



Justice Committee

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

Monday 1 December 2014

Ordered by the House of Commons to be published on 1 December 2014.

Written evidence from witnesses:

- Steve Matthews, Magistrates' Association [LAS 43](#)
- Civil Justice Council [LAS 80](#)
- Family Justice Council [LAS 82](#)

[Watch the meeting](#)

Members present: Sir Alan Beith (Chair); Christopher Chope; John Cryer; Nick de Bois; John Howell; and John McDonnell

Questions 245-281

Witnesses: **Lord Dyson**, Master of the Rolls, **Sir James Munby**, President of the Family Division, **Lord Justice Sullivan**, Senior President of Tribunals, and **Steve Matthews**, Magistrates' Association, gave evidence.

Q245 Chair: Lord Dyson, Sir James, Lord Justice Sullivan and Mr Matthews, welcome. We are very glad to have your help as we look at LASPO, if I can use the acronym. We appreciate that there are some very proper limitations on what judges can say on some of the controversial issues that arise, but we want to benefit from your experience so far. We envisage that we will benefit significantly from finding that out. I thank Sir James for sending us some notes of cases which we have circulated to members, and which were mostly cases that we had indeed noted as being significant in all of this. To start with, can I ask you what types of alternative funding you have seen in operation, and whether you have any experience or views about whether they have met the needs of litigants?

Lord Dyson: Since the modifications to the conditional fee agreement arrangements, which certainly used to take up the slack in a lot of civil litigation, they have become considerably less attractive. Frankly there is far less money to be made, and the evidence seems to suggest that lawyers are much less willing to take them on unless they are pretty certain that the claims are going to succeed. That fairly obvious alternative source of funding is still available but is much less resorted to than it previously was. Likewise,

damages-based agreements do not seem to be used very much because they are not seen to be particularly attractive, and also claimants are not very happy at the idea that they have to surrender a significant chunk of their damages in respect of costs. That is of course what happens in the United States but it is not part of our culture here. It may be that there will have to be a shift. There is considerable resistance to those alternative sources, and that is one of the reasons why I think the withdrawal of legal aid has led to a big rise in the number of litigants in person. That is all I can say, at the moment at any rate, about alternative sources of funding.

Q246 Chair: We will come on to litigants in person in the course of this session. Does anyone else want to add anything in relation to the other courts represented here?

Lord Justice Sullivan: The position in tribunals is rather different of course. Historically, there has not been a great deal of legal aid in any event, so the charities have tended to fill the gap—the Royal British Legion in war pensions cases, by way of example. There aren't any alternative sources of funding. Charities are working at full stretch in any event, in so far as they can help. In so far as there are alternative ways of better using limited existing funds, I would certainly put in a plea for legal advice. It is much cheaper than legal representation. If you can advise people as to the merits of their claim so that they are discouraged from putting in duff claims and encouraged to put in good ones in a sensible way, you can probably leave it in the tribunals world to the expert tribunal to sort it out. There is not that much need for legal representation as opposed to legal advice.

Sir James Munby: The only areas in family law where there is alternative funding are cases where what is at issue is money in large quantities. In the big money cases, there are various techniques under which, in effect, people lend money, typically to the claimant, secured on the eventual outcome because they can be pretty confident that the claimant will get a large chunk of the matrimonial assets.

In cases involving children, of course, there is no alternative funding in that sense. There is no money at the end of the day. Many people have limited resources and do not in fact resort to insurance. I would be sceptical, though I do not know very much about the world of insurance, that there were insurers prepared to provide legal expenses insurance for family cases or children cases except at premiums that would make it unworkable. Therefore, in reality, the only alternative funding is from charities and the pro bono sector providing services for free.

Q247 Chair: Presumably, under the old system, you experienced cases where one side was legally aided and the other side was not. How did that experience compare with the situation now?

Sir James Munby: One of the issues in family cases is a perennial debate—some of the recently published material throws some light on this—on whether, in terms of the forensic complexity of the process, it is easier or more difficult if neither party is represented than if one party is represented. I suspect the conventional wisdom, which up

to a point is supported by the recently published research, is that the worst of all possible worlds is where one party is represented but the other one is not.

Q248 Chair: Mr Matthews, what about the magistrates court?

Steve Matthews: I cannot add anything, with regard to the funding, to what Sir James said. It is certainly our experience, which we hear from our members in the family courts, that we are seeing increasing numbers of unrepresented litigants. In particular, the number of occasions is increasing where one side is represented and the other is not. Whether that is because they are legally aided or because they are funding it themselves varies, but it is now becoming quite a common occurrence in the family courts.

Lord Dyson: Perhaps I answered your question too literally. When you said alternative sources of funding, I did not take that to extend to the question of alternative methods of supporting litigation such as pro bono, the agencies and all that. I took that to be separate. I perhaps took your question rather too literally.

Q249 Chair: Is there anything you want to add?

Lord Dyson: Just to say that quite plainly what is happening is that there is a considerable growth in the support of litigants in person by pro bono advocates, and advice from the advice bodies in the voluntary sector. We are depending more and more on that, and we are looking more and more to them for the very valuable support that they provide.

Q250 Chair: The number of cases in the civil courts and tribunals has declined markedly in the last 12 months. Do you think that is primarily because of the legal aid changes?

Lord Dyson: It is very difficult to know. There are statistics, and some of them may frankly not be that reliable. There could be a number of reasons for that. One reason could be to do with court fees. As you know, court fees have gone up. There is a very fine balance there. The civil part of the business, as the Government like to call it, is the only part that makes any money; that is the cash cow that is used to finance the whole thing. There is a danger that if you put court fees up too much you are going to drive the business away. There may be an element of that, but it is very difficult and I simply do not know what the reasons are. We were rather alarmed when we were shown most recently that there was a drop of £38 million in the income from the court fees as compared with what was projected not very long ago. We have been trying to get to the bottom of the reasons for that, but we have not yet got there.

Q251 Chair: In your case, Sir James, there are cases, are there not, which it might be better did not come to court?

Sir James Munby: I was going to say that it is almost impossible and it is probably too early to come to any sound conclusions, but it is a distinct possibility that one of the

factors leading to the reduction in private law cases is the introduction of compulsory MIAMs, which means you cannot get to court unless you have been through at least a preliminary mediation phase. That process takes some time. The statistics are not yet available, and it is too early to detect trends as to the relative impact on the undoubted downturn of the legal aid changes and the MIAMs changes, both of which came into effect at roughly the same time.

Q252 Nick de Bois: When do you think might be a good time? How long do you think we would need—five years?

Sir James Munby: There is no science in this. I would have thought three years. One could be reasonably confident after three years that any trend which appeared to be there was a real trend rather than just a short-term blip.

Q253 Chair: The National Audit Office has expressed concern about the sustainability of legal aid law firms. Do you share their concern? Would you recommend a career in legally aided civil work to law students?

Lord Justice Sullivan: Chair, I am sorry but could I just come in on your last question about the fall in the number of cases?

Chair: Yes, please do.

Lord Justice Sullivan: Undoubtedly there have been very substantial falls in two of the larger tribunals in the number of cases going through—social entitlement and employment. The big three are really social entitlement, employment and immigration. In social entitlement, there is little doubt that, because there was not that much legal advice available anyway, the fall is due to DWP's fairly well publicised problems with Atos and so forth. We are very dependent, as you can imagine, on the activities of Government. Government policy changes can lead to substantial increases or decreases in the number of cases. That has happened in social entitlement.

In employment, it is almost impossible to disentangle the combined impact of fees and compulsory mediation in front of ACAS before you can get to the tribunal, and possibly some impact due to changes in the economy. Undoubtedly, there have been very substantial falls in the number of cases in those two tribunals. I have asked the chamber presidents, and certainly the view is that they are not due to LASPO. In immigration, the numbers seem to be holding up, although there is a slight dip. It very much depends rather more on the energy of the Home Secretary than any impact of LASPO, as to how many appeals we get in immigration.

Q254 Chair: Returning to the sustainability of legal aid practice in civil law, does anyone want to have a go at that?

Lord Dyson: I will have a go, but it won't satisfy you in the least, I am afraid. I have read the executive summary of the National Audit Office report. I have skimmed the full report.

As you would expect, it looks like a rather impressive piece of work. They make some interesting points, including a criticism that the reforms have not taken into account the effect on the public purse across the board, rather than just looking at the Ministry of Justice. I am in no position whatsoever to say whether that is right or not; I simply do not know.

As to whether it is right to say that legal aid practice is no longer viable and whether I would recommend a lawyer to become a legal aid practitioner, I am afraid that is not really a question that I frankly feel qualified to comment on. Maybe my colleagues feel differently. The people who know about it, of course, are the lawyers; they know how their finances are run and know about the fees that they can earn and so on.

Chair: It is quite difficult for them to say that there is not a problem.

Lord Dyson: Well, quite. But it is equally very difficult for us to say anything about it either.

Q255 Nick de Bois: I would briefly like to turn to litigants in person. Would each of you give a summary of what you think the impact has been on the courts and tribunals of the increase of litigants in person? Would I be right in assuming that such impact also differs in each forum?

Lord Justice Sullivan: The summary answer to your question, from the tribunals' perspective, would be that there was very little, if any, difference, but that is primarily, as I said, because there was not that much legal aid available in tribunals in any event. Tribunals have been geared up for a very long time to deal with litigants in person. We do not call them litigants in person; we just call them appellants. The courts have a certain degree of angst about litigants in person, but we do not. We are geared up to deal with them. If you can imagine a social entitlement tribunal, it has its own expertise—legal, medical, and very often a disability member or whatever—so they are geared up for people simply to turn up and present their cases against the Government.

Nick de Bois: Having had advice before, perhaps.

Lord Justice Sullivan: In an ideal world, having had advice before. If they do not get that advice, it means that there is more for the tribunal to sort out, but they are used to sorting things out, very often in the absence of any presenting officer from the Government Department as well. They will have John or Joan Citizen as an appellant in person and nobody from the Government Department. The tribunal will simply have to work it out. That is pretty much standard form, probably helped by the fact that unlike, say, the family system, the main respondent in at least two of the big tribunals is a Government Department, so you at least start with a decision letter from the Government Department. Whether right or wrong, it will at least give you a starting point.

Lord Dyson: I will speak for civil, and I am sure James will speak for family. There has been a very significant effect. The position of the civil courts is very different from that of the tribunals. First of all, as Jeremy said, the respondent in tribunal cases is nearly always a Government authority, which has made a decision, usually a reasoned decision of some

kind, so you have a clear starting point. The appellant knows what he or she has to deal with. The battle lines are usually drawn very clearly, and most tribunal cases are pretty simple. They have hundreds of thousands of them, but the vast bulk of them are simple and straightforward.

Lord Justice Sullivan: Don't tell my chamber presidents that.

Lord Dyson: I said "the vast bulk of them". In civil, the position is quite different. I am not for a moment suggesting that every civil claim is something of great complexity; that would be quite wrong. A lot of the small claims—claims up to £10,000, as you know, except in personal injury cases—are pretty straightforward, but quite a lot are not. Once you go up the ladder a bit, and we are talking not just about fast-track but about multi-track, some cases can be of very considerable complexity. The obvious example is a clinical negligence claim.

If you have a litigant in person who has to deal with that sort of case, it is extremely difficult in the more complicated cases. I agree with what Jeremy said a few minutes ago. There are the two elements, of course; one is the advice stage and the other is the representation stage, and different considerations arise in respect of those two. It is the advice at the early stage that shapes the litigation and is so difficult for many litigants in person. They are not in a position, without advice, to know whether they have a good case or not. They are not in a position to know how, if they have a good case, they should present it and how to set about getting the relevant evidence. There may be questions of expert evidence, which at the moment is not covered by legal aid. It is a completely different ballgame from the tribunals. I do not want to go on; I could spend the next half-hour talking about it.

Q256 Nick de Bois: Perhaps I could ask you one thing on that point. How does that impact? Is it that the case takes longer because more guidance has to be advised, or there are more breaks—that is probably not the technical term—to allow people to gather their thoughts and perhaps overcome some of the difficulties they are facing?

Lord Dyson: The answer to that question, like, I am afraid, the answer to so many of your questions, is not very straightforward. You have to break it down. I believe the Government have very recently produced some statistical evidence to suggest that, on average, the length of hearings with litigants in person is no longer than where parties are represented. I do not know how reliable that evidence is, but let us just assume for the moment that it is reliable. As I say, I do not know whether it is or it is not.

From my limited experience of dealing with litigants in person myself—but more importantly what I have gathered from talking to lots of judges and, in particular, district judges who do this day in, day out—quite often the hearing where you have litigants in person is indeed shorter than where you have lawyers. That is not because lawyers are there to indulge in spoiling tactics and get into technicalities just for the sake of it. It is because, I am afraid, that very often litigants in person are totally overawed by the experience and they just dry up. I have seen this quite often. They put in their witness statement and their case, and you say, "Now, Mr So-and-So, what do you want to add?" They just say, "Well, nothing." They just freeze, frankly. Of course, there are some

litigants in person who will go on talking for ever, but if you balance the two it does not surprise me, if the evidence shows this, that overall the length of a hearing with a litigant in person is no greater than with lawyers.

The problem comes not at the hearing stage, but at the pre-hearing stage and the case management conference stage when the judge first gets to grips with the case, tries to knock it into shape, see what the issues are, and give directions for the efficient and proportionate conduct of the litigation. It is at that stage where, if you have lawyers present, they are used to narrowing the issues, and they do. Despite what you hear about lawyers, they mostly are responsible and they narrow the issues. They know what are the things that really matter and, because they are experienced, they know what directions to ask the judge to make. I am not suggesting that all case management conferences where lawyers are in attendance just go through by consent, but on the whole the evidence that I have heard very strongly suggests that at that stage the presence of lawyers helps the thing to go through more quickly.

The evidence is that case management conferences with litigants in person take a good deal longer because the judge has a whole mass of paper and has to try to work out what the case is all about and what the issues are. He cannot go on to decide what directions to make until he has sorted out what the issues are. When he has sorted out the issues, he moves on to decide whether there should be a limit on witness statements, experts and the rest.

Q257 Nick de Bois: It is entirely possible that that has not been measured by the Government survey, which we will obviously look at.

Lord Dyson: It is entirely possible. Such evidence as I have heard is anecdotal. I do not have statistics, but the anecdotal evidence I have from very reliable sources is that that is where the problem arises. That is critical, and it is why advice at an early stage is in a way, I think, more important than representing the parties at the hearing.

Q258 Nick de Bois: Sir James, the family courts?

Sir James Munby: I very much agree with what Lord Dyson has just said. The starting point, unhappily some might think, is that our entire system—our rules—assumes that both sides are represented. Therefore, the framework within which we are operating is a framework which assumes representation. The rules are not geared up to litigation where neither side is represented. The rules are incredibly technical and complex—some might say unnecessarily complex. The consequence is that, with very few exceptions, even intelligent and educated litigants in person have great difficulty actually understanding the process and what is required of them.

The consequence of that is that, in a world where, in both family and civil, the emphasis is very much on pre-trial preparation strictly managed by a judge who insists upon proper compliance with the rules, the case where there are litigants in person is a case which comes before the court in an unprepared fashion. For example, litigants in person, by and large, are not capable of preparing a bundle of documents that complies with the rules, let

alone a bundle of documents that contains what is relevant and does not contain what is irrelevant. One of the consequences of that—this is partly anecdotal and partly my own experience of dealing with cases where there are litigants in person—is that the burden on the judge of pre-reading before the case starts is greatly expanded. That is not something captured by the Government statistics; the Government statistics are measuring the length of hearings—hearings in court—and that is very considerable. Even if you have the documents in a lever-arch file, rather than brought to court in the proverbial plastic bag—you would be surprised at how many times people come to court with the proverbial plastic bag—you cannot assume that you are not missing something unless you read every single page.

If you have a properly prepared bundle, you know where to look in it, and you know that section x, which deals with the contact notes, is not going to be central to understanding what the case is about. I have very often found, including sitting in the Court of Appeal dealing with, for example, permission to appeal applications for litigants in person, that you have to read every single sheet of paper because somewhere in it there may be something that is the proverbial needle in the haystack. My general impression is that litigants in person, particularly in family cases, think they have a lot of good points. Most of their good points are thoroughly bad points. It is a slight exaggeration, but they have great difficulty in finding the good points. You have to go on your own search to find the good points, and that takes up a lot of time.

In terms of hearings, I suspect that final hearings may, if anything, be shorter if there are litigants in person. That is because, as Lord Dyson said, they tend to dry up. One of the consequences of the LASPO changes is that, certainly in the family courts, we now have many more litigants in person who are not litigants in person through choice. Previously we had a lot of litigants in person who were there through choice. They tended to be people who had a particular point of view, but who understood the case, were articulate and had the confidence to appear in court. We now have a lot of litigants in person who are there not through choice and who lack all those characteristics. The anecdotal evidence, which is quite strong and which I get in particular from district judges dealing with family cases, is that, at the first hearing in a private law case or in a private law money case, they take up much more time with LIPs than if there are not LIPs. First of all, they have to manage expectations. They have to explain in the way in which a solicitor would have explained: “You may think this case is terribly urgent, but the judge is not going to be able to make a decision today just because the issue is contact with Johnny on Saturday.” Managing expectations is something traditionally done by the lawyers, but now it is being done by the judges. It takes more time teasing out what the issues are. It takes time explaining the process.

Q259 Nick de Bois: And this is the judge doing this.

Sir James Munby: This is the judge doing this. There is a lot of anecdotal material that in the early stages of family cases the hearings are taking longer. I suspect there may be truth in the assertion that the final hearing is taking less time.

Q260 Nick de Bois: One of my questions was how this affects the role of the judge. You have all been very good in answering that, as well as my original question. Mr Matthews, is there anything you would like to add about the impact of litigants in person?

Steve Matthews: Certainly. I can speak on behalf of magistrates hearing family cases. I would certainly agree with the points that have been made. We have the advantage, some people would say, of having a legal adviser in court with us who can sometimes assist litigants in person in framing questions, for example, although obviously they cannot act on their behalf. They can assist them to some extent in that way, in explaining the process and what is likely to happen.

One of the points that we are aware of, and following from the points that have been made, is in terms of the pre-hearing process. We are very much aware that the application form for private law applications is 24 pages long. The associated advice leaflet is 32 pages long, all of which contain a lot of legal jargon that litigants in person, without the benefit of any advice, often struggle with. One thing we do not know, but we hear, is that some people are put off altogether when faced with this, particularly in the light of the legislation that came into effect recently, in October, saying that it is in the interests of children to have relationships with both parents. There is concern that perhaps children are losing out simply because one parent or another is put off making the application.

We are starting to see more litigants get some form of advice, not necessarily from lawyers but from various agencies. There are websites that have been set up that will help them go through this process, with personal support units in some courthouses and locations assisting them to fill in forms and explaining the process before they come into court. In court, as the others have said, it quite often takes time to explain the process to litigants in person—what they need to do in terms of filing statements or bringing any other evidence that they want to bring. The whole process can take much longer and be daunting for people who are not familiar with it and have not had the benefit of any advice.

Q261 Nick de Bois: I was just checking to see if I had the numbers. Have you seen any significant increase in the number of litigants in person?

Steve Matthews: We did a survey of our members hearing family cases earlier this year, and 46% of parties were unrepresented, so that is almost half the parties appearing before magistrates in family cases.

Q262 Nick de Bois: Do you know what it was like before the changes?

Steve Matthews: Some 97% said that there had been an increase, although what the figure was before I do not know.

Nick de Bois: My other supplementary has been covered within the detail, Chair, so thank you very much.

Lord Dyson: Perhaps I could just endorse what Sir James said on a really important point, which is simply not addressed by anything so far coming from the Ministry in terms of what they say is happening, and that is the additional amount of time spent by judges in preparing for these things. We get it in the Court of Appeal where a high percentage of applications for permission to appeal are now by litigants in person. Judges have to spend ages ploughing through page after page of applications for permission to appeal, very often in almost illegible manuscript, and they take much longer than would something equivalent from a lawyer. In fact, the likelihood is that a lawyer would not do it because they would know there was nothing in it. That is a hidden additional burden. In the Court of Appeal we have been trying to measure that. The whole question of permissions to appeal is something that is taking up a huge amount of the time of judges. The focus all the time is on the hearing of appeals, but a vast amount of the time of the Lord Justices of Appeal is dealing with those applications for permission. There has been a very marked increase in the burden there.

Sir James Munby: I would like to add two quick things. First of all, I entirely agree with Lord Dyson on the distinction between advice and representation. The big, big problem, implicit in what I have said already, is the absence of pre-litigation and pre-hearing advice.

Chair: I think that message has come through.

Sir James Munby: The other thing is that two things were published on Friday. One was the MOJ preliminary statistical analysis on the impact of LASPO in relation to hearing length. Also published on Friday was a much more detailed and, in a sense, more illuminating document: the research carried out by Trinder and her colleagues, commissioned by MOJ. It is based upon practice pre-LASPO in the family courts, but there is a very illuminating section in the middle where they analyse on a qualitative and a quantitative case study basis the impact of the case with representation on both sides, representation on one side and no representation.

Chair: We will look carefully at that.

Sir James Munby: Very interestingly, they also examine the reasons why cases sometimes go short. It is not an encouraging picture. The reasons they give why they think that some cases may go short with LIPs suggest that it is not to do with the presence or absence of lawyers so much as litigants in person giving up, not understanding the process and so on and so forth.

Q263 John Cryer: I have a brief question to Lord Dyson. You mentioned cases where litigants in person just dry up in front of the court. What effect does that tend to have? I cannot imagine that it makes their cases particularly compelling.

Lord Dyson: It certainly does not. It is very difficult. What is a judge to do? Judges try to be as fair as possible. They make all allowances possible to litigants in person, but ultimately they are the only ones who can speak. We still have an adversarial system. You may want to ask questions about that, but as long as we have an adversarial system, I suppose a judge could say, if the judge sees that there is something in the litigant in person's witness statement that is crying out for some elaboration, "Mr So-and-So, I see

you say this in paragraph 25 of your statement. I wonder whether...” and then the judge might ask a supplementary. Given that we have an adversarial system, and given the fact that there is a party on the other side, the judge is in quite a difficult position.

Chair: Presumably the judge can take full account of the written statement if he thinks it states the case reasonably clearly.

Lord Dyson: Certainly.

Chair: And will not be deflected from doing that by the fact that the other party or the other side is represented.

Lord Dyson: No, absolutely not. But so often in our adversarial system a party’s position is strengthened by what they say during the course of the oral argument. It is all the more important if, as is often the case with litigants in person, they have not really done justice to their case in their written material because they are not particularly used to writing things down.

Q264 Mr Chope: I declare my interest as a non-practising member of the Bar. I want to follow up on the issue of the proliferation of litigants in person. Do any of you believe that it is leading to miscarriages of justice as a result?

Steve Matthews: As I suggested earlier, what we do not know—it would probably require some more sophisticated research to try to find out—is how many people are put off making what may be a legitimate application because of the fact that they cannot get legal representation, have been unable to get advice and are put off by the forms and the process and so on. That is something of concern, but at the moment it is not something that we can measure.

Lord Dyson: I am sure that there will be some cases where a party who is unrepresented and who actually has a good case will lose because he or she does not have legal representation. I cannot prove it, but I was given an anecdotal example at a conference we had only 10 days ago. A designated civil judge gave just such an example. I cannot remember the details now but there was a technical point of law which, had the claimant been a lawyer or been properly advised, could have been dealt with and would have resulted in the claim succeeding; but because he was not aware of it the claim failed. That is a very stark example. It is impossible to prove but it would be extraordinary, frankly, if there were not some cases that are decided adversely to a litigant in person which would have been decided the other way had that litigant in person been represented by a competent lawyer. It is inevitable.

Q265 Mr Chope: Sir James, do you agree with that?

Sir James Munby: Yes. I suppose if one separates them into law and fact there is probably less chance of a miscarriage of justice on a pure point of law. Perish the thought that any judge should know the entire law of England and Wales, but if there is a purely legal point there is a reasonable chance that the judge will spot it and pick it up, even if the litigant

does not, assuming that the judge is dealing with something that he is very familiar with. I am quite sure there are cases where even the most experienced judge does not spot some point that would have been spotted by a legal representative—the example that Lord Dyson gave is telling—and that can be the difference between victory and defeat, particularly if it is a knock-out point.

The ones which are more difficult to assess are the ones where, if there is a miscarriage of justice or a suggestion of miscarriage of justice, it turns on the facts. In the nature of things, because the judge does not have the same relationship with the litigant as the litigant's lawyer does, the judge has no opportunity of discussing, as it were, what the case is about—the behind-the-scenes part of the case. He cannot have a conference with the litigant to find out what a line in cross-examination might be. Therefore, there may be something completely unknown to the judge in the facts which would have been given prominence, but the litigant may not understand its significance. I go back to the point I made before. Many think that things are relevant which are not relevant. Many are quite unable to spot the significance of some peripheral matter which may be crucial—credibility, for example. It would be extraordinarily absurd and foolish to believe that there are not such cases. How many? In the nature of things, it is almost impossible to calculate.

Q266 Mr Chope: I want to go back to Lord Dyson's point about the case management conference. The Low Commission suggested that the Courts Service should basically be looking after litigants in person. Is it at that stage that you think more help can or should be given to litigants in person? If so, how?

Lord Dyson: I think that is a critical stage in the process. It is legal advice at the outset as to the merits of the case—whether you have a decent case—and then advice, if you have, as to how to present it in an efficient and economical way. I think that is the critical thing. As to how that is to be done as a matter of mechanics, if that is your question—

Mr Chope: Yes, it is.

Lord Dyson: There is scope for pro bono work and there is a lot of that, but you cannot expect the whole system to be run on the basis of pro bono work—at least I do not think you can; I do not think it is reasonable. We are fortunate in this country that we have a lot of lawyers who do a lot of excellent work pro bono. We also have agencies that have lawyers who give advice. The Government recently announced £2 million—they have offered it. They have put up £2 million. I do not think it is £2 million a year; it is £2 million for the next year, which is of course very welcome, but we would be frankly deluding ourselves if we think that that is going to make a huge impact, particularly as they have said they want £700,000 of that £2 million to go to the personal support unit.

The personal support unit is a wonderful organisation. All of us in the judiciary celebrate the work that they do, because they give all sorts of assistance to litigants in person and tell them how the system works. They calm them, let them know what to expect and all that, but they do not give legal advice. They do not give advice on the merits of the case or how the case should be presented. I can only speak for myself, and my view, without in any way seeking to diminish the value of the work done by the PSU, is that legal advice to

litigants in person at the outset is the critical thing that we need, and that costs money. The £2 million, or what is left of it after the £700,000 for the PSU, will go some way, but I do not think it will go all that far.

Sir James Munby: I agree with the view expressed by the Low Commission that that is the thing that needs tackling. I would query whether HMCTS is the appropriate body to do it. First of all, HMCTS has been cut to the bone and simply does not have the resources at present to do it. Secondly, there are constitutional difficulties about HMCTS giving advice to litigants. It is very clear that they do not give advice. They are told that they cannot give advice, and most judges, I suspect, would take the view that that is the correct stance for them to adopt. If you ask me, “How does one solve it?”, I answer by asking a rhetorical question, if I may do so. Does anybody here know what I mean by the California model?

Chair: I should, but I cannot remember.

Sir James Munby: I will send you a reference; there was an article about it in *Family Law* a couple of months ago, and it gives the web link to the relevant Californian material. Very briefly, in California the state runs a system which applies, as I understand it, in both family cases and civil cases, such as debt and landlord and tenant, where public money is focused not on representing individual litigants but on providing support and advice to litigants as a class. The model is very interesting. Each Californian courthouse has facilities on site where litigants in person are assisted to fill in the forms correctly, so that when they go to the counter the form is quickly filled in. They run training seminars so that you can go along to an LIP class and there will be somebody there to explain to you how the system works.

Interestingly enough, so it is said, they found that the cost of that to the public purse is much less than the cost of providing lawyers to individual litigants. The comment that was passed back, albeit by somebody who appears to be a passionate supporter of this system in California, was that before the system was set up the view of the Californian judges, if somebody turned up as an LIP, was “Oh goodness, where are the lawyers?” Now apparently it is the other way around, and the judges in California are so impressed with the consequences of the efficacy of this system that they tend to sigh if lawyers turn up. The reason why it worked, apparently, was that they worked out that the cost to the public purse in California in terms of the added burden on judges was greater than the cost of funding that alternative system. I am not promoting the system—

Chair: It sounded quite like it.

Sir James Munby: All I am saying is that I was immensely impressed when I saw a presentation about it. It is certainly something worth thinking about. We will send you the reference to it.

Q267 Mr Chope: It sounds, Mr Chair, as if we should be paying a visit to California to see what is happening.

Can I ask about McKenzie friends? We heard evidence that there are a lot more McKenzie friends now, and that there is almost a new breed of professional McKenzie friend growing

up. What are your experiences and views of McKenzie friends, particularly the professional ones?

Sir James Munby: I tend to take a reasonably relaxed view about most McKenzie friends. The fact is that, in the areas where there is no representation, some kind of support or input is better than nothing. In my experience most McKenzie friends add value. They tend to be articulate and to have understood what the case is. Many of them have a surprisingly good grasp of the law, not just book law but how the courts work. Undoubtedly, in my experience, many of them assist in explaining to the judge what the case is about and in speeding up the process. Some of course do not fit into that category. Some are semi-professional; some are charging.

There are two separate issues. One is quality. So far as I am concerned, the fact that somebody is charging is no guarantee of quality, but on the other hand it is no disqualification. The other is that, as a matter of principle, should it be open to people practising as McKenzie friends to charge? That is a question of law and a question of policy, which I don't think it would be appropriate for me to discuss today.

My own experience has been that you can usually tell pretty quickly whether a McKenzie friend is assisting the client and the process. More often than not, I have found that they do. When they are not, you can usually tell by the body language. The client starts getting uncomfortable; I find that you can tell just by looking at the litigant whether the McKenzie friend is actually putting their case or running some agenda.

On balance, I think McKenzie friends are a good thing. I am talking about McKenzie friends who address the court. I am not talking about McKenzie friends just doing their traditional function. Where there are difficulties, I like to think I would be able to manage it all right. I always allow the litigant to speak as well as the McKenzie friend. I never say, "Either you speak or your McKenzie friend speaks." I think that is an important safeguard; that way you can be sure that you are getting from the lips of the litigant what the litigant wants to say. Sometimes that is important, although I find what you are getting from the McKenzie friend is often invaluable.

Lord Dyson: I think that most judges think that, in principle, McKenzie friends are a good thing provided that they are reasonable McKenzie friends. The controversial aspect is the professional McKenzie friend. That is something quite controversial, and there is a judicial working group exploring that whole question at the moment. As James said, there are really important policy questions that arise. Paid professional McKenzie friends do not owe a duty to the court, and our system depends so much on the advocates having a professional duty not to mislead the court. That is a very important part of our system. If there were to be professional McKenzie friends and they did not have such a duty, that would be a matter about which a lot of people would be very concerned. There is no regulatory body at the moment to regulate them. There is quite a raft of issues which, if we are to go down that route, would have to be addressed.

Q268 Mr Chope: Will the body that is looking at this be making recommendations to Parliament as to what should be done?

Lord Dyson: In the first instance they will be making recommendations to the Lord Chief Justice. I cannot speak as to what happens thereafter.

Q269 Mr Chope: May I ask a specific question of Sir James? Should there be a statutory bar on an alleged abuser personally cross-examining an alleged victim of serious domestic violence or sexual assault in the family courts?

Sir James Munby: If you will allow me, I am going to be very cautious in what I say in answer to that. I have expressed, as I suspect you are aware, in at least one judgment, if not two judgments, an analysis of the issue from a judicial point of view. That analysis, which I stand by, seems to me to raise some very obvious questions, and to some people may even suggest some answers. The discrepancy between the family system and the criminal system that I identified is the result of parliamentary decisions, because Parliament legislated—forgive me, I cannot remember precisely when, but quite some time ago in 1990-something—in relation to the criminal courts but did not legislate similarly in relation to the family courts. The question is, it might be thought, is there some policy justification, some principled justification, or some proper rationale for that distinction between the criminal courts and the family courts? I am not going to go beyond what I said in the judgments. It is essentially a matter of policy to be determined by Parliament.

Q270 Chair: I want to clarify one point which is implicit in quite a lot of what you said. Judges are having to behave in a more inquisitorial way to deal with litigants in person. Should that be formalised in some way? Should we more formally recognise that our system embodies an adversarial system, but sometimes a more directly inquisitorial one, as it sometimes does in the tribunals system, for example? Should that be something recognised formally?

Steve Matthews: It is probably difficult to do it formally. In practice, certainly in family cases before magistrates, particularly where both parties are litigants in person, inevitably it becomes a more inquisitorial process rather than an adversarial one, albeit within the same legal framework. You will have a number of different circumstances under the present arrangements, where sometimes you have both parties represented and sometimes you have one party represented. To try to come up with a formula that would cover all those eventualities is quite difficult, but, in practice, that approach is becoming more common as a way of dealing with it effectively, particularly, as I say, when you have two litigants in person.

Lord Justice Sullivan: I would suggest that there ought to be some formal underpinning of the need for a more interventionist approach once we recognise that an adversarial system cannot be conducted without efficient advocates. Certainly the tribunal procedure rules, if you look at them, are relatively simple. I would not exactly say that they are user friendly, but they are certainly less user unfriendly than some of the rules one finds in the courts, which, as has been said, are really designed for use by lawyers rather than lay people. Simply altering the rules will not be enough. You probably need a change in culture and training—for example, the training of judges in how to deal with litigants in person. You

need training for them in particular areas so that they themselves have the expertise—absent any input from legal representatives—in particular jurisdictional fields to deal with the issues that arise. I think some formal underpinning would probably be helpful, but it will not be enough without a culture change.

Lord Dyson: This is very difficult. Nobody is suggesting that we should go over lock, stock and barrel to an inquisitorial system on the continental model. That simply could not happen for any complex litigation, because you would need more judges, and the judges would need support from lawyers. There might be some modest savings in court time and so on, but there would undoubtedly be a countervailing increase in cost. It is very easy to say that we should just go over to an inquisitorial system.

Q271 Chair: That was not quite my question. It was much more whether we are being drawn into such a system for litigants in person.

Lord Dyson: I think we are de facto. It is a very English way of doing things. Things happen, and we suddenly wake up and realise that things have happened. If you are going to have some sort of formal underpinning or formal expression, you need to identify the criteria for it; for example, I would suggest that small claims cases would be an obvious place to start.

Chair: It happens in practice in the small claims court anyway.

Lord Dyson: It happens in practice. If you want, you can formalise that. I would have thought that, if you were looking for a criterion, it would have to be cases of simplicity. Anything of complexity is difficult unless we are going to change our whole approach. It is already happening, as you pointed out, and there may be further development in this area. I do not see any particular difficulty and I would not myself seek to stand in the way of it, but we have to think very carefully how far we want to go. We cannot go everywhere. We cannot do it across the board.

There are one or two other things, since Jeremy mentioned them. On training, judges are already being trained to deal with litigants in person. It is one of the things that we are doing to try to react to the new world. Complexity of rules, again, is something that has been spoken about for as long as I can remember. Nobody really seems to know how to deal with that. We have just created this huge thing that has taken over. One very interesting development, which you may or may not know about, is that the working group under Mrs Justice Asplin is doing some very valuable work in trying to find solutions, or at any rate to mitigate the problems. One of the ideas that she came up with was to simplify a selected number of the civil procedure rules—the ones which are the most important and in most common usage. The Civil Procedure Rule Committee, which deals with the rules, has now set up a working group or sub-committee to try to bring that into effect. There are lots of other things that we are trying to do in the system to mitigate the difficulties. Sorry, I have gone off-piste a bit. You asked about inquisitorials.

Q272 John Cryer: Going back to litigants in person, are there any circumstances under which it would be appropriate for judges to refer LIPs to the Legal Aid Agency for exceptional cases funding? That is a question open to anybody.

Lord Dyson: I cannot talk about exceptional funding, because two of us heard an appeal about four weeks ago from the decision of Mr Justice Collins which challenges the legality of the Lord Chancellor's guidance in that respect. I am sorry to be unhelpful but it would be inappropriate for us to comment.

Q273 Chair: We understand that. We are simply trying to explore what has been happening from experience. If you want to say nothing at all about it, we understand.

Lord Dyson: I think I would rather say nothing, if you don't mind.

Q274 Chair: Would either of your colleagues like to say anything?

Sir James Munby: Anecdotally, judges sometimes, in an attempt to break what seems to be an impenetrable logjam, get in touch with the Legal Aid Agency. There are one or two specific individuals there who tend to be approached and who are in fact enormously helpful. But, anecdotally, and also in my experience, the logjam is often too big to be unblocked by a simple telephone call. The complexities of getting legal aid applications through are considerable, so I am not sure that a system of judges ringing up the Legal Aid Agency will solve the problems.

Q275 John Cryer: But there are circumstances under which judges communicate with the Legal Aid Agency and say, "Look, I think we need some intervention in this case to get things moving." Does that happen?

Sir James Munby: It tends to be, "Can you explain what the current state of play is and how far has the application got? When can the court expect that the application for legal aid will be decided?" There are two problems. One is purely in terms of process. A judge will know about the case but the judge will not know about the legal aid application. There are materials relevant to the legal aid application which the judge should not know about because they are covered by legal professional privilege, and therefore the judge is in difficulties even if it were proper for him to express views to the agency. When there are telephone calls, they tend to be simply fact-finding: "What stage has the process got to? When can we expect an answer?" That leads to, "Shall I adjourn the case for one week or four weeks?"

There are real points of principle here. My view is that it is not the function of judges to facilitate applications for legal aid on behalf of one litigant. It would put them in a very false position. Putting it bluntly, judges, particularly if they were previously barristers, are very unfamiliar with the minutiae of the process for obtaining legal aid. It is incredibly technical and very complicated. It is the sort of thing that solicitors understand. Those judges who have previously been barristers do not. Although in principle I would like to

explore ways, if appropriate, with the Ministry of Justice to see whether one could somehow oil the wheels of the process, I am sceptical as to whether it would be either proper or practical to go particularly far down that line. In any event, in a sense, either the system is working properly or it is not. If it is not, is it actually an appropriate use of public resources to ask judges to do something which is actually the responsibility of somebody else?

Q276 John Cryer: Have there been any circumstances under which the Courts and Tribunal Service has provided some form of funding to representatives, or any other kind of assistance?

Sir James Munby: So far as I am aware, there has not yet been a case where such an order has been made.

Lord Justice Sullivan: I query whether HMCTS would have the power to do it anyway, as I think has been mentioned before. Never mind the query as to whether it has the budget to do it; I do not know that at the moment it even has the statutory powers to do it. I very much doubt it.

Q277 John Cryer: What would you make of some sort of fast-track system where certain cases could be pushed through and get assistance?

Chair: For legal aid applications.

John Cryer: Would you think it was appropriate if certain cases could be fast-tracked through the system?

Lord Dyson: I am not sure I am qualified to answer that question. I am afraid that I do not know enough about the workings of the legal aid system. This is where, as James said, I am afraid you have a bunch of barristers, and it is telling.

Q278 John Cryer: Does anybody else want to have a go?

Sir James Munby: I would have concerns about that for this reason. I am just focusing on family cases. The essential tension is very simple. A judge dealing with a particular case is focusing on that case; his or her priority is that case. The agency is concerned with huge numbers of cases. If a judge gets a call on the telephone saying, "This case is very urgent," the judge simply does not know, and is in no position to know, just how urgent or compelling it is compared with all the other cases in the system. I would have a real concern that if there was some fast-tracking system, unless the criteria were very clearly laid down, it could easily turn into something where a particular litigant gets fast-tracked just because a particular judge takes a particular view and expresses him or herself in strong language.

Q279 John Cryer: If somebody knows how it works, they can get it through, whereas other judges would not be in a position to be able to do that.

Sir James Munby: I would be a bit fearful of that.

Q280 John McDonnell: Can I suggest that you breathe a sigh of relief on the urgent applications, because most of the solicitors who have appeared in front of us cannot understand the forms either?

I want to turn now to mediation. Why has the number of family mediations fallen when legal aid is still available?

Sir James Munby: The conventional wisdom—it is pretty deep-rooted and I am inclined to think it is right—is that, contrary to assumptions at the time mediation became compulsory, the route to mediation was actually through solicitors. It was solicitors in particular in family cases who, recognising that mediation might be the solution, were directing and spelling out to their clients the advantages of mediation. With the withdrawal of legal aid, of course, no solicitors were there, and therefore one important route to mediation, namely encouragement from solicitors, disappeared.

I cannot personally express a view about it. All I am doing is reproducing the very commonly held view that that was the original cause of the problem. There is no doubt in the statistics that mediation plummeted following LASPO. If the question is, “Well, why haven’t things recovered?”, things are getting better. The mediation task force was set up, chaired by David Norgrove, who did the family justice review. Many, but not all, of its recommendations have been accepted by Government. There is still a long way to go. My personal view, which is rather a hobby horse of mine and I have repeated it frequently, is that there is a desperate lack of information available to those coming into the system.

At one level, it is a very simple point. We all know that the word is “mediation” because that is the word used in the statute. But if you are facing relationship breakdown, you do not know that the word begins with “M;” you do not know that the word is “mediation”. What about “conciliation”, “arbitration” and all the rest of it? There is a big public education problem. The trouble is that without a public education solution somewhere on the web where you can get easy access to information of a trustworthy and impartial sort, the first time that many people bump up against mediation is when they go into the court office and get the 20-page form that spends 12 pages asking them incomprehensible questions about MIAMs. There is a big public education problem.

One of the problems is that we have too much material. Every agency in the system has stuff on its website about mediation and stuff about LIPs. There is no coherent strategy. There is no obvious port of call. I do not know whether it has changed, but only four or five months ago at most I googled “legal separation”, and the first thing that came up on Google was an MOJ website which explained that to get a legal separation you have to get a lawyer and go to court, because what they were talking about was judicial separation in the context of divorce.

There is a very simple problem. The world works on search engines; we work on Google, and I think there is a big task to make sure, when you go to Google and feed in the kinds

of words or phrases that the typical litigant would feed in, that what comes up immediately is sound information which explains, in the context of mediation, that mediation is the thing. It should explain what mediation is and what it is not. It should explain why it is a good thing and why it can help you. It should explain why it can be more beneficial for you and the children. Having sold the message, it should then go on to say, "And if you want to mediate put in your address," and up will come a list of mediators within 20 miles of your address. Some of this is being done, and a lot of work has been done quite recently, but I see the preliminary work in terms of explaining to people, "The thing you want is mediation." Unless you know that "mediation" is the word to put in, you never get to the starting point. There is a lot of work to be done. The figures are getting better, and I suspect that over the next year or two we will get back to where we were three years ago. I think there was misunderstanding of the scale and complexity of the issues, and inadequate appreciation of some of the immediate unintended consequences. That has largely been remedied now.

Q281 John McDonnell: How can we encourage other forms of alternative dispute resolution in areas of law other than family law?

Lord Dyson: It comes down to education. We must always remind ourselves that most litigants in person have a dispute only once in their lives. There are a few serial litigators, but mostly it is a one-off, so it is a completely strange experience. This takes us back to where we were about three quarters of an hour ago when we were talking about the advice stage. The advice stage has to include advising them that mediation is available as an alternative. It is one which the courts strongly encourage, to the extent that an unreasonable refusal to embark upon mediation, even if the party is successful in the litigation, can sometimes result in the party being deprived of his costs. There is very strong encouragement from the courts, and that carries through to the judges, for the parties to mediate. The answer has to be education and advice. I do not think there is anything else.

Lord Justice Sullivan: There are some areas where mediation does not look very promising, at least in the tribunals context. If you have a dispute about tax with the Revenue, your immigration status with the Home Office or your detention in a mental hospital with the Department of Health and so forth, it is very difficult to think of alternative dispute resolution. There is scope to look at it in some areas, such as special educational needs, particularly where the parties will have to have a continuing relationship with each other—the parents and the education authority and so on. On the other hand, we ought to be aiming to get most of our procedures as simple as possible in any event, so that an alternative procedure would have to be very much simpler to have any real advantage. In the employment field we now have compulsory conciliation, effectively, through ACAS before you can take your claim to the tribunal. It is a bit too early as yet to see how successful or otherwise that has been. Prior to that, there was quite a good record when the employment judges were, as it were, able to suggest themselves voluntary mediation. That had quite good take-up and quite a good success rate. There is scope, provided you focus it on particular areas.

Steve Matthews: Perhaps I could make one other point. Our feedback is that, since the requirement for MIAMs was introduced, the vast majority of parties are now going to the

MIAMs session, but the numbers then going on for mediation are still limited. Our impression is that cost is a factor in that, because to make an application is quite a substantial cost, and if you go on and are then diverted to mediation that is a cost as well. For people who have very limited resources that is sometimes unrealistic from their point of view.

Chair: Lord Dyson, Lord Justice Sullivan, Sir James and Mr Matthews, thank you very much indeed. We are very grateful for your help this afternoon.