



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 10 December 2014

Ordered by the House of Commons to be published on 10 December 2014.

Written evidence from witnesses:

- Shailesh Vara MP, Ministry of Justice [LAS 73](#)

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

Questions 282-330

Witnesses: **Shailesh Vara MP**, Minister for the Courts and Legal Aid, Ministry of Justice, and **Matthew Coats**, Director of Legal Aid Casework, Legal Aid Agency, gave evidence.

Chair: Good morning, Mr Vara and Mr Coats. Welcome. This is the last of our public evidence sessions as we inquire into the impacts of the changes in legal aid for civil matters. We look forward to getting a Government and Legal Aid Agency response this morning on some of the issues that have been raised. I am going to ask Mr Corbyn to begin, but I must, first, see if there are any interests to be declared.

Andy McDonald: Chair, may I declare an interest as a former legal aid practitioner? I am a solicitor but I no longer practise.

Chair: Thank you very much. Mr Corbyn.

Q282 Jeremy Corbyn: Thank you very much for coming to give us evidence this morning. I never thought I would be asking this question, and it is about legal aid underspend. The National Audit Office has concluded that the Ministry of Justice saved more money than it had anticipated following the civil legal aid reforms. Do you understand why this could be a matter of concern, given the implications for access to justice, or did you simply get the estimates wrong?

Mr Vara: First of all, good morning, Sir Alan, and good morning to the whole of the Committee. As far as the underspend is concerned, it is important to put matters in

context, and that is that the National Audit Office gave estimates. If we are to have more reliable figures then, clearly, they need to be figures in steady state, and those figures will only be available in the financial year 2018-19, when matters that are currently progressing have filtered through the system. That being said, however, I can say that there has been a smaller uptake on mediation than we had anticipated, for which we are taking measures, and also the agency has had a better debt collection system than perhaps we would have expected. So there has been more money that has come in, and that has contributed towards the underspend.

Q283 Jeremy Corbyn: Can we just take it through? First of all, less money has been spent on debt legal advice, even though, both anecdotally and factually, the demand for debt advice has gone up massively. Who is monitoring this in the Department and why are a lot of people simply not getting advice when they should be getting advice, which would make theirs and their families' lives a lot better?

Mr Vara: Certainly. We are very keen that those people who qualify for advice do apply to us and get the relevant advice. First, at the moment, we are looking into this, but, secondly, there are also many other agencies that do provide this sort of advice—law centres, citizens advice bureaux and so on. It may be that people are aware that there have been reductions in legal aid and they simply are not coming forward when, perhaps, they should be.

Jeremy Corbyn: But it is 85% lower than you anticipated.

Mr Vara: As I said, the National Audit Office is using estimates. Those are figures which are an estimate by a body that is not using figures that are in steady state, which, as I say, will be more forthcoming in the financial year 2018-19.

Q284 Jeremy Corbyn: Will the Department be able to give us more accurate figures? If you say the National Audit Office figures are wrong, presumably you have a more accurate figure.

Mr Vara: No. What I am saying is that we are monitoring the situation. You will be aware that the Legal Aid, Sentencing and Punishment of Offenders Act 2012—LASPO—says that we will have a review between three and five years after implementation. In the meantime we are actively reviewing matters. In terms of whether we have specific figures, I do not know if my colleague Matthew has any figures.

Matthew Coats: The issue of following up on what is happening and what the Ministry is doing is a good point. We are taking steps, through research, to understand what is happening in terms of the advice that people are getting. There has been a very large-scale survey, called the justice problem resolution survey, which is a telephone survey of some 10,000 people who have a problem to resolve, and it will quantify how they are seeking to resolve that, and it will include debt. There is also a more in-depth survey, which is 100 or so detailed interviews on people who come into contact with the justice system; and there is a separate exercise on the not-for-profit sector, researching the impact and state of that

part of the system. All of that research will be concluded next year, and that will inform a number of questions, including the one on debt take-up.

Q285 Jeremy Corbyn: Can I urge you to bring a sense of urgency to this? Anecdotally, and I am sure that colleagues will bear this out, I have many people in my area who simply cannot get debt advice because there is too long a waiting list and too long a queue. If they don't get debt advice, they get deeper into debt. They either get bailiffs coming round taking their materials and goods or they lose their houses. It is devastating for families when that happens.

Chair: Other things you could do in the meantime are, for example, by advertising the telephone advice more widely and by working with food banks. Very often, it is not properly understood that what food banks try to do is to tide people over while they assist them to sort out their affairs and get into a better position. Debt advice is a frequent need of people who come to food banks. Could you do more to advertise this service?

Mr Vara: To give credit to the Department, we have spent a lot of money trying, first, to inform people of the changes but, secondly, to help them in the transitional phase. For example, there is a transition fund where some £100 million has been spent in 2010-11 and 2011-12, where more than 900 organisations have benefited since its inception. This includes charities, voluntary organisations and social enterprises. There has also been the Advice Services Transition Fund; in the period of 2011-2013, a total of £40 million has been spent in England and Wales, again, allocated to 301 organisations.

Q286 Chair: We are all familiar with this useful and necessary process. Does it not sound as if, maybe, some of the money that is not being used on your debt advice service might be better used in helping those organisations, most of which are struggling to deliver to the numbers that are coming to them?

Mr Vara: We are certainly in listening mode. As both Matthew and I have said, we are actively trying to see how we can improve the system. We take note of what you say. In the past, we have, certainly, taken measures to improve where we have felt it necessary to do so. Domestic violence is an example where we felt that the requirements for evidence were too stringent. I looked at the facts before me and loosened the requirements. Likewise, I am happy to look at this particular issue in light of the research that we have and any other comments that colleagues may have.

Q287 Jeremy Corbyn: Can I make three quick points before we move on to the next line of questions? First, will the Treasury get the unused money back, or will it be remaining within the Department? Secondly, the exceptional cases funding scheme has seen 5% of applications granted. There were 107 grants from 1,790 applications. Your Department anticipated a grant rate of 50%. This is a massive difference. It looks like there is a one in 20 chance of getting an application through, whereas you expected a one in two chance. What has happened there?

Can you give us a note, if you cannot answer it now, on what you are going to do to change the situation?

Mr Vara: I hope I can address the answers right now. As far as the first question is concerned, where there is an underspend, you will appreciate that in the Agency there may be another area where there has been an overspend, so there does tend to be a balancing exercise both within the Agency and in the Department. As far as the exceptional case funding is concerned, the answer, really, lies in the heading. It is meant to be exceptional. By definition, “exceptional” means that there is not going to be a very generous distribution of that particular fund unless the criteria are met. Sadly, many people take the view that exceptional case funding is another means of trying to get funding which is being denied in one way. Exceptional case funding is not discretionary. It is specific. It is defined as ensuring that we are not in breach of our obligations under the European Convention on Human Rights and, indeed, our EU obligations. Where there is a danger that we may be in breach of those two obligations, then ECF is available. As I said, there is a belief that it is a discretionary fund and that, if you are turned down through the normal route, then, if you apply here, you might just be lucky, but that is not so.

Q288 Andy McDonald: Good morning, gentlemen. Could I ask you a couple of questions about access to legal aid and the sustainability of the legal aid market? There has been quite a lot of commentary on this matter. I know that the Law Centres Network expressed the view that “the LASPO changes have been detrimental to access to justice, in particular for the most disadvantaged and vulnerable individuals and groups in society.” The Civil Justice Council has said “there are areas of real concern in terms of people’s ability to seek justice, and the support available to the most vulnerable in society.” The National Audit Office concluded that the MOJ simply did not know if those who remain eligible for legal aid could access it—in other words, whether the Government were successfully ensuring access to justice following the reforms. How do you respond to that criticism, and what are you doing to ensure that eligible litigants have access to publicly funded legal advice?

Mr Vara: Thank you, Mr McDonald. It is important that we recognise that, when this Government came to power in 2010, it had to take some very quick and difficult decisions, bearing in mind the economic difficulties that the Government inherited. Unlike the National Audit Office, the then Lord Chancellor and the Ministers whom he had with him did not have the benefit of hindsight. The legal aid budget was some 25% of the budget of the Ministry of Justice, and it was a budget of some £2 billion. In these difficult economic times, it was inconceivable that such a budget, which was 25% of the Department, would be ignored. Consequently, decisions were taken, and the decision is to reduce that budget from £2 billion—which is one of the most expensive in the world—to £1.5 billion, and at £1.5 billion, Mr McDonald, it will still remain one of the most expensive legal aid budgets in the world. The decisions were taken bearing in mind that we had the difficulties, but also with the recognition that many people were going to court who were not being best served by going to court. For example, it might be better to go to mediation.

Andy McDonald: We will come on to mediation.

Mr Vara: If that is a subject that we will come to later on, that is fine. That was one of the considerations. We also took the view that, given the financial constraints, it was good and

right to target the money where people's liberty or lives were threatened, or where they were being threatened with homelessness or eviction, rather than, perhaps, when there were financial issues involved. I do not accept the view of the National Audit Office, but I do say that the National Audit Office speaks with the benefit of hindsight. Difficult decisions were taken in 2010. They were taken with good intent. I am confident that the £1.5 billion that will still be spent after the reductions will be more than sufficient to sustain the legal market to ensure that those who are eligible do have access to legal advice and that there will be adequate providers as well.

Q289 Andy McDonald: I am a little puzzled because it, surely, was not with hindsight that you needed to understand that these reforms were going to hit upon the most vulnerable in our society. I would have thought that that was self-evident. Surely, our justice system is at the cornerstone of our society and one that has to be protected. Be that as it may, the National Audit Office criticised the MOJ for failing to understand the civil legal aid market before the reforms and for conducting only limited monitoring of the impact on providers after the reforms. How are you going to ensure the sustainability of the legal aid market, and how will you now monitor the impact of reforms on providers?

Mr Vara: We have extensive measures in place to monitor what is happening. As I said earlier on, LASPO itself says that there will be a thorough review within three to five years after implementation, but we are not waiting for the three years. We have started the process and we are taking a view on what is being said. The National Audit Office did say that we are on track to achieve the savings that we wish to achieve of £300 million. They also acknowledge that, in terms of any derogation from that £300 million, they can only find £3.4 million, which they consider is a consequential issue of litigants in person. If we are going to quote regularly the National Audit Office, perhaps I may come back and just say gently that that very report says we are on track to achieve the savings which we wish to achieve. They also say that there is a 1% possibility of derogation.

Q290 Andy McDonald: Mr Vara, thank you for the information about being on track on savings, but it was the impact upon providers that I was interested to hear about from you.

Mr Vara: I believe that there are enough providers. You will be aware, Mr McDonald, that we are undergoing a tender process at present. We have consulted widely. We have spoken with the very people who will be needing the services of providers. We have spoken with the professions themselves—the Law Society, the Bar Council and a whole variety of other people who are part of that big picture—and we believe there will be adequate provision from providers and the legal market will be sustainable. I say again that £1.5 billion is a very significant sum of money. I cannot believe that that sort of money does not buy very good—and a large amount of—legal advice.

Q291 Andy McDonald: Do those providers agree with you about assurance that the market is sufficient?

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

Q292 Chair: Minister, when the permanent secretary was asked at the PAC about the evidence which was the basis for this policy, bearing in mind the desire for an evidence-based policy, she said that the Government were absolutely explicit that they needed to make the changes swiftly. Therefore, it was not possible to do research about the current regime before moving to the cuts. She said: “I was simply saying, in terms of the evidence, that the most critical piece of evidence that was relevant to the decision that was made ‘was the size of the spend’.” That’s the reality, is it not?

Mr Vara: There is a reality that we had to take very urgent action, and that we did do. In an ideal world, it would have been perfect to have a two-year research programme speaking to all the stakeholders and then come to a decision. Sadly, the economic situation that the Government inherited did not allow that luxury. We had to take quick decisions. There was also the feeling that a large part of those savings would enable the ultimate end users of the legal services—the public—to be better served by not going through the legal route but by other routes, such as mediation and the like, to which Mr McDonald says we are going to return later on.

Matthew Coats: We regularly review market capacity to assure ourselves about coverage and sustainability. We have in the region of 1,600 providers in civil across the country. Every time that we re-tender for a specific area of law, our recent experience is that we have had more bidders than we had in the previous tender for that area of law. In addition, when you compare the number of people who withdraw from the market—there have been plenty of predictions about how people would have to withdraw from the market—the number of voluntary withdrawals, if you compare last year with the year before, has gone down.

Q293 Mr Chope: One of the consequences of the reforms has been an increase in the number of litigants in person. In the family courts alone, that figure is some 18,000. The research that was published by your Department, from Professor Trinder, showed that that can have a significant impact on the judiciary, the court staff and others involved in the court process. What are you doing in response to Professor Trinder’s findings?

Mr Vara: Thank you, Mr Chope. Again, it is important to put matters into context. Even before the legal aid reforms came into play, in 66% of private family law cases, at least one of the parties was unrepresented. Following LASPO, that figure went to 74%. It is important to recognise that courts were very used to dealing with litigants in person, and this is not something new, although there is a small percentage by which the number of litigants in person have increased. That being said, we are mindful of the increase. We have taken note of the Trinder report. We are trying to assist, as best we can, and recently,

in October 2012, the Government announced measures to assist litigants in person. For example, we have made better leaflets available, we have online advice available and guidance, and we have online videos available. We are proposing to make sure that, in the court structure, there is a dedicated person who is responsible for dealing with litigants in person and, indeed, that there is a specific judge who has responsibility for litigants in person. We recognise the issue. We have taken action and we will be monitoring it to make sure that litigants in person are assisted as best as possible. I repeat, it is not something that is new. Courts and judges are used to dealing with litigants in person. They have a few more to deal with now.

Q294 Mr Chope: Sir James Munby told us that this is an issue of increasing concern to him and to his colleagues, so much so that they are now investing a lot more effort in training judges on how to deal with litigants in person. The strong impression he left with this Committee when he gave evidence was that the judges were increasingly having to burn the midnight oil in looking through all the documentation, because litigants in person are not necessarily very good at separating the wood from the trees. So, in order to ensure justice, there is a lot more burden upon the judiciary. Do you accept that and, if so, what is your response to it?

Mr Vara: The increase from 66% to 74% is bound to increase some of the work load. We have tried to help out as best we can. For example, where there are litigants in person, we are ensuring that the court will take on the responsibility of preparing court bundles so that the judiciary, hopefully, will find that litigants in person have all the papers in the right order. We are also assisting by ensuring that where there needs to be the service of applications the court is undertaking that. It was the case before that litigants in person, with the best will in the world, were sometimes not able to serve all the proper applications. We are assisting. It is a process in which, hopefully, in a year's time, people will be able to say that progress has been made, efforts have been made and it is improving. I do not deny that there are issues at present, but we are taking action to ensure that that is dealt with.

Q295 Mr Chope: I am going to come in a minute, in a bit more detail, to possible solutions. We have heard that there have been specific cases where the Legal Aid Agency has refused to allow public funding for a court-ordered expert report, which is crucial to determine the case, where the other party is a litigant in person and cannot afford to pay half the costs. Is it appropriate that the Legal Aid Agency is preventing some family courts from obtaining expert evidence required for the court to make a decision in the best interests of the child?

Mr Vara: The Legal Aid Agency is bound by legislation and case law. It has its rules. Where people fit the criteria, funding is available. You will appreciate, Mr Chope, that we have to operate within those rules. This is taxpayers' money. We have a duty to the taxpayer to ensure that that money is properly utilised according to the rules as prescribed by Parliament and case law. It is also fair to say that, where you have one party who is legal aid assisted and another is not, the issue of apportionment comes into play. It cannot be right that, when you have two people who are both going to benefit in a particular case from an expert report, there is an expectation that only the legal aided party will pick up

the full cost of the expert report. There has to be an element of apportionment. The person who is legally aided will pay a portion of the expert fees when they qualify for legal aid.

Q296 Mr Chope: You are both familiar with what Sir James Munby said in the case of *Q v Q*, where he said that, if the legal aid authorities are not going to fund this expert evidence and it is required for the interests of justice to be served, then the courts themselves are going to have to start paying for these experts. That is, effectively, the taxpayers paying for the experts, wearing a different hat. What are you doing to address that issue?

Mr Vara: There is the issue of what Sir James Munby said in *Q v Q* in terms of whether it be expert reports or whether they require payment for an advocate to cross-examine a witness. I take the view that the Legal Aid Agency, as I said, is bound by a framework set by legislation and case law. Where Sir James Munby speaks in the terms he does, it broadens the debate into the powers of the judiciary to be able to do that, and the powers of the courts. I, for one, do not accept that a judge can order a court to pick up the tab for advocates when the Legal Aid Agency, having gone through the proper procedures, has felt that the person does not qualify.

Q297 Mr Chope: So you dispute what he said, which is: “It is, after all, the court which, in accordance with FPR [Family Procedure Rule] 1.1, has imposed on it the duty of dealing with the case justly.”

Mr Vara: In *Q v Q*, Sir James Munby made certain comments and he said he was considering the matter. He did not say that the court would do that. He said he was considering it. My view, as part of the debate of that consideration, is that I do not feel it is right that a court should be able to order somebody to have an advocate for their purposes, because the judiciary is very used to having litigants in person.

Q298 Mr Chope: Why is there no statutory bar on alleged abusers personally cross-examining their alleged victims in the family courts?

Mr Vara: There has not been a bar, or there was not a bar, before LASPO, and there is not one now. Judges are well trained in these matters to ensure, where you have a situation of a defendant cross-examining somebody who is also a victim, that it is done appropriately and sensitively and, where necessary, those questions may even be asked by another party. There is the use of video conferencing or screens. Judges are trained to deal with this situation. In the criminal scenario there is a bar, but there is not and has not been in the family scenario. That pre-dates LASPO.

Q299 Mr Chope: If there were such a bar, would there be any implications for the legal aid system?

Mr Vara: There would be an issue of costs. That would have to be decided.

Q300 Mr Chope: A judicial working group has been set up on litigants in person. To what extent is your Department involved in that?

Mr Vara: It was a judicial review group. As such, we were not a party to it because it was the judiciary who dealt with it. We have, however, taken note of recommendations and, as we have always done, we will continue to work with the judiciary to ensure that we get the system working as efficiently as possible. We have the responsibility of the administration of the courts, while the judiciary has the right to decide on the actual judicial aspects. We do take on board what they say and we are trying to work with them to improve the system.

Q301 Mr Chope: Why have you cut the long-term funding of the legal website Advice now?

Mr Vara: We are constantly trying to update and ensure that the facilities we have available are fit for purpose. Occasionally, we take the view that there are other measures that may be used in terms of better communication. There are procedural matters here, but, believe me, our aim is to ensure that as much information as possible is put out for the public to be able to access it as easily as possible and that it is in as user-friendly a way as is possible.

Q302 Mr Chope: Which is exactly what the Low Commission said was important and should be done. The Low Commission commended the Advicenow legal website as being a really good example of this in operation. Why have you changed your mind about that?

Mr Vara: The Low Commission, to be precise, was putting forward proposals that it hoped would be put in parties' manifestos for them, possibly, to implement post-election. They have come up with proposals for a future date rather than for implementation now.

Q303 Mr Chope: Another suggestion that they made was that the Courts and Tribunal Service should contact litigants in person before a hearing to check they have the correct papers and other evidence to ensure a case will be able to proceed. Are you considering making funding available for that?

Mr Vara: The Low Commission speaks in terms of early intervention. It comes back to the earlier issue of costs. Suggestions, well meaning that they are, do have a cost implication. We have had to make reductions in the legal aid budget. We have targeted those where we feel they are best targeted. That is dealing with people at a more serious stage rather than at an early stage.

Q304 Mr Chope: Can I ask about McKenzie friends? There are a lot more McKenzie friends around, including an increasing number of, effectively, professional, paid-for

McKenzie friends, people who are unregulated and for whom there is no proper accountability. Are you concerned about the increase in the number of professional McKenzie friends, and do you have any plans to discuss the issue of regulation?

Mr Vara: McKenzie friends are an increasing part of the legal framework. I have discovered that some are very part-time and may assist in only a small number of cases throughout a year, whereas there are others who do it much more so. Some are unpaid and some are paid. It is an issue that we are looking at and monitoring. One of the suggestions is that in the immediate future they might wish to consider setting up an association, but in terms of regulation we have no plans, at present, for the regulation of McKenzie friends. Clearly, it is something we will be keeping an eye on.

Q305 Mr Chope: The judiciary have told us that they are looking into the issue of professional McKenzie friends, not least because a professional McKenzie friend, unlike a professional lawyer, has no duty to the court. That can have a big impact upon our system of civil justice.

Mr Vara: Certainly.

Mr Chope: Surely, this is an area where you, as the Justice Minister, should really be concerned, is it not?

Mr Vara: It is an issue which I have taken a very keen interest in. My view at the moment is to watch and listen more carefully. As I say, there is a thought that there ought to be an association, but, in terms of proper regulation, at the moment the courts do have ultimate power to decide on what role a McKenzie friend can and does play in the court. It is still for a judge to decide the extent to which a McKenzie friend can assist. We do have that check at present, but it is clearly something that does need to be looked at as time goes on.

Q306 Mr Chope: Post-LASPO, the NAO found that there are 18,000 more litigants in person in the family courts alone. Is it realistic to expect the recently announced £2 million over two years to fund sufficient help to mitigate the impact of litigants in person on the courts and ensure access to justice?

Mr Vara: Again, I go back to the figures I mentioned earlier on. Before LASPO, in 66% of cases in family law, at least one of the parties was unrepresented. It is now 74%. It is not something that the courts were completely unaware of. We are, however, very keen that people do not end up in court. There is the issue of the taxpayers' money but there is also the issue of the individuals. The court process is a confrontational one. It is a process that causes a huge amount of upset and misery for the parties involved. If there is a better way of trying to resolve their difficulties, we should actively be looking at it. That is what we are hoping will be so with mediation.

From a taxpayers' point of view—because, ultimately, we have to remember that this is taxpayers' money and it is our duty as Ministers to ensure that taxpayers' money is best utilised—there has to be some argument in a case where you have the choice of having two sets of solicitors paid for by the taxpayers, two sets of counsel, where counsel are

involved, paid for by the taxpayer, and then they go to court, the structure of which is paid for by the taxpayer. In the process, you have two parties, all of whom are experiencing deep upset and trying to resolve a deeply personal issue. The alternative is that, perhaps, they should be encouraged to go to a mediation process whereby it can be more constructive engagement rather than constructive opposition. We take the view, genuinely, that that is good for the individuals concerned. That is why we are hoping that more people will go there and that the figures you have referred to, Mr Chope, will show a decrease as time goes on. The difficulty we have with mediation is that it requires a behavioural change. We have all heard people saying, "I'll see you in court." I am not aware of anyone ever having heard, "I'll see you at mediation."

Chair: We will come back to that.

Mr Vara: Right.

Chair: I should explain that there have been problems on the rail and tube system this morning, which has led to a couple of our members joining us later than usual. I will take that into account and invite Mr McDonnell to raise a supplementary question on the group of questions that we have just been discussing.

Q307 John McDonnell: Minister, I was late because of a cancelled train on the Bakerloo line. I want to bring you back to Sir James Munby's statement. I do not want to draw the judiciary into any political dispute here. He said: "And, in the final analysis, it is the court which has the duty of ensuring compliance with Articles 6 and 8 [of the European Convention on Human Rights] in relation to the proceedings before it." You must accept, mustn't you, that, where a court finds that someone—a litigant in person, for example—is not sufficiently represented, advised or supported in a way such that there is not compliance with those articles, the court does have a duty to act?

Mr Vara: Good morning, Mr McDonnell. We have tried to ensure that the exceptional case funding provides funding to make sure that where people need to have funding to fulfil their rights under the European Convention on Human Rights, or any other European Union regulations, they qualify for funding. That is the purpose of the exceptional case funding provision that we have made available. The issue arises where people take the view that they should qualify, and they don't. That is an issue of interpretation. As far as the Legal Aid Agency is concerned, we have two sets of eyes that look at all the applications. They are taken very seriously. Sir James Munby is speaking from the point of the judiciary, and he has spoken quite eloquently outside the court as well, but we do try to work as best as possible with the judiciary to make sure that all those who fit the criteria get the funding that is available for them.

Q308 John McDonnell: You have dealt with the exceptional case funding already. On that point of principle, it is the duty of the court to act in those instances, is it not?

Mr Vara: It is the duty of the court to interpret the law and to work with the systems that we, as a democracy, have before us. The Legal Aid Agency is set up and there is legislation and case law that underpin it. It has to operate within those confines. There was

a time when Ministers had discretion for funding in legal aid cases. Ministers no longer have that discretion because the Agency is independent, and that has to be right. We have set down the rules, the rules are there, and they operate by them. The courts have always managed in the past in difficult circumstances. That is the nature of the courts, and the nature of a judge's job is to ensure that, whatever circumstances come before her or him, justice is delivered. If that means there are litigants in person they will have to deal with them, or, in the case of articles 6 and 8, they may take one view, but we, for our part, take the view that there are rules by which we are guided.

Q309 Chair: Is it not pretty clear that, in circumstances where a court decides that either representation or an expert report is required to satisfy articles 6 or 8, that should be a pretty good steer to those who are administering the exceptional cases fund, which is massively underspent, that it is probably a case that they ought to deal with?

Mr Vara: In some of the cases that I am aware of, when they were looked at again, the applicants had not given sufficient information in the first place, and it was a means issue. Matthew may want to come back on this. Had the applicants provided all the information in the first instance, they would have qualified without the judge having to make that steer in the first place.

Q310 Chair: That brings up another problem, which is the form. It is a massive document, which most people think requires the assistance of a solicitor to complete. Solicitors may be reluctant to take this on because that takes up quite a lot of time on their part, with no certainty that it would be granted. This is not a form, as it currently stands, that a lay person is likely to be able to complete, is it?

Mr Vara: I will invite Matthew to come in on that, but can I just make some preliminary comments on that? At the moment, a person can obtain a preliminary view by simply sending some facts without filling in the form, and that can be obtained simply by writing an e-mail or, indeed, by telephone. I accept that the form is a detailed one and perhaps Matthew might want to come in on that.

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

Can I reassure you on a more general point about compliance with judgments, which is one thing you raised? There have been judgments. The exceptional case route was always likely and even designed to be changed by judgments and case law—and, indeed, it has around asylum and immigration. The rate of grants has changed accordingly. It was always the intention that the scheme would mature over a period of years and be influenced by the courts.

Q311 Andy McDonald: Could I ask a supplementary on the issue of the exceptional case funding in terms of the timescales taken to make a decision? Often, people will be coming up against deadlines and have hearings scheduled, yet they do not know whether they have funding for a very significant matter. I have personal experience of this myself, so I declare that right from the off. It often creates immense difficulties. What is the thinking of the MOJ about deadlines and timescales for decisions?

Matthew Coats: We have set a timescale of 20 working days to make decisions on exceptional case funding, and in the overwhelming majority of cases we have hit that. Some cases, by definition, are complex and take some time to clarify. We also realise that some cases have a level of urgency around a court hearing and, indeed, there are other factors. We prioritise those within the team. The speed at which they are dealt with is much quicker. It is around half of that service standard. We have made available a helpline so that people can speak to the exceptional case funding team to get clarification of exactly what is required. We took great care, in advance of the new arrangements coming into place, to recruit, train and supervise a team to do the job properly. I believe that we do.

Q312 Andy McDonald: We have already touched upon the issues of early intervention. In its final report, the Low Commission concluded that focusing on the seriousness of the position that the claimant was in “creates a perverse incentive to wait until things reach a crisis point. If the government wishes to see individuals resolve their problems outside the formal justice system, removing the availability of early advice to help people resolve their problems before they become more intractable does not make sense.”

Lord Dyson commented that that legal advice was better value for money than legal representation. The Committee has heard evidence that focusing money on early advice not only helped deter unnecessary litigation but was a cheaper way of ensuring access to justice than confining it to the more serious cases.

Lord Low told us here that part of the work of the Low Commission showed that early legal advice was indeed better value for money and a more effective way of deterring unnecessary litigation.

Is the MOJ aware of these conclusions, which are supported by the experience of our witnesses?

Mr Vara: Not only am I aware of the Low Commission but I actually had a meeting with Lord Low as well. I come back to one of the points I mentioned earlier on, which is that it is an issue of money. We have allocated that £1.5 billion in areas where we feel it is most serious and where we can afford to do so. We do not have the luxury of being able, also, to provide funding at an earlier stage, which is where Lord Low is going.

Q313 Andy McDonald: But does that not cost money at the end of the day, when people's situations become worse?

Mr Vara: From our initial analysis, the views are mixed, but we keep an open mind. We are open to persuasion because, ultimately, we would like to see justice and access to

justice for as many people as possible. If the proposals suggest that this is a means of saving money in the long term, it is certainly something we are going to look at seriously. The results of our own research—which is inconclusive, I might say—show that it is yet something that we need to look into further. Indirectly, the Government and the taxpayer are funding early intervention through law centres, citizens advice bureaux, and so on. I am aware, for example, that in Coventry, where the Coventry law centre works very well in partnership with the Coventry and Warwickshire council of disabled people, that they have had two-hour workshops to try to give people some knowledge beforehand and, where necessary, they will follow it up with one-to-one sessions. There is also network collaboration in Avon and in other parts of the country. While there may not be a specific direct funding for early intervention, in a roundabout way the taxpayer is contributing towards that measure.

Q314 Andy McDonald: But if you conclude that early intervention is the right way to go—and, as a Committee, I think I can say quite confidently, that we have heard evidence across a range of issues during the past several years where the focus has been on better outcomes being achieved by early intervention—could the current legal aid system be reformed to take account of what the Low Commission has said about early intervention? Could it be changed?

Mr Vara: Mr McDonald, you will forgive me if I don't make policy decisions on the hoof in this Committee. Certainly, we would be happy to look at all the available research. We will continue doing our own, and we will make changes as, when and if required. I repeat the point that £1.5 billion is being spent on legal aid. In fact, last year, it was £1.7 billion. Our ultimate aim is to go down to £1.5 billion. That does provide a lot of legal advice. There is also provision available through the agencies that I have already mentioned. Early intervention is certainly something that we may talk about, but we are looking at processes of sorting matters before they get to court. The court should be the last resort, and that is where mediation comes in, to which, I was told before, we are coming.

Andy McDonald: We will come back to that. We will get there.

Q315 Chair: One of the issues that this Committee has identified in previous reports is the costly nature of poor decision making by Departments like DWP and the Home Office, which lead to extensive tribunal and court proceedings. We have looked at ways of trying to incentivise better decision making. We have argued that there is the polluter pays principle. The Low Commission took a different view of how you could create an incentive. What is the Department's thinking on this at the moment? Do you recognise that this is something we ought to be making progress on?

Mr Vara: Sir Alan, you raise a very good point. One of the things that DWP is doing is ensuring that, where a case does go to appeal, the officials who took the decision in the first place are taking note of what the judge is saying, so if there is, for example, a repeat practice of a particular type of decision reaching an appeal and getting overturned, then, where lessons have to be learned, they are being learned. Where decisions are taken, it is important that there is a review and reconsideration, rather than ultimately ending up in

court. When decisions go to court it is something we need to learn from. Ideally, we want to learn from those decisions with a view to making sure that future decisions do not end up there. For example, in employment tribunal cases, there is a provision that people must go to ACAS to try to resolve the dispute beforehand rather than ending up in the tribunal in the first place. The preliminary reports on that show that many people have availed themselves of that process and that cases have come to satisfactory conclusions. I agree that we do need to take note of what is being said in the courts and try to avoid getting there.

Q316 Chair: The Low Commission recommended that the MOJ established further protocols with the DWP, the Home Office and UK Visas and Immigration about taking steps to improve the quality of decision making, and that the Ministry of Justice should report to us and the PAC annually on how these protocols were being observed. That is a rather more extensive procedure that you have suggested. It is not merely the obvious point that, if the Department loses in court, it should tell its staff why it has lost and not make the same mistake, but that there should be a much more active process of saying, “We don’t want to end up with appeals because we should get the decision right the first time.”

Mr Vara: Clearly, Sir Alan, you will appreciate that we work closely with these various Departments, because they end up in court, for which we, the MOJ, are responsible. There tend to be departmental policies and issues. In terms of what the Low Commission proposes, there would need to be detailed discussions with other Departments as to whether such measures are necessary or not. Clearly, it is something that needs to be looked at in further detail. It is a proposal but one that will be considered in the remit.

Q317 John Howell: I wanted to pick up on your comment on, essentially, this loop that you have got going—that lessons of poor decision making are referred back to them. I want to ask a question about the timing of that because it is not my impression that we are seeing very much in the way of good timing for those lessons to be learned.

Mr Vara: You will appreciate, Mr Howell, that these are decisions that are part of the DWP remit rather than the Ministry of Justice. We administer the courts, but my understanding is that those decisions are filtering through and that officials are taking note of them. To the extent that they are taking note and making sure that they do not end up in the appeal courts again, I am not aware of the precise details of that, but I do know that there has been some impact and it has led to better decision making.

Q318 John Howell: You used the term “filtering through”, and that is the point I am trying to get at—that this is a situation where it is necessary to have much more than simply filtering through. It needs some active work to feed those decisions back and to get changes.

Mr Vara: Certainly, and I would hope that the Departments concerned would be treating them, as I suspect they probably are, with the respect that they deserve and making sure that they don’t just land on somebody’s desk, but that they are read and passed to the

relevant people so that decisions are appropriately taken. You will appreciate that it is not for me to tell another Department how they should be operating and so on.

Chair: I think it is for the Ministry of Justice to say to other Departments, “Stop landing so many problems on our doorstep.”

Mr Vara: We can certainly have a dialogue with the other Departments in terms of trying to encourage them to do things that will make life better for everyone—their Departments as much as ours.

Chair: A number of witnesses have pointed to the removal from scope of housing benefit cases as a decision which leads to increased costs because they then end up in a possession hearing, which does attract legal aid. Had the right advice been given at the first stage, you wouldn’t have got into the legally aided stage.

Mr Vara: Sir Alan, you raise a good point, but, again, I come back to the issue of difficult decisions having to be made with limited funds. We had to make some tough decisions and we took the decision that, at an earlier level, there were issues of finance. Do we fund that or do we fund people who are threatened with eviction, or there is a repossession issue and they are facing homelessness? I am afraid, faced with difficult decisions, we have decided to fund the people who are, literally, facing homelessness.

Chair: Most people would have agreed that that was a priority, but if you are creating more such people, you are increasing your own expenditure by measures intended to save money.

Mr Vara: I would hope that some of the other agencies we work with will be able to give them the sort of advice that otherwise they would not get or cannot get from legal aid.

Q319 Jeremy Corbyn: Before I ask my questions, I am very pleased with your references to the European Convention on Human Rights. On human rights, I assume you are going to endorse its works.

On the question of the operation of the Legal Aid Agency, many of our witnesses have said that it is overly bureaucratic in its approach and, indeed, some providers who want to provide legal aid services—and there are not necessarily too many of those around—are not being given cases because of this bureaucratic approach, and this has even been criticised in court by judges. What are you doing to monitor the work of the agency?

Mr Vara: Matthew may wish to come in on this one, but where there is bureaucracy that is hindering the process, we are happy to look at it to make life easier for all concerned. I do not know if Matthew wants to come in with some more detail on that.

Matthew Coats: Sure. We hope it is not bureaucratic. We need to make sure that public money is spent well. There have been issues in this area. The accounts of the predecessor organisation were qualified for reasons of accuracy of payment. We have made sure, through proper stewardship procedures and checking the details, that the error rate is now down to 0.7%. There is an obligation for us to keep it there.

That said, we do not want to make it more difficult to get the ability to have legal aid, so we have got an innovations group with providers, a controls optimisation group with representative organisations, and regular dialogue with both providers and their umbrella organisations about how we can do that. Where we can introduce changes, we do. As to the restrictions and procedures for prior authority for an expert witness, for example, at its peak, we were asking for 300 a week to be sent in. We have streamlined things, so that has gone down to 80 per week. We used to require people to provide us with three months-worth of bank statements to assess eligibility and we have reduced that to one month, given the challenge that people will find. So there is a balance between the level of check and stewardship and what we ask providers to do.

At a time when there is less legal aid money about, it is particularly important to get legal aid payments to people in a timely fashion, so we have speeded up the processing, and civil bills are being processed in 10 to 12 days at the moment, which is faster than they have been done historically. That is an important contribution that the agency can make. So, no, we don't seek to be bureaucratic. We do have responsibility for the stewardship of public money. We do seek to make improvements and we do think that timely payment is incredibly important.

Q320 Jeremy Corbyn: I do welcome the more rapid payments, because that is very helpful, particularly to small practitioners who often have cash-flow difficulties. That is welcome. Have you taken on board the criticisms made by Sir James Munby, the President of the Family Division—he raised the matter in one particular case in the family court—about the bureaucratic procedures? The Housing Law Practitioners Association told us that they were very concerned about the provision of cases for people who desperately needed to be assisted. Gillian Guy, chief executive of Citizens Advice, described it as a “technical minefield” for getting access to legal aid. Julie Bishop of the Law Centres Federation expressed her concern as well. These are all very credible people who have done a huge amount of good work in many areas. If they are expressing concerns, what are you doing to address their worries?

Matthew Coats: As I have said, we have a variety—no one size fits all—of mechanisms for discussion for taking feedback. Where we can make improvements within the framework set for us by Parliament to operate the procedures, we do. We try to provide information to providers about how to access the service. We have a strong and talented team in the field that supports providers in day-to-day operation of the scheme. I believe, from the examples I have given, we listen to feedback from people. In the end, we are governed by operating a set of rules set by Parliament, by case law and, in some instances, by guidance from the Lord Chancellor, and doing so in a transparent way, which I believe we do.

Q321 Jeremy Corbyn: The reality is that you are underspending, many people who are desperate for debt advice do not get it and, as a result, end up homeless, repossessed or there are all kinds of horrible outcomes, and you have a very technical and bureaucratic approach which means that many simply do not get access to justice, even on a reduced level of legal aid. It just looks to me as though the Treasury is saying to you, “Save money by being bureaucratic and slow,” and then they get the money back at the end of it. Surely, you have a

duty to make sure that the maximum amount of legal aid money is available to those who are entitled to it and deserve it.

Mr Vara: May I come in here? There is an issue of balance here. We have to ensure that the rules are sufficiently robust to make sure that those who are genuinely entitled do get the money and those who are not do not. The rules are there but, in terms of enforcing them, we have to have a process. Where revisions can be made to improve the process, we are listening and we do make the changes. There does come a point when we do need certain evidence or certain facts from some people, and if they do not provide that to us, we do not have the evidence to justify the payment because the taxpayer expects us to have the proper evidence. It is not always the case that it is the bureaucracy. It is that the rules require we need to look at some information. It may be that other parties have to go away and find that relevant information, which I would like to think they would recognise as being necessary in the proper performance of our duty rather than it being an inconvenience. It may be all too obvious to them that they need the funding, but it needs to be pretty obvious to us as well, based on the evidence. There is the perception side. They know it is obviously due to them, but they need to give us the evidence so that we, likewise, can give it to them. We are more than happy to give people the funding to which they are entitled and for which they qualify. We encourage people to apply. We have had a change of system with LASPO. Some of the uptake has been less than we would have liked. We are looking into that. We want to make sure that people are not deterred from applying when they should be.

Q322 Jeremy Corbyn: If we met at the beginning of the next Parliament in six months' time, assuming we are all still here, would you be able to tell me that the spending level is what it should be, that there are not delays and unnecessary bureaucratic obstacles to getting, in particular, debt advice?

Mr Vara: I don't know what the position is. There is the small matter of a general election. I hear what you say in assuming we all get here, but in such matters I am making no assumptions.

Chair: We now come to the subject you have been waiting for.

Q323 Andy McDonald: Mediation. Minister, in an evidence session on the National Audit Office's report, "Implementing Reforms to Legal Aid", on 4 December, the permanent secretary, Ursula Brennan, accepted the assertion in the impact assessment for LASPO that the availability of publicly funded mediation would deter people from going to court was a claim for which—and I quote—"we did not have evidence." Is she right?

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

Q324 Andy McDonald: I am sorry. Evidence comes before the decision is made. What does it say about evidence-based policy making if you don't have evidence to justify the policy decision that you are taking?

Mr Vara: The evidence we had was that this country was in the worst economic situation of anyone sitting round this room, in their lifetimes. When you are faced with such a decision—I accept that you may disagree with me on that point—and from where the Government were sitting—

John McDonnell: It does not justify a leap in the dark, though, does it?

Mr Vara:—the spend, spend, spend era was over, and we needed to have some serious decisions in terms of savings. So we had to take tough decisions. When you have a legal aid budget which is 25% of a Department's spending, you cannot ignore it. When you look at that £2 billion expenditure, tough decisions had to be made and they had to be made quickly.

Chair: That includes, of course, the criminal legal aid area, which has not been as drastically affected as the civil legal aid area.

Mr Vara: Absolutely. There, there is the danger for people of loss of liberty, and criminal legal aid is available there. We have had to review all aspects of legal aid, including, of course, the fees that are paid to counsel and solicitors. On the civil legal aid side, where we hope to make some £300 million savings, a large part of it does come from the family side. We do not have the luxury of stepping back, when the economic situation was as austere as it was, to say, "Let's just sit back. Let's continue the funding. Let's have the luxury of a two-year research programme and then we will take decisions." We took decisions. We took them in good faith. As the NAO report says, we will get the targeted savings.

Chair: Let's get back to why mediation has not developed in the way that was hoped.

Q325 Andy McDonald: Indeed. The National Audit Office knows that, whilst the MOJ expected 9,000 more family mediation assessments in 2013-14, following the last LASPO reforms, there was actually a decrease of 17,246 or 56% in that year. The amount spent by the MOJ on family mediation fell in 2013-14. From the £24 million pot set aside to fund mediation, the Ministry spent only £9.4 million. Can you explain why the number of mediations have fallen so sharply when legal aid is available?

Mr Vara: I would like to think I did explain it earlier on, and that is that our expectations were not fulfilled and fewer people took up mediation. One of the reasons for that, of course, is that a lot of private family law cases that did go to mediation beforehand went from solicitors. It was solicitors who made the referrals. If people are not going to solicitors because they are no longer dealing with such cases, those sorts of referral have dried up. We did act as quickly as we possibly could. We have taken measures to make sure that people are aware of it. I am happy to say—there is still a long way to go—that the National Family Mediation reports that their members are reporting an increase in referrals of some 30% to 40%.

Q326 Andy McDonald: You say that, but the National Family Mediation has told us that they received no referrals from the gateway telephone service. What is the role of the gateway telephone service in encouraging mediation? Have you given that consideration? It has received no referrals at all.

Mr Vara: I don't know when they gave evidence to you, but the evidence we have from them is that some of their members are reporting an increase. I would like to think it is partly to do with the MOJ being proactive in making sure that people are more aware that mediation is available.

Q327 Andy McDonald: So the gateway telephone service is ineffective. Are you scrapping that, then, because it is not going to work?

Matthew Coats: We will look into exactly the issues with gateway telephone and mediation. Our role is also to ensure that there is a good network of providers available. We have got about 270 mediation providers providing services in about 1,700 locations. Given the issues that we have seen, we have decided to extend the contracts for a period and, indeed, to seek new providers to encourage access. We have received applications from around 65 more organisations that want to provide services. We are assessing that at the moment, to see whether they will be added to the network. Coupled with the measures that the Minister talked about, that should help with the uptake of mediation services.

Q328 Chair: It is as if, with the benefit of hindsight, the route to mediation was not understood when the Department made its decision. Clearly, it would have been difficult, given what you have said to us, for you to make the decision that we would keep legal aid for a wide range of family cases because it is a route to mediation. It is as if nobody noticed that, if you take solicitors out of the equation, the mediation is much less likely to happen.

Mr Vara: Sir Alan, we did take the view that people would, perhaps, themselves recognise that, obviously, they have a dispute when they are separating and that they would go to another forum. We expected that behavioural change to be there. We recognised that it was not. We took action as soon as we possibly could. For example, if one party was legally aided, then we ensured for the first mediation session that the other party would also benefit free, which was not the case before. We have made that change. We have made a publicity drive. We have started to improve communications. As I say, there is a gentle increase in the number of people out there. I come back to the clichés. We are all used to people saying, "I'll see you in court." We will probably succeed, but it may be a while yet when people start saying, "I'll see you at mediation." We have some way to go, and I hope that people will recognise that that is beneficial not only from the taxpayers' perspective but for them as individuals where a mediation is less confrontational and more in terms of constructive engagement.

Q329 Jeremy Corbyn: I agree with what the Minister said—that mediation is obviously the best way forward. Funding at least the first mediation session for both parties, where legal aid is involved, is important. That is welcome. What can you do to monitor the way in which legally aided divorce or domestic issues are done so that there is a pressure on the legal representations of the person who is legally aided to go to mediation rather than go to court? I do not have the facts on all of the cases but, anecdotally, it sometimes seems to me that a legally aided solicitor goes to court quite quickly, and the other party then has to pay up whether they wish to go to court or not. Surely, the pressure ought to be the other way.

Mr Vara: Legal aid is still available where there is domestic violence, for example.

Jeremy Corbyn: Yes, and I absolutely accept that. That is welcome.

Mr Vara: In other areas, we are working on trying to get that behavioural change where people recognise that mediation is beneficial to everyone. It may not be beneficial to the lawyers concerned because it may mean less work, but from my perspective—you will appreciate this—it is not the job of the taxpayer to sustain the legal profession. We want to make sure that legal aid is available for people who qualify and that there are properly qualified lawyers who can give that advice. That is where we fit in.

Q330 John McDonnell: So it is best not to make policy on a wing and a prayer but on the basis of some form of evidence.

Could I just raise one other question—you do not have to answer it now—as there has been some concern in family cases that there is an increase in care proceedings as a result? Have you any evidence of that?

Mr Vara: Where children are involved, under certain circumstances, we do provide legal aid. In terms of what you say, I would need to look up the precise figures in terms of where that is going.

John McDonnell: Perhaps you could write to us.

Chair: Is that a question about public law proceedings resulting?

John McDonnell: Yes.

Chair: Mr Vara and Mr Coats, thank you very much indeed for your help this morning.