is already contributing to the Advice Services Transition Fund; the MOJ, as the parent Department; and the DWP, as the Department that causes most of the need for legal advice. Allowing problems to escalate actually costs the state money. Allowing problems to escalate to the point when they become a crisis is costly—for example, rehousing someone under a statutory duty, or providing mental and physical health care for people who are stressed out by the weight of their legal problems.

After we published our report, we had a second phase, as you know, of working through the implementation of our recommendations, and we got Professor Graham Cookson to carry out a review of the evidence. He concluded that there was a great deal of evidence to suggest that early legal advice saves the state money, so that, pound for pound, there is a return on investment. We have seen figures comparing the cost of early and late interventions when dealing with housing problems in Coventry; they showed that late intervention involved social costs of £8,837, with direct costs to the state of £5,287 in greater legal and repossession costs and so on. That is a total of £14,124, whereas early intervention involved social costs of only £1,516 and state costs of £200, totalling £1,716,

so there is a considerable difference. All these considerations add up to a substantial argument that it would be a good investment for the Government to find that money.

Q207 Chair: May I pick up on the point you made earlier about the next Government needing to get a move on in order to continue the fund from, I assume, 2015-16? Surely that is something that the present Government will have to address rather than the next Government, if organisations are to be in a position to take advantage of the continuance of the fund.

Lord Low: That is a fair point. Budgets will have to be set, I suppose, before the financial year 2015-16 begins; you are perfectly right, Sir Alan. My mistake. It would be appropriate to say that it is something that the present Government should look at. But even when budgets are set, if we are talking about £20 million—I do not want you to think that I am being casual or profligate with the Government’s money, but £20 million is a comparatively small sum—I would have thought that, if it was not already there, the next Government would have a little bit of leeway in which they could tweak the budget that they were handed on taking office.

Q208 Andy McDonald: On the question of how this is going to be funded, half of it already comes from governmental sources. How realistic is it that the support fund will find £50 million a year from non-Government sources?

Lord Low: We devoted quite a lot of time and thought to this, and a good deal of space in our report, and we think that it is quite realistic. There is funding from the private sector for debt advice through a statutory levy on financial services, and there are possibilities for expansion there, I think. Housing associations have a turnover of over £10 billion a year, and are increasingly becoming involved in giving advice. In fact, over the recent period, they provided advice for 500,000 people—half a million.

There are considerable resources available from the health sector, and we did some work on that. Everybody is strapped for cash, but the health service has a budget of over £100 billion, which is very large compared with the MOJ’s budget. We think that resources could be found from the health sector, and should be found from the health sector, because there is evidence of increasing mental ill health arising as a function of austerity, and the increased legal problems and the problems of debt and housing that people are experiencing as a result of austerity. That is giving rise, as I say, to considerable problems of ill health, and it would pay the health service if it could make some resources available to anticipate those problems and, with luck, head them off before they escalate to crisis level. We take the view that that would be a good investment for the health service.

There is also interest in lawyer trust accounts, which we spoke of in our report. That is a scheme for firms with profits above an agreed threshold, with the proceeds going to the Access to Justice Foundation, who fund advice projects. There is considerable scope for attracting funds into the National Advice and Legal Support Fund.

There would be logistic difficulties. The resources I am talking about would have to come in penny packets from different sources to different authorities. These would be attracted

by the local authorities who were funding and producing the advice and legal support plans. They would have to try to attract those funds; each plan sponsor would have to try to attract those funds. There is not a budget of £50 million sitting there for somebody to wave a wand at and attract into the National Advice and Legal Support Fund. The resources would have to be attracted, as I say, by individual fund commissioners. I hope that I have said enough to indicate that the resources are there to be attracted.

Mr Sandbach wanted to say something on the previous question, about why cash-strapped Governments should find the money. Would it be agreeable to you if he says what was in his mind?

Chair: Mr Sandbach.

James Sandbach: I wanted to add that the way the Commission envisages that the fund could be developed is through extending and rolling out the current Advice Services Transition Fund, which comes to an end next summer, in 2015 and that—

Chair: That was the point of my earlier question.

James Sandbach: That is why some of these issues might need to be addressed before 2015. The cliff edge is the summer of 2015; July is when that funding runs out, but if, as an immediate action, the next Government could roll forward the funding for another year, it would give a platform for establishing an advice fund. One has to bear in mind that, predominantly, the Advice Services Transition Fund is not really Government money but lottery money. Most of it is lottery money, so it is a matter of apportioning some lottery money to start it up.

Q209 Andy McDonald: The Commission recommended that the MOJ conduct a “sense check” review of the areas taken out of scope by LASPO. What do you mean by a sense check? What do you anticipate the results might be?

Lord Low: We meant checking to see if the cuts that had been made made sense or if they were counter-productive. For example, in the area of housing, to which I have already referred, we picked up a considerable amount of evidence that the withdrawal of legal aid from what you might call early stage housing cases left problems to fester and escalate to the point where they became a crisis. That is the first point: housing problems are not in scope until they reach the point of crisis and the individual is in imminent danger of being evicted. If legal aid was available earlier, that crisis would be prevented from building up, and it would be a considerable saving. It is a perfect example of where it makes more sense to put the fence at the top of the cliff than to call the expensive ambulance when the person has fallen to the bottom. By sense check, we mean a check to see if the cuts made sense, or whether the early intervention and preventive approach favoured by the Commission might not be a better approach.

Q210 Andy McDonald: The Commission also recommended that the next Government develop a national strategy for advice and support. What would this cover, and what, in your opinion, is the likelihood of cross-party support for it?

Lord Low: We had in mind a framework providing a coherent, integrated, joined-up approach across Government and local government to support the provision of advice. At present, the system is too ad hoc and fragmentary, and relies too much on individual departmental discretion. We would like to see a framework established that provided for coherent, integrated, joined-up support across Government, which might have champions in individual Government Departments. The strategy would incorporate a phased plan of implementation over a period of years.

The prospects for cross-party support are good. We have had discussions with all political parties, notably at the party conferences, and all the parties seemed alive to the advantage of a strategy. We have not heard any voices that are critical of this approach. It is a sensible approach for any Government coming into office. Any Government coming into office will not have the resources to let rip on setting up the National Advice and Legal Support Fund straight away. In those circumstances, it makes sense for the Government to establish a strategy for doing this over time. When they are not in a position to do all that we want immediately, it makes sense to put in place an articulated scheme for doing it over a period of time. You might say, “Why do this?” if they do not have the resources immediately to hand, but there could be considerable benefits in setting up a framework that would get the different Government Departments and local government working together in a more coherent way than is happening at present.

Q211 Nick de Bois: Good morning, Lord Low. I would like to return, if I may, to your fence at the top of the cliff rather than the ambulance at the bottom, which is an excellent analogy for the question of early intervention. The Government clearly stated that one of their aims in these reforms was to save money, confining legal aid to, in their opinion, the most serious cases, but your Commission concluded that early intervention was the most cost-effective approach. You seemed in your answers to Mr McDonald and the Chair to suggest that you can reconcile these two differences—saving money and the benefits of early intervention—by looking at the wider social costs; for example, the effect of not dealing early enough with something makes it more expensive. But of course, in Government-speak, they work to budgets in Departments, so are we being realistic? Can you save money with early intervention, as far as a legal aid budget is concerned? Are you effectively saying that Governments have to think outside the box to achieve the saving?

Lord Low: That is right. Obviously, you could put both of these approaches into effect if you wanted, and they would complement each other, but we would say that the intervention, prevention and advice approach would obviate the need for cutting so much at the legal aid end of the spectrum. As you say, it is an invest to save approach, and if we could put something of that kind into effect, it would reduce calls on the legal aid budget at the more serious end of the spectrum.

Q212 Nick de Bois: If I may, I shall press you a little on this. In the evidence that you were taking, was there evidence that other agencies were successfully taking up early intervention to a greater degree than they did before the legal aid reforms? In other words, I am perversely asking whether, when the idea of taking only serious cases became the norm, we saw other

agencies responding effectively to the need for early intervention, or were they simply not able to or not inclined to?

Lord Low: May I ask my colleague to answer?

James Sandbach: One of the main issues about the relationship between the advice sector and the legal aid system was that the part of the legal aid system that the advice services were involved in was very much legal help that was essentially little bits of advice; they were paid at around £250, as fixed fees, and were targeted at early intervention. That is what has been missing in the reform package.

In the way that different agencies responded to it, the big problem has been the lack of specialists within the agencies. For example, in Portsmouth, the last Government set up a community legal advice centre, but it was wound up in 2010, before LASPO came in. When the city council reviewed how it was going to commission advice services in Portsmouth in future, it found waiting times to see specialists of up to two to three months, with a 12-stage process. They found that, if those agencies redeployed their specialists on the front line rather than the back line, they cleared the queues and got people through the system much faster.

Q213 Nick de Bois: That is a positive though, isn't it? They were able to adapt positively.

James Sandbach: They were able to adapt positively as long as they had specialists within the system. The big hit that advice agencies have taken is not so much in the overall sustainability of their funding and model, because they have been able to keep going, but the fact that they are losing specialists. They are not necessarily lawyers, but people who are well trained in their specialist areas of housing, benefits or employment. It has been the loss of those specialists—

Nick de Bois: Because of funding.

James Sandbach: Because the legal aid changes have affected things, yes.

Lord Low: As Mr Sandbach indicated, there is some evidence of advice agencies adapting and working together more collaboratively, but it is early days yet. There are green shoots of earlier intervention, but it is too early to have seen a lot of it so far.

Q214 Jeremy Corbyn: Lord Low, thank you very much for coming here this morning, and thank you for your report. Why did the Commission prefer a system of cost orders in social welfare cases, where a claim is represented as a means to encourage Government Departments to get decisions right first time? Wouldn't a polluter pays principle be a better one?

Lord Low: We thought that what we recommended was an illustration of the polluter pays approach. We thought our recommendation was very much in line with your Committee's approach in your report of November 2011, where you recommended incentivising

Departments to get decisions right first time, and getting Departments to pay the costs of upheld appeals. We envisaged this—as I think you did in your earlier report—as providing an incentive, which was an illustration of the polluter pays principle.

We gave quite a lot of time to thinking about the issue, and we toyed with various schemes, but we realised that they were all subject to the criticism that they would just be churning the same amount of money around the system between Government Departments. The proposal that we ultimately came up with, which we saw as an example of polluter pays, would be a way of breaking out of that cycle, not just churning the money around the system but providing an incentive to the Departments, which also benefited the system by defraying the costs that were incurred in hearing appeals.

Q215 Jeremy Corbyn: Could you say anything about the Nottingham pilot case, which was the subject of liaison between public agencies and advice agencies in the first instance? How did it work out? Did it end up with more resolution of disputes rather than litigation?

Lord Low: Yes, I think so. We were very attracted by the Nottingham illustration of systems thinking, which has been driven forward by AdviceUK. The kind of system operated in Nottingham avoids the delay involved in triage—sometimes as many as a dozen referrals, as Mr Sandbach just said, to get to the right person—by putting specialists in the front line. It looks at clients in the round rather than in silos, with the aim of reducing failure demand, or systemic and repeat problems. It looks not just at the presenting problems but at the background issues of poverty, unemployment, homelessness, mental ill health, drug and alcohol addiction and so on. As I say, it puts a premium on early intervention, getting decisions right first time and the savings to be made on the processing costs of getting it wrong.

The Nottingham example was a joint project involving advice agencies and the city council's housing and council tax departments. An independent evaluation showed that the time taken to process cases fell in the advice service from 142.2 days to 30.8 days, and in the benefits services from 56.3 days to 16.3 days, which I think you will agree represents a considerable improvement. We were very attracted by this approach, and we would certainly commend it to the National Advice and Legal Support Fund, but it is ultimately up to the partners in local plans what approach they adopt.

Jeremy Corbyn: That was very helpful. If we do not have that information, Chair, I wonder whether we could ask Lord Low to send a note to us to that effect, on the figures that he has just given, as it could be helpful to us in drawing up our report.

Chair: Yes.

Q216 Jeremy Corbyn: Lord Low, your Commission recommended that 90% of the National Advice and Legal Support Fund be allocated to local authorities. That seems a high figure, and would obviously put stress on other organisations and agencies that use the fund at present. What is the thinking behind that?

Lord Low: It does not strike me as surprisingly high or too high a figure. We want most of the money in the fund to go into funding advice and providing a front-line service, which in our model is delivered at a local level. Operationally, we see local delivery as the most practical approach and the best equipped to take account of local circumstances. This 90% is essentially the money that our scheme is for; it is the money for providing advice. The remaining 10% was a residual amount that we thought it would be important to hold back for national projects—things that needed to be pursued at national level: for example, an increased focus on public legal education or the development of a framework of quality standards. Certainly, it seemed entirely appropriate to us for most of the money to go on front-line services at local level, and that is the 90%.

Q217 John Howell: The Commission concluded that there was “no silver bullet” to the problems faced by litigants in person, and recommended a package of reforms. What is most likely to be a successful approach? Is it a case of incremental changes, or is it following some of the recommendations that you set out?

Lord Low: Our view is similar to that of the Civil Justice Council, whose proposals fall broadly into two categories: shorter-term recommendations, which are things that can be done to improve guidance, court forms and existing support structures for litigants in person; and longer-term changes, such as more mediation, and changes in how the judiciary and court staff handle cases involving litigants in person. Both of these are equally important. There needs to be a good deal of change in the way that courts operate if the system is to be made more user-friendly for litigants in person. For example, there needs to be much more and better guidance available for litigants at all stages of the process, provided in plain English and through multiple channels. We think that the Government are on the right lines with the recent changes they introduced for providing some support to litigants at court.

Q218 John Howell: You concluded that a one-stop helpline and website would free up resources for those who need them most. What features should the helpline and website adopt to fulfil those expectations? For example, does it have to be free? What sort of features should it adopt?

Lord Low: It is not exactly a one-stop shop. It is more a comprehensive service for the general public, or a default option or fall-back position for those who have nowhere else to go. We do not advocate a single brand, because there are too many advice lines and websites out there. Their providers have considerable investment in them, and they each serve a distinctive function, but we think the system is too fragmented at the moment. We need better integration of telephone services and websites, and better collaboration between different providers, but we stop short of proposing any definitive model for a one-stop helpline, as there are several potential models. We think that the Government are best placed to initiate conversations with different providers about how different helpline brands could work together to achieve comprehensive coverage.

Coming more directly to your question, comprehensive must mean being able to answer questions about all areas of law, not just those in scope, as the Government’s mandatory

telephone gateway does at the moment. It should be at least at a generalist level, and not simply a call centre that signposts people to go elsewhere. Website provision needs to be better co-ordinated, with direct links to specialist materials and guidance embedded across a range of platforms. We do not think it is necessary for the Government to launch a whole new advice brand, but it would be good if they could make better use of the two leading web advice brands that exist at the moment. Those are Advicenow, which is part of Law for Life, and Adviceguide, which is the website originally developed by Citizens Advice for their own advisers but now available to the general public as well as to advice organisations licensed by Citizens Advice.

Q219 John Howell: The MOJ recently announced a £1.4 million scheme to assist litigants in person in court. How effective do you think that approach is likely to be?

Lord Low: As I said just now, we think that the Government are on the right lines with this. We must be grateful for small mercies, but £1.4 million is a fairly small amount of money for this kind of thing. The scheme relies heavily on a more strategic use of pro bono lawyers, and building the capacity of personal support units that can support people but cannot assist them in establishing and arguing their rights or advise them on the merits of their case. Although the scheme will be useful in meeting some unmet need, there will always be a number of cases where the parties need more substantial caseworker support or help from a specialist. The scheme would be more valuable if it could recruit and retain a specialist back-up resource, but we welcome the initiative that the Government have taken. It is a good start, but we see it as something to be built on. You may recall that I said earlier that there would be benefits in bringing together this scheme, as it develops, with the embryonic National Advice and Legal Support Fund, as it begins to get up and running.

Q220 John Howell: Can we look for a moment at the role of judges in this? How realistic would it be for judges to adopt a more inquisitorial approach?

Lord Low: That is a question that might best be answered by the Civil Justice Council, but I'll have a crack at it. We think a more inquisitorial approach is a good idea, especially for litigants in person, but it is fraught with difficulty. For judges who are used to operating an age-old common law system relying on an adversarial approach, it would take them out of their comfort zone. It would take a lot of time to work up and get used to, but we note that the Hickinbottom report—do you have a date for it, James?

James Sandbach: It came out last year. It was actually the judiciary itself, in response to the Civil Justice Council, who commissioned one of their own to look at the whole question of how judges handle litigants in person. That report made a few recommendations on how the civil procedure rules could be adapted, but the main issue about moving towards an inquisitorial system would be the civil procedure rules themselves. There would need to be very different types of civil procedures, and possibly a more general rule about flexibility within those civil procedures.

Lord Low: We could send you those recommendations, if it would be helpful.

Q221 John Howell: I think that would be useful. I have a question on the use of McKenzie friends. When we involve McKenzie friends, how can litigants' interests be protected?

Lord Low: McKenzie friends play a vital role, but there are risks in giving essentially unqualified people too prominent a role. We would endorse the proposals of the Civil Justice Council that there should be a code of conduct for McKenzie friends. That is the way we would approach the issue.

Q222 John McDonnell: Can I bring you to exceptional cases funding? It certainly has not worked in the way that the Government predicted, in terms of scale. On the figures that we have before us from the Legal Aid Agency, the Government's prediction for the number of overall grants for exceptional cases was 3,700. They predicted between 6,000 and 7,000 applications, but what has happened is that only 57 of the 1,400 applications have been granted, and 42 of those were for family representation at inquests. Your Commission recommended that classes of cases where it "appears manifestly unfair that legal aid funding was not available" except under the exceptional cases funding scheme should be brought back into scope. What type of cases or litigants, if any, did you have in mind?

Lord Low: The clearest case is the one that I have already referred to—the housing cases that need to be addressed earlier, before they escalate into a crisis. We would certainly see legal aid in housing cases being brought back into scope, so that those facing situations that could result in them losing their home, perhaps due to housing benefit issues or mortgage arrears, come back within scope. It seemed to us no sense to include those cases, otherwise you have to wait until the housing benefit claim goes wrong before you can do anything to assist the client.

We are also concerned about the more complex type of welfare benefit appeals involving points of law. Only a few dozen of these, which appear in the Upper Tribunal, are included in scope, but we think that the system should also cover more complex cases that are heard at the Lower Tribunal. There is new legislation in welfare cases that needs interpreting; legislation on universal credit will be a case in point. We would like to see more legal aid coming back into scope for these kinds of cases. There was an unfortunate mix-up at the end of the debates on the LASPO Act, when that actually came up in Parliament. It was proposed that the scope of legal aid should be widened to embrace these kinds of cases. The Government came forward with a proposal that was as narrowly defined as it could possibly be, and the House of Lords said it was not good enough and rejected it. The Government unfortunately said, "All right, in that case you don't get anything at all." That rejection of what the Government offered did not have the desired effect of stimulating the Government to make a better offer. The effect it had was to induce the Government to take their present minimal offer right off the table. That was obviously an unfortunate mix-up, and it needs to be revisited—to do the sensible thing rather than saying, "Sucks to you. If you're not going to accept what we're offering, we'll give you nothing at all."

Q223 John McDonnell: You excluded family law from your considerations, but have you any comments on family law? There seems to be some reportage in the *Law Society Gazette* that in divorce cases, the problems are resulting in an increase in care proceedings.

Lord Low: I don't know that I picked that up. James, do you have any thoughts on that?

James Sandbach: It can do, yes. The reason why the Low Commission did not include family within its overall scope was because the Norgrove review and the Family Justice Review work were creating a separate debate about family justice.

Lord Low: I think I dealt with that before you came in.

James Sandbach: There is certainly a big overlap between family law issues and social welfare law issues. It is the case, having taken family law out of scope, that there will still be ordinary private law cases that end up going to care proceedings because the boundary between what is private law and what is public law in family is fuzzy. It is very fuzzy for very vulnerable families who have multiple problems in their relationship breakdown, and it is getting the right help for those cases that we are concerned about.

Q224 John McDonnell: Would it be feasible to have a merits test for deciding whether an adviser should be paid for completing an exceptional cases funding application? Do you accept that there is a danger of unmeritorious applications being made if there is no merits or other test?

Lord Low: There obviously could be a merits test, but it would still leave you with the chicken and egg problem of the adviser having to undertake the work of reviewing the case in order to determine the merits and whether or not it needed to be paid. The system is self-policing, in that advisers would be reluctant to complete unmeritorious applications as it would undermine their entitlement to receive this kind of work.

As regards the second point about the danger of unmeritorious applications, I question why advisers would spend time taking forward unmeritorious cases. There is an argument about supplier-induced demand, about suppliers leading demand for litigants, but given that these cases involve knowledge of human rights and EU law—these are exceptional funding cases—it would require a lawyer to determine whether there was a case, so I am a bit sceptical about the danger of unmeritorious applications.

Q225 John McDonnell: How could the Legal Aid Agency simplify the application process for exceptional cases funding so that the application could be completed by a layperson?

Lord Low: I am a bit sceptical about that as well, given the need to engage human rights legislation and EU legislation, which are complex tranches of law. I am a bit sceptical about the possibility of devising a claim form that a layperson could fill out.

Chair: Thank you very much indeed, Lord Low and Mr Sandbach. We are grateful to you for your help, and your offer of further help is much appreciated.

Lord Low: Thank you for inviting us.

Examination of Witnesses

Witnesses: **Elisabeth Davies**, Chair, Legal Services Consumer Panel, **Steve Brooker**, Consumer Panel Manager, Legal Services Consumer Panel, **David Holland**, Chief Executive, Institute of Paralegals, and **James O’Connell**, Head of Policy, Institute of Paralegals, gave evidence.

Chair: Welcome, welcome. We have Elisabeth Davies and Steve Brooker, who are Chair and Consumer Panel Manager respectively of the Legal Services Consumer Panel, and David Holland and James O’Connell, the Chief Executive and Head of Policy respectively of the Institute of Paralegals. We are grateful to you for coming in to help us with our inquiry into the future of legal services.

Q226 John McDonnell: The Institute has told us that “solicitors for whatever reason continue to be unable to supply affordable/desirable legal services to most of the population”. Why is that? Why are solicitors, particularly those in the legal aid sphere, unable to do that?

James O’Connell: There are a number of reasons. Historically, the solicitors’ profession is geared to providing a premium service at a premium price, and that is still their main focus. Their billing rates—the way of charging—are still based on a flat hourly rate; typically, solicitors charge the same regardless of the value of the work. The Solicitors Regulation Authority has taken a decision that solicitors will be the premium providers of legal services, and their regulatory system reflects that. Typically, if you have a premium provider, there is a premium service. We think that the regulatory burden is quite expensive, which militates against providing a lower-cost service. The regulatory system also puts great onus on solicitors—basically, get it wrong and you’re in great trouble. It is quite difficult to provide a cheap service if you are subject to a premium risk.

Law has gone from being something that, in my grandfather’s day, one might encounter once or twice in one’s life—a big-ticket issue—to something that one encounters every day. When I was starting out, a firm would have one person practising intellectual property, but now they have five or six different variants of it. The law is exploding in breadth and usage, and there is no way that one profession can meet that need, especially given all the niches involved in it. What we see is the solicitors’ profession saying, “We are going to do this, and we are going to walk away from other practice areas where, because of all these regulatory and business models, it is not profitable.” That is why they are not going into those niche areas—the areas that are less remunerative for them.

David Holland: I emphasise that point. Larger firms tend to be premium providers who specialise in a small number of premium practice areas, which reduces the diversity of practitioners, and the increasing world of diversity and sophistication in society has

continued to generate new practice niches. One single profession, even as impressive as the solicitors' profession, cannot hope to provide sufficient—

Chair: Could you speak up a little?

David Holland: I was saying that, with the increasing diversity and sophistication of society, one single profession cannot hope to provide sufficient practitioners to meet the untapped needs, even if the issue of affordability is put to one side.

Q227 John McDonnell: May I ask the Consumer Panel what their views are on that?

Elisabeth Davies: We certainly agree that the core challenge ahead is to extend access to legal services to those who are currently excluded on the basis that they can no longer afford legal services. In relation to areas of law previously covered by legal aid, the question is who is going to provide those services going forward, and how. We agree with the Institute in that we are talking about solutions coming from a number of different providers. Those providers are both from within the traditionally regulated industry—in the context of the Legal Services Act—but also from outside it.

We now have some consumers who cannot afford to pay anything for legal services, but we also have consumers who can afford to pay something, and the issue is how providers are going to respond to that. I am sure that we shall come to that in terms of some of the solutions that are emerging. With the issue of affordability for consumers in mind, yes, it is about the amount you pay, but it is also about certainty around costs. That is one of the reasons why we have seen a significant increase in the number of fixed-fee billing processes. James referred earlier to flat hourly rates. Our survey shows that in family work fixed-fee deals accounted for 12% of work in 2012; it is now 45%. That is a significant increase, and a significant development that potentially has some real benefits from a consumer perspective. Those are probably the key points that we might add.

Q228 John McDonnell: The Institute has called for a detailed review of legal aid structures, as you said, to make the best of limited resources. What are the key issues a review would need to consider, and would those issues be relevant to a wider review of legal services provision?

James O'Connell: We are not expert in the legal aid system. Typically, paralegals play a very small role in that, so we would be hesitant about giving our opinions on legal aid. Probably the Panel knows more about the topic than we do. What we said was that we think the legal aid problem, difficult though it is, is actually a subset of the larger problem of inaccessibility and unaffordability. To the extent of dealing with the question of how to deal with that bigger issue, we would echo what Elisabeth said.

The solicitors' profession in particular is a great profession—I am a solicitor myself and proud of the fact—but to use an appalling analogy, and I apologise for it in advance, it is almost like going back to a time when the law was small enough and self-contained enough that you could have it run by a high priesthood, a professional elite, but now it is out there and everyone is doing it and that elite simply cannot cope. English is now a

global language, and you cannot just go back to native English speakers from Britain and say, “Well, you’re the only people we’re going to talk to about English.” It is a bit like that with the law. Historically, it has just been about solicitors; everyone starts talking to solicitors and about solicitors when they talk about the law. That was great when it was just British English, but now you have this global language and we need to go much wider.

Our first suggestion would be to start with a clean sheet of paper. A lot of the contradictions and problems that we have now are from trying to tweak and work within the current system, and it has reached a point where it is not working terribly well and we need to start again. We need to take a step back, and move back from the obsession with job titles. The whole regulatory system is based on job titles, which produces some very perverse situations. It is not uncommon for Elisabeth as a solicitor in one firm to be doing whatever work, and for David to be a paralegal in a different firm but doing exactly the same sort of work. Elisabeth has six years of formal training, a mountain of CPD regulation on her head, an annual practising certificate, ferocious personal liability, professional indemnity insurance and so on, to provide that service. David has none of those things—no CPD requirement, no personal regulation and so on. That is the sort of contradiction you get when you focus on job title and not on what the consumer receives. We would say, “Let’s start with a clean sheet and look at reserved activities—the heart of the unregulated divide.” They are historic and kind of arbitrary, and certainly outdated. What activities need to be reserved? Some of those that are possibly do not need to be, and some activities that aren’t possibly do need to be, but let’s look at it from the consumer perspective rather than whatever. That is the first thing.

The second thing is to move away from the focus on regulated and unregulated. From the consumer perspective, we find that that is a false distinction. They want legal advice at an affordable rate. For the most part, they do not care who they get it from as long as they are reasonably secure and comfortable with the person giving it. There needs to be regulation, but starting with the clean sheet of paper is the main one.

The other main thing is to have a look at the issue of standards. Standards are extremely important in the legal profession. In some ways, they are what defines the regulated section, but too often they have unintended consequences. One example is the fact that what in many ways is an admirable requirement to keep up standards of advocacy in courts, which I completely agree with, has led to the bizarre situation that most people cannot afford to go to court.

We are going to talk about McKenzie friends later, and one of the questions that we were asked earlier was whether they are unfair competition to solicitors. They are not competition at all.

Chair: We shall come back to that point.

James O’Connell: That is an example of where standards, with the best intentions, have ended up producing almost a closed shop in some areas. That needs to be looked at, to see whether it is still valid.

Q229 John McDonnell: On the point about regulation, as a small step before your major review, do you think there is a case for different levels of regulation, in terms of legal aid lawyers and others who deal with individual litigants as against big law firms that primarily deal with business interests and business clients?

James O'Connell: I do, yes. The man or woman who wires my house and the man or woman who wires the space shuttle are both technically electrical engineers, but that is really where the connectivity ends. The solicitors' profession has almost got to the stage now that if it was not regulated under a sole job title it would not be one profession. Absolutely, there needs to be a distinction.

I myself ran a law firm, helping people who were being made homeless. If somebody has not paid their mortgage, there obviously has to be a county court hearing before they can be evicted. There are factual things to prove and legal issues to prove before the order can be given. Of course, people who are about to be evicted for non-payment of mortgage tend to have no money and therefore no representation, and they quite often get evicted when they wouldn't if they had representation, because they simply cannot put their case. I was providing that service on an advocacy basis for a charity, but I was under the same regulatory pressures as Allen & Overy, and it was uneconomic. It was costing me money to go to court to save people from being evicted, and I had to close my law firm. I am not bitter about it, and there are other people doing it, but it seems crazy. It comes back to the issue of what is the priority. My direct answer is that one of the things a review should do is say, "Access to justice should be given a higher priority over other competing things than it has at the moment."

Elisabeth Davies: The issue of differing levels of regulation is key. Access to justice is a fundamental, but the reality is that there always needs to be a balance with consumer protection. On the question about almost tailoring the regulation, and whether you can move away from one size fits all, there is merit in it, but it has to be tailored on the basis of risk to the consumer and risk of consumer detriment, and not to do with the size or type of business.

It is not about having more or less regulation in future. It is about targeting it, and making sure that it is as effective as it possibly can be in terms of doing the job that you want to do. You can use the example that you referred to in terms of the difference between a sizeable city firm and a smaller high street lawyer. You could argue that corporates often employ in-house lawyers; they are repeat purchasers; they are far more familiar with things; they are better at monitoring the quality of service; and they are more able to voice their concerns. You might say that, on a risk analysis, the risk to high street lawyers is greater than that for corporate consumers who might use globally significant players.

You have to be really careful about the assumptions that you make around risk, because the reality might be that the risk to an individual still has to be balanced; yes, they need access to your high street lawyer and access to justice, but those risks have to be protected. There is a cautious yes to tailoring, but there has to be scope, given the diversity of legal providers, to look at that and make sure that regulation is targeted in the right way. The fundamental focus has to be that you tailor on the basis of risk to the consumer.

Q230 Jeremy Corbyn: Don't you all think that there is a bit of a danger in the route that we are heading on in the narrative this morning? I have miserable experiences of a pre-regulatory regime on immigration, where a lot of totally incompetent and often dishonest people gave dangerous advice to vulnerable individuals and charged them a great deal of money for it at the end of the day. I was strongly in favour of the registration and regulation of all of them. Do you think that this general narrative of the deregulation of those who have worked hard to become qualified as solicitors will end up leaving a lot of people very vulnerable, badly represented and with much worse access to justice than they have at present? I do not know whether you agree with me, but I think that the real issue is the lack of proper funding for legal aid, to ensure that everybody gets access to justice, rather than going down the road of deregulation.

James O'Connell: I do not think that we are advocating deregulation in the sense of removing regulation. Immigration is a good example. Immigration practitioners who are not solicitors have to be regulated by the Office of the Immigration Services Commissioner, and the level of regulation is very different from that for a solicitor. The solicitor's brand is a premium brand, and the SRA quite rightly upholds that premium standard. I am not speaking for the Panel, but we are saying that there needs to be unbundling and separating out, with important things like immigration being regulated, but with different levels of regulation.

Chair: We are coming specifically to unbundling in a moment.

James O'Connell: We agree that standards need to be maintained, and I echo what Elisabeth said. We have been looking at standards for paralegals. We found that there are certain core standards, and if you are a legal practitioner, you should be applying those standards. It is a question, perhaps, of intensity and necessity in certain circumstances. I agree with you completely, Mr Corbyn; it is just that I would not give everything to solicitors, because they are not able to do it. They are premium providers; they are a small group. There are lots of areas where they cannot practise.

One of the ironies at the moment is that the SRA is coming down hard on solicitors, understandably, saying, "Don't practise it unless you are already expert in it. If you don't know it and are not competent in it, don't do it." How will you ever get competent in it? It seems to be a dead end for new practice areas, so there has to be a bit of flex in the system. Solicitors will always be important, but they cannot do everything, and they shouldn't.

Q231 Mr Chope: You say that there is an issue of consumer risk, but quite often consumers do not know what the risk is. That is why we have what are called professions. That is why I go to a doctor or a dentist: I do not know how to treat or diagnose myself. Similarly, people go to the legal profession because the legal profession has members who understand the law; they have the basic integrity, which is a sine qua non, and they have competence. In the past, a firm of solicitors would employ people who were not fully legally qualified; they might be what we used to call outdoor clerks or legal executives, or they might be articulated clerks or people under training, but responsibility for what was done in the name of the firm would rest with the partner. What is the problem with that model? We have a growing number of people who belong to the Institute of Legal Executives. Why cannot we harness their resources? All the work does not have to be done by the senior partner at Allen & Overy, it can be done by

people who are under the control of and supervised by a partner, but who have a lower level of competence.

Elisabeth Davies: I always think the health analogies are really interesting. There is no incompatibility or inconsistency between professionals and more empowered consumers. We see that in health care all the time, but one of the things that we have seen in health care that we are not yet seeing in the likes of legal services is levels of information being made available in a way that is useful for people, in a way that is usable, in a way that actually helps people to make choices. If you saw the news coverage this morning about much greater information being available on surgeons, in terms of the effectiveness of their surgery, we are not seeing anything like a comparable level of performance data when it comes to solicitors and the legal profession. We are quite some way off, but there is no inconsistency in respecting and acknowledging the professionalism of legal services while, at the same time, wanting to see more empowered consumers. We are starting to see that, but it is not the kind of pace of change that we would like in other areas. That is probably the main thing that I wanted to pick up. I think your other question is probably aimed more at James.

James O'Connell: Being a solicitor, I would love it if solicitors could step up to the plate and provide all those services, but the reason the large and growing-like-Topsy unregulated sector exists is that they cannot, and in some cases, choose not to because the work is deemed uneconomic, whether it is passed down to a paralegal or whatever. We have not done the research to back this up, but anecdotally we have seen that solicitors firms, when given the choice between chasing low-margin work and finding more premium work, will always go for the premium work. You are almost harking back to a world that has gone. There are thousands of paralegal businesses out there, and they exist because solicitors either cannot or will not handle those sorts of work. What do we do with them? The market has spoken, in that sense, and it depresses me in some ways. That is why we are worried.

I am sorry to go off on a slight tangent, but we see the Legal Services Board and all the others focusing, rightly, on the regulated side of things, but the unregulated side is growing like crazy and it worries us for the same reasons that it worries Mr Corbyn and yourself. You have people out there, some of whom come to us for membership, and we think, "Oh, my God. You want to give advice? I wouldn't trust you to wash my car." There needs to be regulation, rather than saying, "Give it all to the solicitors."

Q232 Mr Chope: Surely, if you are going to have people giving advice, they need some professional indemnity insurance. Isn't that reasonable? Yet what is happening here, you say, is that the cost of professional indemnity insurance is so high that consumers should be encouraged to engage people who have no such insurance.

Isn't there another aspect? If you are a member of the legal profession, you have a duty to the court. If you are a paralegal, you have no duty to the court whatsoever. If you are reckless or irresponsible, you have no professional body before which you can be held to account. People who have been struck off as solicitors can become paralegals. Is that reasonable?

James O’Connell: No, I agree with everything you say. We are in complete agreement. The system at the moment does not work. It is not fit for purpose, and the unregulated sector needs attention to be paid to it. On professional indemnity insurance, if you are a member of the Institute you cannot give a legal service unless you have professional indemnity insurance. It is absolutely important. Solicitors’ professional indemnity insurance is slightly different, because it is so expensive. The average professional indemnity insurance for one of our members is in the hundreds of pounds per year. I work with a one-man law firm who does uncontroversial non-court work. He has not made a claim in 20 years of practice, but his professional indemnity was £65,000. That is the pressure on solicitors—the professional indemnity rates are so high. That does not apply at the moment to the unregulated.

Otherwise, I am in agreement with you. It is not good that this is happening. Where we part company is in thinking that it can be fixed by giving it to solicitors, because, for whatever reason, they cannot or will not reduce their rates to make themselves affordable to a large part of the population. The market has spoken, and all these alternatives have been produced. I will throw the question back to you. How are you going to get—

Chair: I think it’s time for the next question.

Q233 John Howell: If we could stick with the subject of regulation for a moment, I want to look at it in terms of unbundled services, where we are not dealing with a firm of solicitors; we are getting information about how to complete a will off the internet. The first question is to what extent you think they should be regulated, and how they can be regulated.

Elisabeth Davies: There are two questions. There is unbundling per se, in terms of the regulation of unbundling. Is there a separate question particularly around the online delivery of legal services?

Q234 John Howell: No. I want to look at how the online services can be regulated. Will drafting is just an off-the-cuff example.

Steve Brooker: Can I try to answer that? Yesterday, we published a major report on developments in legal services in the period to 2020 and how regulators can prepare for the future. Any opportunity or technology to make legal services more affordable was one of the major themes of the report. We are certainly seeing the growth of online unregulated services for will writing but also for tenancy agreements for small businesses and elsewhere.

We are clear that there are benefits to consumers but risks as well. On the plus side, there are cheaper services, more convenience, more flexibility and scope to remove human error; but on the minus side, taking will writing as an example, some of the risks that we have seen include firms who make a default box ticked so that the customer makes them executor of the will as well as writing it, which, of course, is where all the money is made. We have seen reports of defective will-writing software, which would mean not just one will potentially being wrong but multiple wills, and they will not be discovered until it is too late to do anything about them. We have recently seen the Information Commissioner

warn about a spate of data protection breaches involving lawyers, who are of course trusted with highly sensitive and personal information. We have done work on comparison websites that shows issues around the selling on of personal data without people's consent.

There are all sorts of risks around the online delivery of legal services, but the question of regulation is much trickier. We have to split the regulated sector and the unregulated sector. Solicitors and barristers are currently regulated for everything that they do. If they provide an online will-writing service, and firms like Irwin Mitchell do that, they can make thousands.

Q235 John Howell: I can simply go to an online service and download a “how to complete a will” kit without any recognition that it is either a regulated and trustworthy service or an untrustworthy service.

Steve Brooker: You probably would not know that as a consumer. Our research indicates that consumers assume that all legal services are regulated, so consumer information is one piece of that story. The really tricky thing is what to do about the unregulated sector. You have to ask whether they should be regulated, as well as how you would regulate them.

John Howell: I think that is one of the questions I asked.

Steve Brooker: The sorts of factors that we need to consider are how you encourage innovation in the sector. How do you make sure that the regulation is proportionate and does not choke off new entrants and does not increase the price of wills so that more people still make them? What do you do about companies that operate outside our jurisdiction in this country? Many American firms offer online will-writing packs, for example. Will the consumer rights Act improve the rights of consumers in digital markets sufficiently, or do we need specific regulations on top? We do not have all the answers to those questions, but we hope that our report of yesterday will fire the starting gun for a wider debate and evidence-gathering process, so that we can design a future regulatory framework that strikes the right balance between increasing affordability and access but also protects consumers.

Q236 John Howell: Is there an argument for unbundling to be restricted to certain types of services, rather than being made available for ongoing processes, for example?

Steve Brooker: Possibly that is the case. Certainly, unbundling is less suitable for some areas of law, such as complex child custody disputes, or potentially for certain tasks like negotiation, whereas it is better suited to more transaction-based work, more document-heavy work like probate. We have done some research that shows that one in five of all legal transactions currently involves at least some unbundling, mostly in probate, immigration and employment matters. But every case is different, and every client is different. Some people will struggle to fill out the simplest forms and others will be really adept at negotiation. The current system is that solicitors have to consider whether the client is capable of doing legal work themselves before they agree to such arrangements,

and, in our view, that more flexible approach is probably better suited than someone prescribing situations when unbundling should not be allowed.

Our final conclusion on that is that so little is known about how unbundling works at the moment. We are about to kick off some research with our colleagues at the Legal Services Board that will do two things. One is to talk to consumers about their experience of unbundling, what they see as the benefits and risks, and what protections they would find valuable. The second is to do some research with law firms who unbundle, to find out what challenges they face, and whether the regulatory framework assists or hinders them in doing that work.

Q237 Andy McDonald: I should make it clear that, by trade and profession, I am a solicitor. I am interested in the issue of McKenzie friends, and I read with interest the Consumer Panel's research. The McKenzie friend was once a rare beast, somebody who would come along occasionally but who is now much more regular. People are charging money to perform the role, and some are earning up to £50,000 a year, perhaps with no qualification, support or back-up. The number of fee-charging McKenzie friends is growing. What is your view for the future of fee-charging McKenzie friends?

Elisabeth Davies: I would start by almost turning that question around and asking what is the future for the litigant in person who does not want to go it alone. What it comes down to is that the growth of McKenzie friends is in many ways an inevitable response to the changes in legal aid. Where legal aid is withdrawn, and where you have people who cannot afford a lawyer, in some ways it is only natural that somebody is going to come through the middle and provide a service. They are going to come through and provide a service in a different way. The current regulatory framework permits this, because only a small number of areas are actually reserved.

Chair: Perhaps it is worth reminding ourselves that, pre-LASPO, there were of course people in that position who were not eligible for legal aid, sometimes in contention with people who were legally aided on the other side.

Elisabeth Davies: Absolutely. You are right; the number of McKenzie friends is growing, but we are not quite sure of the exact number because it is not collated centrally at the moment. We know that most are concentrated in family law, but we can work on the basis that we will see McKenzie friends emerging in other areas. We are starting to see that. If not a McKenzie friend at the moment, you probably have two main options; you can hope to get some voluntary support, or you can go for the unbundling option that we talked about.

Lord Low referred earlier to the new support package recently announced by Minister Simon Hughes. That talks about wanting to create access to voluntary and free-of-charge services across the country, provided by the likes of the Personal Support Unit and through pro bono support. As part of our research on the work of the McKenzie friend, we spent time talking to the Personal Support Unit and a student scheme run by Keele university. Both are impressive operations, and we would like to see more of them. We have a Civil Justice Council meeting on Friday, and we shall hear more about that. The challenge of voluntary support is that the nature of that assistance is limited. It tends to be limited to

practical and moral support, so it does not extend to broader advice, or talking on behalf of the litigant in court. That is where we are with voluntary support.

In terms of unbundling, we talked about some of the regulatory challenges around that. Although it is still happening, it is still not widespread. It is not yet advertised on a wide basis, so again it is not as though it is a universal option available for anyone in any part of the country. You can work on the basis that, as it stands, fee-charging McKenzie friends are likely to remain a feature of the court system for the foreseeable future, but the scale is the uncertain piece. A lot of it will be dependent on how voluntary support and unbundling takes off, and how it works around the consumer.

My final point on the future for McKenzie friends is that their future depends at least partly on McKenzie friends themselves. Clearly, there are concerns about them, and our report identifies and acknowledges those concerns. One of the key challenges will be how McKenzie friends demonstrate that they can successfully address the problems that people are highlighting. That is both through self-regulation and the environment that they are working in.

David Holland: I want to speak about self-regulation, which affects McKenzie friends and others. The LETR report recommended voluntary regulation. I think formal regulation has been specifically rejected by the Government. We asked whether we should be involved in some sort of regulatory framework. Our response to the LETR report is that we and the only other paralegal organisation are launching collectively a voluntary register, in a couple of weeks—as it happens, in the House of Lords. It will have a code of ethics that organisations that represent paralegals have to sign up to. McKenzie friends do not meet those criteria at the moment because they do not have an association with the disciplinary process that we have recommended.

Q238 Andy McDonald: What is a McKenzie friend? What is the qualification for being a McKenzie friend?

David Holland: Anybody can call themselves a McKenzie friend.

Andy McDonald: Exactly.

David Holland: But they would have to have some form of association that had professional indemnity, and also processes and ethics compatible with what we are recommending, otherwise they would not be advertised to the public as worthy of use.

Elisabeth Davies: Is it worth providing a brief update, in terms of where and how self-regulation of McKenzie friends has progressed since the report? It is only fair, in their absence, that that is done. Steve, would you like to update us on that?

Steve Brooker: There is a group of McKenzie friends called the Society of Professional McKenzie Friends, which has met a couple of times. We provided some office space for them, although our involvement is limited to just that. Some of the things that they are committed to include a code of practice that covers both courtroom and commercial practice, and they are going to require all their members to have some form of legal qualification or equivalent experience. They are going to require that all their members

have professional indemnity insurance, and they are going to put an independent complaints and disciplinary system in place. It is only a few months since our report, and it is early days.

Q239 Andy McDonald: It sounds like a profession, with indemnity, regulation and disciplinary procedures. Why are we still talking about the concept of McKenzie friends? We will be talking about qualifications next and them actually being able to do the job.

Steve Brooker: It is important, in this area, to segment McKenzie friends into two groups. Of the ones that you mentioned, those in the report—the £50,000 a year earners—there are probably less than 30 to 50 in the country. They are the minority. The majority of McKenzie friends are part-time, and they might earn in the high hundreds or low thousands of pounds a year. If you require those McKenzie friends to have indemnity insurance, to have qualifications and to fall under the jurisdiction of the legal ombudsman and the rest of the panoply that comes with regulation, you will quickly find that their costs soon exceed their annual income, and you would drive them away from the market.

Chair: I want to be clear about the definition. Courts and lawyers use the term McKenzie friend very widely, to include just about anybody non-professional, including a family member or friend who goes along, and almost by definition is not qualified, simply to assist the person.

Elisabeth Davies: With that in mind, it is important to acknowledge that our report provides a balanced overview of both the positives and the negatives of McKenzie friends. Judges themselves say that, overall, they find McKenzie friends help the courts to progress cases more quickly. The type of support a McKenzie friend offers is varied, as you rightly point out. It may literally be moral support or navigational support; it may be help with filling in forms; it may be simply being there to provide emotional advice and support; or it might be moving through into providing general advice as well. It is a varied group.

Q240 Andy McDonald: It is, but there could also be a group with a particular axe to grind on particular issues. I think particularly of family law, and they'll be coming in—

Elisabeth Davies: That is fair.

Q241 Andy McDonald: I am anxious to understand how litigants are going to be protected. I am not convinced that the courts are going to be particularly assisted by somebody coming into a courtroom from that particular perspective. It is one step removed from a litigant in person, and it is putting far too much burden on the judge to do the job of the parties. How can we protect litigants from those sorts of abuses?

Steve Brooker: The McKenzie friend with an axe to grind was the issue that came up most in our report. When we conducted interviews with McKenzie friends, one of the questions I asked was, “What worries you most about other McKenzie friends?” The campaigning McKenzie friend was the thing that came up most often.

The reason why people decide to become McKenzie friends is that they have had their own negative experience of the court system—getting divorced or fighting a child custody battle—and in their eyes they want to give back, to people going through the same situation as them. Some are able to channel that experience in a positive and constructive way, others less so. It might be done consciously, in terms of exploiting litigants in person to pursue a political agenda, or it might be done subconsciously by antagonising the court.

What to do about that is quite tricky. Statutory regulation would not help, because case law says that a court cannot exclude a McKenzie friend because they attach themselves to a particular cause, but judges have the discretion and tools to exclude McKenzie friends who are disruptive in the courtroom, and in more extreme cases they can impose restraining orders or cost penalties. One of the messages of our report is to give the judiciary the backing to use those tools robustly, to send out a clear message to McKenzie friends that disruptive behaviour will not be tolerated and that it will have personal consequences for them. At the same time, it is important not to tar all McKenzie friends with the same brush. The consensus view is that disruptive behaviour is very much a minority element.

Q242 Andy McDonald: I am not tarring with the same brush, but do you not accept that the protests from lawyers about those who are charging fees are quite legitimate, given that they have gone through that training? As Mr Chope indicated, they have shelled out for their professional indemnity insurance, and they are expert at what they do, yet somebody, as Mr Holland indicated, can toddle along and say, “I am a McKenzie friend,” and start undercutting and undermining their very profession. It is not for self-interest purposes but about quality of advice and representation. Is it helping our legal system in any way to undermine it in that way?

James O’Connell: I think it was Karl Popper who said that you get to a certain age in life and you realise that there is no such thing as solutions; you just choose which set of problems you want to deal with. I think this is one of those situations. Everything that you have said is correct. McKenzie friends have many pitfalls, but what is the alternative? “Go away. The courts are not for you.” Speaking personally, I would rather take my chance with a flawed McKenzie friend advocate than go it alone. Indeed, I probably would not go it alone at all. That is the first point.

The second point is that McKenzie friends are not competition to solicitors in the traditional sense. They are the desperate last chance “no one else to turn to” brigade. We have McKenzie friend members, and we speak to them. The volunteer McKenzie friends tend to be very driven people. They are one-man charities, but there is a limit to how much they can do, because they have a day job as well. People go to them when they cannot find a solicitor. They are not at the top of anyone’s speed-dial list.

To solicitors who say that it is unfair, I would say that McKenzie friends did not cause them to be unaffordable to their clients. McKenzie friends did not put in place the regulatory burdens that they are suffering from. In terms of fees, I would say, “Look unto yourselves.” In terms of unfair regulatory burdens, look unto the SRA. It seems a bit harsh to make it the McKenzie friends’ problem.

The focus on McKenzie friends can be a bit misleading. The way to stop the axe grinders is to give people who want to use McKenzie friends choice. The way to do that is to allow more fee-charging—I'll stretch the term professional—by professional McKenzie friends. That implies more recognition of what they are doing. We are back to what Steve has been saying about regulation, codes of conduct, education and the like. You can go one way or the other on this, but my main point on the fee-charging side is that the McKenzie friend standing up in court is just one step in a long process. What people need is help from the moment the dispute arises—"Oh, my God, my landlord is being a beast to me"—through to the enforcement of judgment. Just to focus on the court, the adversarial part of it—

Q243 Andy McDonald: Let's not then. Let us talk about the whole process, right through to when a McKenzie friend gets involved.

Chair: We are running short of time.

Andy McDonald: What if the case goes disastrously wrong for that litigant? If they rely entirely on the advice and guidance, representation and advocacy of the McKenzie friend and it all goes horribly wrong, and is massively consequential for the individual, where is the redress? Where is the back-up?

James O'Connell: That happens with solicitors as well.

Andy McDonald: They have insurance.

James O'Connell: Yes, but we are back at the Karl Popper choices. If you are saying that it is more important that those who can afford litigation, the minority, have a right to redress if things go wrong, and you are willing to pay the costs of the majority of people who cannot get access to justice, and that is the price you are willing to pay, it is fine. If not, it is not good enough to say that it may go wrong, therefore don't have it and everyone else can just have no access to justice.

Elisabeth Davies: I promise to be very brief. In response to that kind of piece on consumer protection and access to redress when something goes wrong, that is precisely one of the reasons that the legal ombudsman is considering whether to open its voluntary scheme for unregulated legal businesses. There is obviously a challenge around making sure that that is an affordable option, but it is actually one of the solutions. It might mean that, irrespective of who has provided your legal service, you get to access the legal ombudsman, because that is certainly what most consumers would expect and anticipate. That is much better from the consumer perspective.

The other point that I wanted to make is that people are representing themselves. Litigants in person are here and they are on the increase. They are not going away, and they need support in a system that has not been designed around their needs. Legal aid has been withdrawn, so they cannot afford the services of a lawyer, and it is inevitable that alternatives will fill that gap. McKenzie friends are just one example. We are so pleased about the report because we are now discussing these issues, but the McKenzie friend is just one example of the growing unregulated market.

Research by the Legal Services Board says that just 21% of people with a problem who seek advice now get it from a regulated lawyer. All the issues that McKenzie friends are rightly shining a light on need to be resolved in that context, in terms of the broader problems and issues that are coming along.

Chair: A very quick question from Mr Corbyn.

Q244 Jeremy Corbyn: Do you not think that you are all heading down a very dangerous road? You are helping the destruction of universal access to justice. You are destroying the careers of people who have studied hard to become regulated solicitors.

Chair: What is your question?

Jeremy Corbyn: My question is this. Do you not think that you are exacerbating the already unfair access to justice regime in this country, and that the real issue is restoring the legal aid cuts, rather than what you are proposing?

James O'Connell: No.

Elisabeth Davies: My brief answer is no. We absolutely accept that the core challenge is extending access to justice to those who can't currently afford—

Jeremy Corbyn: But you're not doing that.

Chair: The question has been asked. Let us hear the answer.

Elisabeth Davies: That is what we are looking at. We are trying to look at what the solutions are from the consumer perspective. If you put them at the heart of it, the solutions are going to come from both traditionally provided services and new and emerging services.

Jeremy Corbyn: With second-rate quality.

Elisabeth Davies: We do not know that they are going to be of second-rate quality.

Jeremy Corbyn: But you do know, because they are not qualified.

Chair: Order.

Elisabeth Davies: We want to get the balance right between access to justice and consumer protection. Nobody is sitting here looking for substandard services.

Jeremy Corbyn: But that is what you are providing.

Chair: This session will not continue beyond 11.15, and I call it to an end. Thank you very much for your help this morning. Order.