

Justice Committee

Oral evidence: Courts and tribunals fees and charges HC 396

Tuesday 9 February 2016

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Written evidence from witnesses:

- [Law Society of England and Wales](#)
- [Law Society of Scotland](#)
- [Bar Council of England and Wales](#)
- [Ministry of Justice](#)

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Members present: Robert Neill (Chair); Richard Arkless; Alex Chalk; Alberto Costa; Philip Davies; Mr David Hanson; Dr Rupa Huq; Victoria Prentis; and Marie Rimmer.

Questions 330–447

Witnesses: Chantal-Aimée Doerries, Chair, the Bar Council; Michael Clancy, Director of Law Reform, Law Society of Scotland, and Jonathan Smithers, President, Law Society of England and Wales, gave evidence.

Chair: Good morning, everyone. Thank you very much for coming to give evidence to us. I will shortly ask you to introduce yourselves for the benefit of those who are watching and for the record. For the sake of good form, I ask my colleagues on the Committee to declare any relevant interests. The relevant one from my point of view is that I am a member of the Bar, although I am not currently practising.

Victoria Prentis: I am, too.

Alex Chalk: I am a member of the Bar, and I am practising.

Richard Arkless: I am a non-practising solicitor member of the Law Society of Scotland, and I have dealt with Michael Clancy on a few issues in terms of briefing notes for parliamentary debates and for the Committee.

Alberto Costa: I am a practising Scottish solicitor and notary public, and a practising English solicitor. I know Michael Clancy in my former capacity as a council member of the Law Society of Scotland, and I have met Jonathan Smithers on a number of occasions to discuss, among other things, legal services regulation.

Q330 Chair: A number of us have met personally, but not in any professional connection, of course. We are all quite well known to each other. I ask the panel to introduce themselves, and we will then move on to questions.

Jonathan Smithers: I am Jonathan Smithers, president of the Law Society of England and Wales.

Chantal-Aimée Doerries: I am Chantal-Aimée Doerries, chairman of the Bar Council of England and Wales.

Michael Clancy: I am Michael Clancy, director of law reform at the Law Society of Scotland.

Q331 Chair: Thanks for coming to give evidence. We have had a good bit of evidence already, including from members of the profession in various other capacities. We are interested in looking at a wide range of court and tribunal fees, as you know. You have seen the response that the Government just published to the August consultation. In effect, they are saying, “We are not going to increase the capital money claims from £10,000,” among other things. Good? Bad? Comments? I imagine that most people would say it is a good thing.

Jonathan Smithers: Yes, it is indeed welcome that it is not going to be increased. That does not necessarily answer the question as to the level at which fees currently are.

Q332 Chair: Would you prefer to see them more or less?

Jonathan Smithers: Less.

Q333 Chair: How much?

Jonathan Smithers: It goes to affordability, which is the central part of it. We all understand the concept of cost recovery, but affordability goes to access to justice questions and the ability of every individual in the country to access justice. Indeed, as the Lord Chancellor recognised in his Legatum speech, there is the possibility of a two-tier justice system—for the rich and the poor. Any increase in fees will militate towards that, rather than against it.

Q334 Chair: From the Law Society’s point of view, you had concerns in your written evidence about the issue of being a “profit centre”. One would understand that. When we had evidence from the judiciary and others, there seemed to be a view that there was the possibility of cross-subsidy, although the evidence on that varied. It was an issue of proportionality. When a significant proportion is recovered, and so on, what is the right amount? What does the Law Society think about that?

Jonathan Smithers: The cross-subsidy point is indeed an important one. In principle, we would not agree that cross-subsidy in the justice system between civil and criminal, for example, or between civil and family, is the right way to proceed. It is not fair on citizens that one particular group is subsidising another in particular types of claims where there are genuine disputes.

Q335 Chair: Even though it might be common in other walks of life, you do not think that it is appropriate in this one.

Jonathan Smithers: Indeed. Yes.

Q336 Chair: Why? What is the difference?

Jonathan Smithers: For example, in the criminal justice system, the Crown is prosecuting individuals, so the Crown is taking responsibility. When two individuals have a civil dispute, there is no reason why they should necessarily contribute towards other areas—or indeed in family disputes, matrimonial disputes and so on.

Q337 Chair: As I understand it, the Law Society has an issue about the current level of money cost claims and about where the cap should be pitched. It is not that there should be no taxpayer contribution, but it is a matter of what is proportionate in the context.

Jonathan Smithers: Absolutely. It is about what is proportionate for access for justice. The increase is of sufficient level that many people are clearly barred from that, with fees potentially of £10,000, as you say, which are extraordinarily high for an individual. That will change the negotiating position of parties, particularly where one is much larger than the other. We have anecdotal evidence of that.

Q338 Chair: Ms Doerries, what is the Bar's point of view?

Chantal-Aimée Doerries: We would certainly agree. We welcome the fact that the cap was not raised, but we remain concerned about the continued shift in paying for the justice system away from the state and towards those who have the misfortune of, effectively, having to use the justice system and appearing before the courts. We were certainly surprised to see in the consultation response that the savings or the money that the Government anticipate making from the latest round is in the region of £15 million, which we would say is a relatively small amount, given the quite substantial risk for citizens in terms of access to justice and the competitiveness of the market. We remain concerned about the push in the direction of enhanced fees in circumstances where there has been no real or substantial evidence gathering to take into account the fee increases to date and the detrimental effect that we believe those fee increases have had on access to justice.

Q339 Chair: Is your view on cross-subsidy the same as that of the Law Society, or is it significantly different?

Chantal-Aimée Doerries: We do not support cross-subsidy. We think that the justice system is something the state should significantly contribute towards. Citizens, through taxes, contribute towards the justice system. When one looks at the role of the justice system in a functioning democracy and a stable economy, the state's provision of the justice system is an essential cornerstone. It seems to us rather arbitrary to require those who pass through the doors of the courts to contribute a greater amount, especially when some of them will not be best placed to make that contribution.

Q340 Chair: I get the impression that “significantly” does not rule out the question of some cost recovery. It is a question of how much.

Chantal-Aimée Doerries: For some time, individuals and organisations have had to pay court fees. We certainly accept an element of contribution towards the costs, but it is the cost subsidy and the enhanced costs that we have real difficulty with.

Q341 Alex Chalk: I just want to understand this. We heard evidence from the Master of the Rolls, who, effectively, said that the key factor is access to justice, and that you cannot have a fee that unacceptably impedes or impacts upon access to justice. Isn't that the issue here, which is more important than cross-subsidisation? So long as people are not improperly deterred from making a claim, does it really matter that much? Why get so hung up on the issue of cross-subsidisation?

Chantal-Aimée Doerries: We say that it does matter. I would certainly agree that access to justice is one of the fundamental issues. We would be very concerned about fee increases that impede access to justice. We certainly take the view that the fee increases we have seen in the last year have led to problems with access to justice. There is a more fundamental, underlying issue, which is that there is an obligation on the state to provide an accessible, functioning justice system. There seems to be a growing trend at the moment that perhaps views justice as a commodity—something that someone chooses to use, rather than a fundamental right within a functioning democracy.

Q342 Chair: Mr Clancy, what is your stance from the Law Society of Scotland's point of view?

Michael Clancy: The order does not apply in Scotland, of course.

Q343 Chair: Do you have any general observations?

Michael Clancy: To observe from across the border would be invidious, but we have court fees in Scotland, too. Our position is that we oppose the principle, but we recognise that the law is the law.

Chair: Understood.

Michael Clancy: The arrangements are somewhat different. We might get into that later in the session.

Q344 Chair: We have some specifics, which my colleagues will want to go into. I have a final point to make before I move on. Ms Doerries, you made the point that this is not a commodity, and I think we would all accept that, but is there an argument that some types of law and legal action are much more discretionary than others? Mr Smithers makes the point that when the state chooses to charge someone with a criminal offence, they do not have much option about being before the court, but you may, as a business, take a view as to whether or not you litigate a contractual dispute, for example. That is your choice. Against that, is it unreasonable to say that one of the things you might have to consider is the potential cost that you should put towards the system for doing that? Should there be a complete blank cheque for something that is your decision as to whether you sue or not?

Chantal-Aimée Doerries: Ultimately, if you are looking at some areas in relation to business, businesses will obviously take decisions as to whether or not to pursue, or indeed defend, litigation.

Q345 Chair: It could be an individual, too.

Chantal-Aimée Doerries: It could be. In a functioning society where we, effectively, have a stable democracy with an economic environment that entities choose to invest into and

carry out business in, a degree of certainty and consciousness of the accessibility of the system lies at the heart of it. If one looks even at the business context, I understand the idea of providing a business system whereby those who participate contribute to the cost of their making use of it, but the challenge comes when you are looking at enhanced costs. In relation to some capacities, you could have an SME with a claim of, say, £200,000, and it has to find £10,000 of capital up front when it is perhaps out of money. Perhaps it may ultimately succeed, but for six to 12 months it will be out of pocket quite substantially. One has to ask oneself whether it is right, in those circumstances, for some individuals or entities to cross-subsidise other parts.

In essence, one might say, having just had the 800th anniversary of Magna Carta; that it smacks of the state selling justice. I know that that sounds harsh but, in essence, that is what the proposals do in relation to enhanced fees. They do not just say that individual citizens or entities will be charged for coming to court, but that we are going to charge them more than the cost to the system of that individual coming to court, in order to cross-subsidise. I would say that that is something that society more broadly should be contributing towards, because all citizens benefit from a functioning justice system. It is not merely those who have the misfortune to end up in court. Even citizens who do not make use of the courts benefit from the fact that we have a functioning justice system.

Q346 Alex Chalk: Suppose it is a multi-million pound charter party claim, with two insurers slugging it out. Is it really unreasonable to say that those two insurers, for whom £10,000 in the context of a £5 million claim is absolutely inconsequential, should not be cross-subsidising, and that we should expect people in the street earning £25,000 a year to subsidise it instead? Is it really so unreasonable to ask them to pay their share?

Chantal-Aimée Doerries: First, those large corporations will be contributing, through the taxes they pay on the profits that they make. One of the challenges is thinking, as a starting point, that the system should pay for itself. What I am suggesting is that, in reality, society needs to recognise the benefit of the justice system. We do that with healthcare, and we do it with education. If anything, justice is as important to the way citizens relate to each other, to the way businesses are able to function and to the way parents have their relationships sorted out if they fall apart. It is right at the heart of a functioning democratic society. I would challenge the conception that, effectively, it needs to be funded predominantly by the users of the system, as opposed to being funded by citizens through taxes—all of whom benefit from the system. There are points to be made about international competition, but we can deal with that later.

Jonathan Smithers: Perhaps I could expand on that. We have general taxation, which pays for the making of statute law through Parliament, but we have a common law system that is the envy of the world, and in fact is mimicked around the world. The common law depends on judicial judgments. To an extent, the law we have in this country depends on individuals taking actions. If they are deterred from doing so, our body of common law will not increase and will not move. One of the great benefits is that it moves and reacts to international and national circumstances. Enhanced fees have the unintended knock-on consequence of stopping the development of one of our nation's greatest assets in the common law.

Q347 Victoria Prentis: I would love to carry on with that, but I think we had better move on to fee remission. This is to all of you. Do you think that the new “help with fees” system makes it easier for applicants?

Jonathan Smithers: I do not think it makes it more difficult. I understand that to qualify for fee remission you have to pay for the fee up front and then ask for it back later on. I understand that the rules are very complicated, and one needs legal advice to get through them.

Victoria Prentis: One is not supposed to.

Jonathan Smithers: Sorry?

Victoria Prentis: You are not meant to need legal advice to get through them.

Jonathan Smithers: No—indeed.

Q348 Victoria Prentis: Is that your experience, or is it just what you have heard?

Jonathan Smithers: I understand that it is needed. Indeed, the threshold for legal aid is below that, so there are relatively few people whom it will help.

There is another, perhaps conceptual, argument. Previously, when the fees were relatively small, they were possibly affordable from income, but fees of £10,000 are not. That is really capital expenditure. People who are having to pay them will have to find that money somewhere from their own capital. If they qualify for fee remission, it would be reasonable to suggest that very few of them will have that, so they will have to resort to borrowing—credit cards, payday loans or advances on the mortgage—which effectively becomes off-balance sheet borrowing for the Government. People are borrowing on their own account to pay the fees back to the justice system, which I do not think is what is intended. To answer your question directly, yes, fee remission is certainly welcome, but we do not think it is enough, and we think it is too complicated.

Chantal-Aimée Doerries: We would agree with that, certainly in terms of its not being enough. At the moment, it exists at the very bottom of the economic scale. That is absolutely to be encouraged, but we say that it should be a lot higher, particularly when we consider individuals with claims. The level of fees at the moment is a problem, and remission does not kick in early enough.

Q349 Victoria Prentis: Do you think there is sufficient awareness of the new system? What can we do to help that?

Jonathan Smithers: I do not think that there is. There is a general impression now that fees are extremely expensive, so people who may think about litigating will not know about the remissions and they cannot get into it in enough detail. It stops them before they get to that point. Having to pay up front and find remission later is itself a barrier.

Chantal-Aimée Doerries: What is quite interesting, to pick up the point that Mr Smithers made, and one of the things that has struck us in the past few years, is the perception among people of access to justice. When we look at the combined effect of the LASPO cuts with the court fees, there is a general sense of lack of ability to access the courts, even in circumstances where individuals might benefit from remission or might still fall within

the limited capacity where legal aid is available. That is one of the challenges—not just the actual situation, but the perception that it creates.

Q350 Victoria Prentis: Do you have any evidence of that? Has any work been done on it specifically?

Chantal-Aimée Doerries: Most of it is based on anecdotal evidence. The Bar Council is investing in carrying out a three-year review of the effects of LASPO, and that is certainly one of the things we would like to look at. It is one of the reasons why we have been calling on Government to carry out that review sooner rather than later. Understanding the consequences, both intended and unintended, is important before moving on.

Jonathan Smithers: There are some statistics regarding employment tribunals, where I understand the MOJ first believed that somewhere around the high 60s percent of claimants would be entitled to remission, whereas in fact only around 21% of claimants were entitled to it.

Q351 Chair: Any comments on the point about remission in Scotland? It would probably be around tribunals. Is that where it would apply?

Michael Clancy: In relation to courts it is quite a different situation, but it may be helpful to make the Committee aware of our system of exemption from fees, rather than remission.

Chair: Right. That is how you deal with it there.

Michael Clancy: That is a significant difference to start with. The exemption is based, for example, on the receipt of certain benefits—income support, working tax credit, pension credit and so on. There is also exemption in relation to people who are in receipt of civil legal aid or certain types of advice and assistance. That is quite a useful counterpoint, to see how another system deals with something of the same problem.

Q352 Chair: If we can trespass upon your time, perhaps you might be able to send the Committee a note as to how the system works in Scotland.

Michael Clancy: I would be delighted to do so, Chair.

Chair: That would be very helpful, thank you.

Q353 Victoria Prentis: This may be something you have not considered directly, but do you have any views on how high the fee remission threshold should be, specifically?

Jonathan Smithers: Perhaps that is something I can take back and submit some further evidence on.

Victoria Prentis: That would be very helpful.

Jonathan Smithers: I would be happy to do that.

Chantal-Aimée Doerries: Equally, though, I would underline the fact that considerations of that ought to be taken against the backdrop of further research on the impact to date.

Victoria Prentis: You have made your point very powerfully.

Q354 Alex Chalk: On how we determine court fees, we all know that the value of a claim is not necessarily the best guide to its complexity. Sometimes they can be inversely proportional, in fact. Equally, others say that it is terribly bureaucratic having a different system. My question is whether the value of a claim remains the appropriate criterion for setting the court fee. That question is to Mr Smithers first.

Jonathan Smithers: It is an interesting question. As you say, there is some merit in simplicity, and it is generally well understood. A value judgment is clearly made by people who are making claims on the basis of how much they might recover. As you correctly say, it does not speak as to complexity, and complexity is sometimes the interesting point that comes out in the building of common law. There is a judgment to be made. I suspect that simplicity would probably favour that, but it is a point that I am happy to take away and submit some evidence on later, if you like.

Chantal-Aimée Doerries: One of the challenges, as you pose in the question, is that you can have a case of very high value that takes two days and therefore uses much less court time; equally, you could have a claim of very small value that takes up a lot of time. You could have a claim that seeks no monetary relief between—picking up your earlier example—two large corporate entities that want a declaration in relation to the meaning of something. That could be dealt with briefly, or it might take longer, depending on the complexity. There are challenges, if one is going to go down the route of enhanced fees, in doing it simply based on money. Although it has the advantage of simplicity, it does not seem necessarily to reflect either the usage of court time or those who are most able to make that contribution.

Q355 Alex Chalk: Based on the existing system, as reformed, do you say stick with value as the principal criterion, or do you say that it needs to be reformed even now?

Chantal-Aimée Doerries: As I said before, we fundamentally disagree with the concept of enhanced fees. Within the system at the moment, there is the oddity of non-financial declaratory relief—I think the issue fee is around £480 or £450—even though the claim could take up a lot of court time, or the claimants could be in a better position to afford paying an enhanced fee than individuals or small SMEs fighting a £200,000 claim, who would have to pay £10,000. We fundamentally have a concern with the principle of enhanced fees and with doing it simply on the basis of the value at the time of issue. One approach would be to look at having charges during the course of the case. Rather than simply requiring parties to pay up front, it would require payment during the course of the process, although that would not necessarily deal with the issue.

Q356 Alex Chalk: Some witnesses have said it would become bureaucratic, complicated and difficult to administer. What is your view? Are you advocating staged payments, or are you saying that they should be up front on the basis of quantum?

Chantal-Aimée Doerries: My answer is that we would like to see some research done on the impact of the fees to date. Against that background, we could come back and answer the question. It is not that I am seeking, if I can put it somewhat colloquially, to dodge the question, but it seems to me that one of the challenges of the last two or three years has been the speed with which changes have been imposed on the system. I mean across the system—whether you are looking at the Jackson reforms, LASPO or court fees. We now have discussion in relation to potential online court and fixed fees. There has been a huge

amount of change in a very short period, with very little study as to what the impact actually is on access. One needs to do that before answering.

Jonathan Smithers: There has been a lot of news recently about a move towards fixed fees and how that is generally a good thing. If you were to move towards staged payments and so on, it would militate against the general direction of fixed fees and therefore the certainty that that gives. It must be balanced, entirely as Ms Doerries says, against access to justice.

Q357 Mr Hanson: We have touched on access to justice; it has been a feature throughout today's discussions. I paraphrase, but the Ministry of Justice is basically saying to us, "Don't worry, we've done some research. It's very qualitative, and we think it's going to be okay." That research was described by the Master of the Rolls as "lamentable". Have you seen the research? Do you have a view on it? Perhaps we could start with the Bar Council, because you cited your concerns over access in your evidence.

Chair: Do you agree?

Mr Hanson: I declare that I am not a lawyer.

Chair: You lead the way, Mr Hanson.

Chantal-Aimée Doerries: Sometimes I find that lawyers better understand the value of the justice system. The point is that, as I understand it, 18 phone calls formed the basis of the research that was carried out beforehand, and a BIICL paper—British Institute of International and Comparative Law—in relation to international competitiveness. Looking at the domestic side, I agree: "lamentable". Eighteen phone calls for such a substantial shift in the way that we charge people for using the courts?

Q358 Mr Hanson: Would you describe it as qualitative, which is what the Ministry of Justice said it is?

Chantal-Aimée Doerries: I have to be frank: I find it difficult to describe it as anything. It is insignificant; if you look at the 18 phone calls, who was telephoned, the practice areas they come from, their experience and who they were representing, it is a very small number. It is statistically insignificant and it does not begin to cover the breadth of topics, subject matters or claims, or indeed litigants who go through the courts. I would say that it is insignificant.

Jonathan Smithers: Similarly, you said qualitative, but it depends what quality. We are all aware that opinion polls are perhaps not always correct. The National Audit Office published a report in November 2014, concluding that the evidence base for legal aid reforms was poor. The data collected by the MOJ was flagged by the Public Accounts Committee in its report, "Implementing reforms to civil legal aid", which, again, said that it was poor. Those comments militate towards saying that the evidence produced so far has been poor.

Q359 Mr Hanson: The second argument put to us is that conditional fee arrangements and after-the-event insurance are available now, are in place and will be able to be exercised in a way that will mitigate against any cost-of-fee rise. Again, on a neutral basis, do you have a

view on whether the current arrangements for conditional fees or after-the-event insurance are of a satisfactory nature to compensate for the fee rise?

Jonathan Smithers: The fees have to be paid up front. The court fees have to be paid. Conditional fee arrangements and after-the-event insurance are methods of funding types of action, but they do not help with paying the fees up front. They may assist generally with litigation, but they also change the risk profile, particularly in non-money claims. Instead of the claimant understanding that they need access to justice and a dispute resolved, such arrangements are all about the cost and who carries the risk. If a firm of solicitors is acting under a conditional fee agreement, it means that there must be an uplift in order to pay for the cases that do not proceed.

Chantal-Aimée Doerries: We think it is unlikely that conditional fee arrangements and after-the-event insurance will, if I can put it this way, plug the gap or hole. I return to the point that it is also a fundamental misunderstanding, in a way, of what the justice system is there for, but it is not something where, at the moment, we have evidence to support any suggestion that it will solve the problems as they stand today.

Coming back to your first question about research, interestingly enough, that was not something the Ministry of Justice considered in the research that it had carried out. The principal people it contacted were debt recovery agencies. Looking at after-the-event insurance and conditional fee arrangements was not something that was covered by that.

Michael Clancy: It is something that we also have some experience of in Scotland, although we do not have conditional fee arrangements. Instead, our analogy is the speculative fee agreement, which is a type of no-win, no-fee funding, where an enhanced fee will normally be charged in the event of success. There are issues about after-the-event insurance in Scotland, because there really is not an awful lot of evidence about its usage in Scotland. Although the society has expressed its reservations about after-the-event insurance, some work needs to be done on that in Scotland.

Q360 Mr Hanson: In summary, if you were acting for the defence in the Ministry of Justice versus conditional court fees, is there anything that you could say about the research that would stack up and say that it is being done in a positive way—anything at all?

Chantal-Aimée Doerries: Are you, effectively, asking me whether there is anything I could say in defence for the Ministry of Justice?

Q361 Mr Hanson: Yes. The Ministry of Justice is saying to us that it has done positive research, which it can stack up, and which shows that fees have not impacted upon demand and that conditional fee arrangements and after-the-event insurance will lessen the impact of fees on access to justice. If you were the Ministry of Justice and you were acting in its defence, is there anything you can say that you think we should know, from your perspective?

Chantal-Aimée Doerries: If I was acting for the Ministry of Justice, I would want to take stock of the current situation. I would perhaps accept that more evidence gathering should have been done at the outset, and use the opportunity to do that now.

Chair: You might give the client certain advice.

Q362 Alberto Costa: I turn to an issue concerning civil court fees, and the effect on domestic as well as international competitiveness. By domestic, I mean the English and Welsh legal services market. My first set of questions is in respect of that; then we can perhaps move to international competitiveness, on which I also invite the Law Society of Scotland to make a comment. Looking at the English domestic market, could the increased costs of disbursements provide larger law firms with a competitive edge, since they are better placed to pay those disbursements initially on behalf of their clients?

Jonathan Smithers: Yes, absolutely; it does provide that. It militates against the smaller firms. It is generally accepted that the SME sector provides growth in the economy. It certainly provides much wider access to justice in smaller communities. Larger firms will have greater access and greater buying power—greater borrowing power, if you like—so they will be able to assist clients in a better way. A firm of solicitors providing holistic advice to their clients on any number of matters will be affected if they simply cannot afford, because of the negotiating strength of the bank, to have overdraft facilities to fund them.

There is a wider point as to whether solicitors exist in order to fund these things for the Government. It is not the solicitors who are taking the action; it is the clients who do so. It is the solicitors who advise them. They may have arrangements where they can assist their clients, but if they are funding those, they will be taking a risk against recovery. If clients cannot afford them, and the case is lost and they are not recovered, there is no such thing as free money—solicitors do not have access to that—and the costs will have to be paid from somewhere else. It will certainly be unhelpful for smaller firms of solicitors, particularly in rural areas, in advising clients at local level.

Q363 Alberto Costa: Have smaller firms made representations to the Law Society of England and Wales specifically on that point?

Jonathan Smithers: Very much so—in our evidence gathering.

Q364 Alberto Costa: Where have you gathered this evidence?

Jonathan Smithers: This is anecdotal evidence, of course, but a number of smaller firms said that there are major cash flow issues for them in doing that. Previously, they were able to help their clients to fund the lower amount of fees, but they are now simply unable to do that.

Q365 Alberto Costa: Could you supply the Committee with that evidence?

Jonathan Smithers: Yes, absolutely.

Q366 Alberto Costa: Perhaps, Ms Doerries, you might like to answer on behalf of the Bar on the effect that it has had on the Bar.

Chantal-Aimée Doerries: As Mr Smithers said, clearly, in relation to solicitors, it will hit the smaller firms.

Q367 Alberto Costa: What about direct access? Your members have perhaps taken instructions. Have you noticed any competitive edge, for example, in relation to larger chambers?

Chantal-Aimée Doerries: This is something that I can go away and report back to you on, but I have to say I am not aware of any example, given the chambers structure, which is a group of self-employed individuals, where a chambers would make that contribution. If you are looking at direct access, which is an area of work that is adding to competitiveness in the market, it will be a real challenge for any self-employed barrister to stump up the sort of money in terms of court fees that we are looking at. I am not aware of that being common practice at all.

Q368 Chair: It might raise some proprietary issues as well.

Chantal-Aimée Doerries: Indeed.

Q369 Alberto Costa: I am thinking, for example, of the new alternative business structures, where we have quite a large number of barristers working in some of the business and commercial firms. Are you aware of any evidence of domestic competitiveness?

Chantal-Aimée Doerries: No. The feedback we have had relates to barristers working in the more traditional structure. I have had a lot of anecdotal evidence, particularly from the junior Bar, in relation to clients who are seriously considering whether they are able to afford, or who have decided that they are not able to afford, the issue fee. In terms of the questions that you are asking, I am not aware of any evidence relating to ABSs.

Q370 Richard Arkless: Mr Smithers, you have clearly said that the larger firms are more likely to be able to afford these disbursements. Is there a different risk profile between the cases that the larger firms are willing to take on and those that smaller firms are willing to take on? In other words, will it be the case that the big firms that can afford the fees will not take on the risky cases, whereas the smaller firms will take them on but cannot afford the fees? Is there an access to justice issue in there?

Jonathan Smithers: There may well be. We do not necessarily have enough evidence to suggest that specifically. The larger firms will clearly have better buying power with their bank and will be able to afford to run more cases, and will, therefore, possibly be able to afford more that they do not recover. A smaller firm cannot do that. As Ms Doerries says, individual barristers are, effectively, sole practitioners, but many solicitors on the high street are, effectively, sole practitioners, and they would not themselves be able to afford the loss of any of these fees, so would be much less likely to look at risky cases. Exactly as you say, that will militate against access to justice for cases that might be marginal or at higher risk but still require a remedy.

Q371 Alberto Costa: On international competitiveness, the Ministry of Justice recently announced that it will not increase the cap on money claims “for the time being”, but it may revisit the proposal in the future. Looking at the current regime, do you think that the introduction of the 5% fee, with a cap of £10,000, has had a significant effect on international competitiveness?

Chantal-Aimée Doerries: We anticipate that it will. It is hard, at this stage, to give you any concrete evidence on that. The best test will probably be in a few years’ time, because international competitiveness turns on the contracts that are being drafted today and on the choice of law and jurisdiction clauses that are being written into those contracts. The £10,000 cap and the enhanced fees below that are now higher than any relative competitor

in the international market. The only international court that I am aware of where it comes in higher than that is in Dubai. In New York and Singapore, it is substantially cheaper.

One of the big changes in the last 10 years is the increased competition in international work. Our main competitors are investing in attracting the work. In Singapore, money is being put into establishing the International Commercial Court, and money is being put behind their International Arbitration Centre. In Germany, they are looking actively at using English language in German commercial courts. We see a market where others are keen to get a bigger slice of the cake.

One of the challenges for England and Wales is to ensure that we maintain the position that we currently have. The level of fees that have now been set definitely has the potential to put off some of that international business, bearing in mind that not all of it is substantial money claims. Quite a lot of the international work that goes through the commercial court in London, particularly on the shipping side, is relatively small in value. The alternative is, for instance, to issue an arbitration claim for £200 or £300 in the LCIA, rather than going through the courts. There are real options out there.

The second message, or the second challenge, is that our competitors like to complain about London being expensive. There is no doubt that if we become known as a country that seeks to make money from its justice system—I put it deliberately in those terms, because that is what our competitors will say—it will not ultimately help us in a market that is increasingly competitive and challenging for us. It is also challenging if you take into account the effects that the sanctions are having in attracting less Russian work to the London market and if you look at the growing economies in Asia and the competition from Singapore as a genuine commercial court. We live in times when we ought to be supporting and trying to attract that work, rather than making decisions that are risky for relatively little benefit. You need only lose one large case from the commercial court. If you think about the revenue that you lose from that case versus the gain that you make from the increase in fees, it is very short-sighted.

Q372 Alberto Costa: Before Jonathan answers, could I turn to Michael Clancy? Given that Scotland is a separate and mature legal system and has its own legal jurisdiction, has there been any noticeable increase in business in Scotland as a result of the changes to the fee regime in England?

Michael Clancy: Not that we have been able to detect. There may be in the future. Regarding the reputation of this country, as I think Chantal put it—perhaps it is “this jurisdiction” that we should be talking about—there is not sufficient statistical information at this point to be able to identify a direct correlation between increases in fees in England and Wales and increases in business in Scotland. That having been said, the Law Society of Scotland and the Faculty of Advocates have been involved in trying to promote the Scottish legal system and the Scottish legal professions in such a way as to attract business from overseas, and even overland from other jurisdictions.

Scotland’s courts are in the process of modernisation. We have a new Lord President of the Court of Session, our equivalent of the Chief Justice, who is working hard to focus the attention of the world on the quality of justice one can get from Scotland. In comparing the table of fees for the courts in England and Wales with those for courts in Scotland, one can see that there is perhaps more value for money to be got—I will not use the word

“cheaper”—in taking a case to the Court of Session in Edinburgh than there might be in taking it to the High Court in London.

Q373 Alberto Costa: There might in fact be healthy intra-UK competition.

Michael Clancy: We are part of an internal market within the UK. I am sure that everyone has their eye on increasing the reputation of the justice systems of this country—I use that phrase advisedly—ensuring that the entire UK has a reputation for providing good, efficient justice at a reasonable cost. Rolling back to the question that was asked about gradation of fees and so on, perhaps it is worth looking at the jurisdictional limits more than at gradation of fees. That is just an idea to throw into the pot.

Chair: That is very useful, Mr Clancy. I need to move on to employment fees. I think we have pretty much got the position.

Chantal-Aimée Doerries: Could I add one thing, Chair, picking up on the point that has just been made? We have seen a shift not, I am afraid, with respect to my friends, to Scotland, but towards Singapore, with English law being chosen and Singapore jurisdictions. My concern would be that the increase in fees will send the work away from these shores, as opposed to elsewhere within these shores.

Q374 Chair: For example, commercial arbitrations governed by English law could in fact be arbitrated in Singapore, or Dubai.

Jonathan Smithers: Indeed. That is very much the case. I have spoken to our major firms, who have offices around the world, and that is very much the push, certainly from Singapore, but also from Sydney, Dubai, Paris and so on, who want to park their tanks on our lawn. They see what we have, and they can use the law of England and Wales. There is a push towards arbitration, rather than necessarily coming to settle here. It is not just the court fees that are lost, but the costs that are paid in this jurisdiction and on which tax is then paid, so there is a larger loss to the taxpayer from work being pushed in other directions.

Q375 Chair: Do you have some evidence to support that?

Jonathan Smithers: There is certainly anecdotal evidence to support it.

Q376 Chair: I wonder if there is anything a bit stronger than that. We have criticised the Ministry a bit for being anecdotal on some things. We ought to apply the same standards.

Jonathan Smithers: We can certainly look for that.

Chantal-Aimée Doerries: We can certainly look for that.

Chair: That would be helpful.

Chantal-Aimée Doerries: The International Commercial Court has just been set up in Singapore. It will allow cases to be heard with foreign counsel on foreign law with foreign judges who have been employed by the Singapore Government. You can see there the direct competition that is being set up.

Chair: You can employ a retired English High Court judge there.

Chantal-Aimée Doerries: You can indeed.

Chair: As indeed happened. We will move on to employment tribunal fees.

Q377 Marie Rimmer: One of the Government's stated aims for the introduction of employment tribunal fees was to encourage parties to engage with the ACAS early conciliation service. There have been significant reductions in employment tribunals. The Ministry of Justice argues that there are other factors behind the fall in employment tribunal claims, such as early conciliation and changes to employment law. In evidence, people asked why they should get involved in early conciliation, and why not call their bluff to see how it goes. To what extent have those factors affected the number of employment tribunal claims, in your opinion? Is there an incentive to settle early? Is the Ministry of Justice correct in what it says?

Jonathan Smithers: Yes, there is, and that is the difficulty—whether we should be providing incentives to settle early or settle correctly. In employment tribunal claims, there is an employer and an employee, and the balance between them is not fair. The employer will have greater power and greater financial muscle than the employee or former employee. It is a matter of finding that balance of access to justice where they can go before a tribunal and have their claim properly settled. Sometimes those claims are not very large, which is one of the issues. They may be a few hundred pounds, but to an employee who has lost their job that is a very large amount of money. Making them arbitrate and settle is, I suggest, not necessarily in the greater interests of justice, and indeed of general industrial relations.

Q378 Marie Rimmer: Does anybody else have anything to say on that?

Chantal-Aimée Doerries: I would generally agree with that. I make the point again that we have called on Government to finally carry out the review into the introduction of employment tribunal fees, and we would welcome that.

Michael Clancy: From the Scottish perspective, the Law Society of Scotland has recently issued its priorities for the Scottish elections, which will take place in May this year. One of those is to support the concept that employment tribunal fees should be abolished in Scotland. As you know, under the Scotland Bill, which is currently in Committee in the House of Lords, there are proposals to devolve employment tribunals to Scotland. A draft Order in Council, which I believe is in the House of Commons Library, shows that the devolution of that power will also give Scottish Ministers the power to change fees and even reduce them to nil, as the Scottish Government indicated in their programme for government.

Q379 Marie Rimmer: Since May, there has been an obligation to notify ACAS of such a dispute, and 60,800 were notified. Of those, 15% were formally settled by ACAS, 22% were not settled and progressed to an employment tribunal and 63% were not formally settled and were not taken to the employment tribunal. What are your views on that?

Jonathan Smithers: It is hard necessarily to draw a conclusion from those raw statistics. Having ACAS involved has been helpful in providing a different form of dispute resolution, but a wider review is essential, as Ms Doerries said. In fact, we recently

submitted a paper on that, about a comprehensive review of the whole tribunal system and how it works. We do not think it functions correctly for either side. We are suggesting that there should be different levels of complexity held in different places. I am happy to submit more detailed evidence on that.

Chair: That would be helpful.

Marie Rimmer: Would you do that, please?

Jonathan Smithers: Yes.

Marie Rimmer: Thank you.

Q380 Richard Arkless: There is a slight difference in the impact of employment tribunal fees in Scotland as compared with England and Wales, and I would like to investigate that a little bit more. To what extent have members of your three organisations advised claimants or pursuers to bring claims to the county court or sheriff court instead of employment tribunals; where that is possible? Where have your members observed that?

Jonathan Smithers: That is not something on which I have any evidence, but I am happy to take the question away and submit later.

Richard Arkless: That would be very useful, thank you.

Chantal-Aimée Doerries: Ditto.

Michael Clancy: I do not think the Law Society of Scotland advises solicitors on what advice to give their clients, nor indeed does it advise clients directly that they should seek a particular type of advice, but it is certainly the case that for certain claims in the employment tribunal as opposed to the sheriff court, the fees are much lower in the sheriff court than they are in the corresponding level at the employment tribunal. From evidence that I think you have received from others as well as from the Law Society of Scotland, there is a clear indication that some litigants are taking that route to get relief for some aspects of money claims only, rather than doing so through the tribunal.

Q381 Richard Arkless: Could access to justice be improved if employment tribunal fees were split between claimants and pursuers, or respondents and defenders? Would that be desirable?

Jonathan Smithers: The whole issue of fees is problematic in those circumstances, partly for the reasons I gave earlier relating to the negotiating position of the two parties. That issue is tackled in our paper about comprehensive reform, and I am happy to submit it. Simply looking at the fees in the context of what we currently have will not necessarily give us the best answer. The employers certainly have much greater ability than the employees do. There have been arguments that employees should make a greater contribution.

Chair: It is all based around the concept of the respondents' fees.

Jonathan Smithers: Yes, indeed.

Michael Clancy: I would agree with what has been said, because of the imbalance and the lack of equality of arms. In earlier evidence it was reflected that one might look to the Scottish courts' experience for differential fees, essentially, being the same. If you are raising an initial writ, the fee is £94. If you are entering a defence, the fee is £94.

Q382 Alberto Costa: For the benefit of other colleagues, could you say what an initial writ is?

Michael Clancy: It is the first stage of raising a court action in Scotland, in a sheriff court.

Q383 Richard Arkless: For clarity, can you confirm what your organisations' positions are—I am talking to the Law Society and the Bar—in relation to employment tribunals? Do you concur with the Law Society of Scotland that they should be abolished?

Jonathan Smithers: Just the fees.

Richard Arkless: Employment tribunal fees—sorry.

Michael Clancy: I would like to return to Edinburgh and live there safely.

Richard Arkless: So would I, Michael.

Jonathan Smithers: I do not think that there is any proposal that all fees are abolished. I go back to the point made earlier about proportionality, affordability and the necessity for people to be able to take those properly, particularly employees, where there is an equality of arms, as Mr Clancy says. There is a necessary access to justice point, and employment claims are something that the majority of the population will perhaps be more familiar with, because they are in employment and deal with an employer-employee relationship. It is really important that they are proportionate and affordable.

Chantal-Aimée Doerries: We would suggest that the review we talked about earlier would be very helpful. It is really a question of affordability, as Mr Smithers said, that is our concern. It is the level of fees.

Q384 Philip Davies: I want to press you on this point about equality of arms. There is a lazy idea that every business is awash with money and every employee is poor and downtrodden. Whenever I suggest that all lawyers are rich, they are all up in arms about it, because they are all apparently scratching around for a living. We all fall into the same trap that people make with lawyers about small businesses. Many small businesses are struggling to keep going. When they face a vexatious claim at an employment tribunal, not only can it be very unaffordable for them getting legal representation, but the reputational risk of facing that kind of thing is very damaging to them. Do you not accept that? If you do accept that there is a problem for those small businesses, what do you propose to do to stop vexatious complaints?

Jonathan Smithers: There are always outlying cases where that will be the case, but in the majority, where the employee has been sacked they no longer have a job and no longer have an income, whereas the business is carrying on. We certainly have anecdotal evidence from many of our members who advise employers, who say that the employers will now make a different value judgment as to the ability of the employee or former employee to bring a claim, based on the amount of the fees.

You are absolutely right about vexatious claimants, but if they are vexatious, they will be dealt with in the tribunal. I do not think that there is any evidence to suggest that the increase in fees has stopped vexatious claimants; indeed, the numbers are quite similar. Those who are vexatious will want to carry on prosecuting their claims regardless. An argument that we raise the fees in order to choke off vexatious claimants is not necessarily one for which there is any evidence.

Q385 Chair: Perhaps there is a sense that the current tribunal system does not adequately deal with vexatious claims, either in kicking them out early or perhaps penalising people financially if they have strung out their employer—their meritorious employer, as it turns out—and caused them cost. There ought to be some sanction against people like that, oughtn't there? Is it adequate?

Jonathan Smithers: One could certainly construct an argument to suggest that employment tribunals may take a different view in those circumstances.

Q386 Chair: Do they at the moment?

Jonathan Smithers: To some extent.

Chair: Maybe not enough.

Jonathan Smithers: It depends. When you get to the hearing, as Mr Davies correctly says, the vexatious employee can cause a lot of difficulty for the employer. I am not sure that is something you can deal with in the context of fees.

Q387 Chair: The fee is not the reason. I understand that.

Chantal-Aimée Doerries: When one talks about vexatious employees, one has to remember that there will be employers who, from time to time, perhaps in the outlying cases, defend cases longer than they should or defend cases where there is no meritorious defence. Our members who practise in the employment tribunals have very much formed the conclusion that the challenge at the moment is the level of fees in terms of access.

Michael Clancy: It is important to remember that some employers are slow to meet their responsibilities, if I can put it like that, in terms of the judgment from the tribunal. Referring to some of the evidence that we have, in 2013, the “Payment of tribunal awards” study by BIS showed that, in Scotland, only 41% of claimants received payment of their award in full; 13% received payment in part; and 46% had not been paid at all. I cannot imagine that 46% of applicants to employment tribunals fall within the category of vexatious claimants, and that the employers are repudiating their responsibility on the basis of annoyance applications.

Q388 Chair: Indeed. One assumes that if they have had some award, they can't have been vexatious, as the tribunal found in their favour, with an award to be enforced.

Michael Clancy: There is an enforcement issue, too.

Q389 Chair: That is very helpful. Thank you all very much. We are obviously a bit constrained on time. I am sure we could have gone on very much longer. All of you have very kindly indicated that you will give us some additional information, for which we are very grateful. This is the last of our evidence sessions, and we are keen to proceed with our

report as soon as we can. The sooner you are able to get that to us, the better. I will be really grateful for that. We will write to you and set out clearly for everybody who has undertaken to provide what. That is the best way forward. Thank you very much for your time and your evidence. I hope that devolution does not mean that we do not have the benefit of the Law Society of Scotland's evidence from time to time, Mr Clancy. It has been most helpful.

Michael Clancy: Chair, that is very kind of you. Thank you, Mr Neill.

Chair: Thank you all very much for coming.

Examination of Witness

Witness: **Mr Shailesh Vara MP**, Parliamentary Under-Secretary of State, Minister for the Courts and Legal Aid, gave evidence.

Q390 Chair: Welcome, Minister. Thank you very much for coming to join us. I am sorry that it has taken us a bit longer to get to your evidence session than we would have liked, but we had quite a lot of material to deal with, as you can imagine. I am grateful to you for coming along to present the Department's response and evidence. To start off with, this inquiry included things like the criminal courts charge, and we issued a short report on that. Our Committee welcomes the stance that your Department took on that, and the Government's swift response to the criticisms that had been raised about the operation of the criminal courts charge. We are grateful for the way that was dealt with so promptly and, we think, proportionately. Can you help me on this? When the Secretary of State indicated what was to happen about the criminal courts charge, when he responded to our report, he stated that there would be a wider review of court-imposed financial impositions on offenders. Could you help us on that? Has that review started yet? Can you help me as to what the terms of reference are, what the timescale is for the review to be carried out and what it may or may not be looking at?

Mr Vara: Certainly. A very good morning to you, Mr Neill, and to your Committee. It is absolutely no problem that there has been a delay. Some of my officials were considering whether that meant that the time I would be before you would be shortened, or whether it would simply be extended. We never reached a conclusion, but it is a pleasure to be here this morning, sir.

Yes, the Justice Secretary has put in place a review. It is intended to try to simplify the process. At the moment, we have fines, compensation, victim surcharge, prosecution costs and the criminal courts charge. It looks as if it is a slightly complex system, and officials are looking into all the impositions with a view to seeing if there is a way forward to simplify the amount of moneys that are collected.

Q391 Chair: When do you anticipate that the terms of reference will be published and you will be able to start gathering evidence?

Mr Vara: We are working on them at the moment. It is something that we want to get right. I cannot at the moment say precisely when, but I would hope that sometime later this year we would have some sort of definitive report. Beyond that, I cannot give you a deadline.

Q392 Chair: There was an oral question to the Secretary of State on 8 December. As I say, I welcome the steps that the Secretary of State has taken, but some people might read him as having left open the possibility of bringing back some form of criminal courts charge once the review runs its course. A lot of people might have felt that the evidence was so fundamentally damning that that would not be a wise course. Is that really something worth considering, or is it not perhaps better to move on in the broader context that you have thought about?

Mr Vara: I think that is one for the review to look into, and it would be premature for me to make any such comment.

Q393 Chair: Nothing is ruled in and nothing is ruled out.

Mr Vara: The court charge has been suspended at the moment. The criminal courts charge, along with the other impositions, are all going to be reviewed as a whole, to see if we can have a simpler system. As you say, it is suspended at the moment. That was the process that we undertook with statutory instruments. I think it is best to await the outcome of the review, rather than to consider the individual points of any one imposition.

Q394 Chair: I am sure the holistic approach is right. That is why we are keen to have as much detail as we can as to when and exactly how that review is going to get under way.

Mr Vara: All I will say is that I am mindful, as is the Department, that this is something that is of interest to a lot of people, not only those in the legal profession but also more generally. We will therefore make sure that officials act as expeditiously as possible, with a view to having a report that is comprehensive and does what we would like it to do.

Q395 Dr Huq: It is good to see you in non-pensions mode this morning, Minister. Any initiative needs a robust business plan before proceeding, but cost recovery, in both the employment tribunals and the immigration and asylum chamber, has fallen far short of what was projected. Why the mismatch between the two?

Mr Vara: It is important to consider employment tribunals in a broader context. Everybody looks at the figures for the number of cases that have appeared before the tribunals and has come to the conclusion that that has to be because of the fees. That is not so. As you will be aware, a review is taking place at the moment, and I hope that it will not be very long before the outcome of that can be made known.

It is important to remember that, for example, in the first 12 months of the ACAS conciliation procedure, ACAS handled some 83,000 cases. That is 83,000 cases which, alternatively, might well have ended up before the employment tribunal. Instead of people going to the employment tribunal, there is now a free service, which I hope this Committee would welcome, where people can go and try to resolve an issue in conciliation, rather than going to the employment tribunal. It is important to remember that, before the employment tribunal fees came into place, the trend of the number of cases going to tribunal had been going down. We also have to remember that the economy has been picking up, and employment is increasing. There have been changes to employment law. All those factors may well have contributed to the number of cases diminishing in the employment tribunal.

Q396 Dr Huq: I want to ask specifically about pregnancy discrimination. There was a Westminster Hall debate on that recently. Maternity Action gave evidence to us and said that there has been a fall of about 40% in the number of cases since the immediate introduction of the fees. Other figures from 2005 suggested that less than 10% of women suffering from this would present themselves in the first place anyway, for fear of repercussions. Do you think that is an initial anomaly, or is it a worrying trend? What can we do about it?

Mr Vara: We cannot rule out that some of those women are going to ACAS, rather than going to an employment tribunal. One of the things that I hope the review will be looking at is to make sure that there has not been any negative impact on people with protected characteristics. You raise a very good point, and I very much hope that it is something that will be looked into. I am minded to say that many of the people you refer to may well have ended up at ACAS as well.

Q397 Marie Rimmer: Could you clarify those 83,000 cases that have been settled by ACAS or have been to ACAS? What is the timeframe for those 83,000 cases?

Mr Vara: Shortly after the employment tribunal fees were introduced, ACAS started a conciliation process for people to try to resolve their disputes through ACAS rather than going to the employment tribunal. In the first 12 months of the procedure starting, 83 cases of employment tribunal disputes—

Marie Rimmer: Eighty-three thousand cases.

Mr Vara: Yes, 83,000 cases where there was a dispute between employer and employee went to ACAS. My point is that, were it not for the conciliation service, many of those cases would have ended up at the employment tribunal. ACAS conciliation is actually taking away cases that would otherwise have ended up in an employment tribunal. People say that it is the fees that have driven away the cases, but I would say that that may well not be the case. It is just that there is an alternative free process rather than paying fees for the employment tribunal and possibly using lawyers. Why would anyone want to pay lawyers and pay fees when they have a free system that they may be able to use?

Q398 Marie Rimmer: Have you any idea of the figure for the number of cases that were settled by ACAS or with ACAS?

Chair: It would be much better, and it is general courtesy and practice, that notes are passed, rather than having conversations, Minister. That is for the benefit of officials.

Mr Vara: Forgive me.

It is part of the review. I do not at present have any figures to hand. Certainly, however, the figures are encouraging and show that people are going there. I understand—I would need to double-check—that it may be that about 80% of the people who go to the conciliation process have said that they are satisfied with the process.

Q399 Marie Rimmer: Would you let us have the figures for that?

Mr Vara: Certainly. I am more than happy to do that. I will write to you.

Q400 Chair: It is not always possible to have figures readily and immediately to hand, but if you are able to send them, we would be grateful. It would also be very courteous, and it

would be appreciated. Can I bring you back to the original question, which was about cost recovery? I wish to get on to that point specifically. As I understand from HMCTS, specifically the Courts and Tribunals Service's annual report for 2014-15, the cost recovery target for civil and family business was 100%, and the actual cost recoveries were 94% and 87% respectively. Those are their figures. Although it is not formed of the same type of specific targets, the information we have in relation to employment tribunals is that the fees were set to produce a cost recovery of around 33%. For the immigration and asylum chamber, they were set to achieve a recovery of around 25%. The respective outturns from the report's figures are 17% as against 33%, and 9% as against 25%. In those two areas, they are falling significantly short of the targets. That indicates that they are not really effective at doing what they are supposed to, doesn't it?

Mr Vara: You raise a good point, Mr Neill. We certainly had estimates in terms of employment tribunal fees. As part of the review, we will certainly be looking into the broader overall objective of what we sought to achieve, whether that has been achieved and whether there is anything else that can be done by way of moving forward. I am not going to dispute what you said. Likewise, with the immigration and asylum cases, there has been an under-recovery. We need to look into that to see where we went wrong.

Q401 Chair: I am grateful. I am glad it is in the review. An under-recovery of something that had some other unfortunate side-effects is not unfamiliar, as we know, in the context of charges.

Q402 Alex Chalk: On cross-subsidisation, we have had a panel of distinguished lawyers and judges who say that it is an affront to justice and that it undermines the integrity of our judicial process. We have even had Magna Carta invoked. They say it is bad news. Are they right?

Mr Vara: I think Magna Carta also mentions access to justice. What we are trying to do is make sure that there is access to justice for all our citizens. That means having a courts and tribunals system that is sustainable, affordable and fit for purpose. We need to pay for that. Therefore, I see no reasons why, if it is possible that a fee can be raised in one area that helps for the greater good of justice, we cannot use that fee to make sure that other parts of the courts and tribunals system work as well as we want them to.

Q403 Alex Chalk: What do you say to the charge that this is a public good and something that society benefits from overall, and therefore the taxpayer should pay for it?

Mr Vara: We have to recognise the economic reality of the time. We were elected to ensure that the economy was put right again—to fix the economy. We have a mandate from the country to do that. I do not think that the Courts and Tribunals Service should in any way be exempted from playing its part in ensuring that the greater picture of economic recovery is there. We incur huge costs in running the courts and tribunals system. We want a courts and tribunals system that is there for everyone who needs access to it. That is why we need the money.

Q404 Alex Chalk: It will be suggested, so it is said, that this will be billed as England and Wales using the justice system as a cash cow. Whether that is fair or not, that is the way it will be portrayed, and that could damage our international competitiveness. What do you say

to those who are concerned about the way this is perceived domestically and, perhaps as importantly, overseas?

Mr Vara: It is important to recognise that the element of cross-subsidisation has been approved by Parliament. People say that it might be regarded in a certain way overseas. When you say that, you mean the court fees generally.

Q405 Alex Chalk: Yes, exactly: the UK is effectively trying to squeeze the orange, or whatever the expression is—it is trying to extract as much money as possible and is taking the wrong approach, and that damages our competitiveness, so the argument goes.

Mr Vara: We are looking at every way we can make sure that we have a sustainable courts and tribunals system. I do not see why there should be an issue where users of courts and tribunals should not be paying. It seems reasonable; going back to the criminal courts charge, the original concept was that those who are convicted should pay towards the service of the court that is there to deal with them. From a broader perspective, in terms of the international market looking at us, if you are saying that they are saying that we are trying to squeeze money from the courts, I am minded to say that they are probably not taking that view. If you are talking about a deterrent for overseas people coming here—is that where you are going?

Q406 Alex Chalk: Yes, that is part of it. People can choose all sorts of places—Singapore and elsewhere—so why would they go here if they think England is trying to take too much money out the system?

Mr Vara: You raise a very good point, but people do not come to the UK for legal services because of our costs; they come here because of the quality of our lawyers and because of the independence and the quality of our judiciary. They come here because they use UK law—English law—in their contracts. They certainly do not come here because of cost. I simply refer the Committee to the report that was published and reported on in some of the newspapers last Friday. The report spoke of a doubling of charge-out rates in some firms of solicitors in recent years. If the lawyers, despite their fees increasing, find that overseas people are still coming here, I am minded to say that court fees are certainly not going to be a deterrent either.

Q407 Chair: Might that change, perhaps? We could get to a scenario where you can litigate your commercial dispute or arbitration, say, in Singapore or Dubai, in front of an English qualified judge, perhaps a retired High Court judge, using English lawyers, more cheaply. That shifts the balance somewhat, doesn't it?

Mr Vara: That is already happening in some places, but it is important to put things into perspective. The court fees are a tiny, tiny proportion of the overall legal costs that parties incur. I am minded to say that, if a particular individual or company were thinking of bringing their case to the UK, their first thought would not be, "What are the court fees in the UK?" They are likely to take a much bigger approach. In fact, I am minded to say they would probably not even know what the court fees are.

Q408 Chair: I wonder why it is, then, that the Governments of Singapore and Dubai are investing so much in their international courts. Are they doing it for the sake of national pride, or is it because they see a business opportunity that we may be missing?

Mr Vara: Certainly they see it as a business opportunity, but I refer the Committee to the comments that I made earlier. It is not simply money that draws people to a particular area; it is the fact that we have lawyers who are some of the best in the world at what they do. People are paying for the quality of advice that they get. Let us be absolutely clear: we have a wonderful, independent and top-quality judiciary, which people across the world have confidence in. That is why they are coming here.

Chair: Mr Costa, are you going to come in on the competitiveness point? We will then move on.

Q409 Alberto Costa: We have already covered some of these questions, but I have one question, Minister. The Ministry of Justice cited the British Institute of International and Comparative Law report, in stating that fees were not a determining factor in whether to litigate in England and Wales. Did the same report not suggest that increasing fees would be likely to have an adverse impact on litigants' decisions to litigate in England and Wales?

Mr Vara: I think the report said it may have an impact, rather than it would. When I read the report; that was my understanding. I got the impression that a lot of the people who had been questioned were simply hedging their bets by saying, "Yes, of course it may have an effect." I looked at some of the responses, and they did not seem to be that definitive.

Q410 Alberto Costa: Notwithstanding that, given that it may have an impact, do you not think that the Ministry ought to measure the effect of the fee increases on international competitiveness?

Mr Vara: We are certainly aware of what the international market charges in terms of court fees.

Q411 Alberto Costa: That is not the question. I asked whether you would measure the impact of the fee increase on international competitiveness.

Mr Vara: I come back to a point I made earlier. We are talking about a tiny, tiny proportion of the overall legal costs.

Q412 Alberto Costa: Sorry, Minister, but are you saying that you will measure or you won't measure the potential impact?

Mr Vara: When we introduced the fees, we looked at the BIICL report that you have just referred to. It did an analysis of what it thought would be the impact of the court fees.

Q413 Alberto Costa: Do you not think that the wise thing would be to give an assurance to the Committee that you will think about this, and you might perhaps write to us with a strategy for measuring the impact on international competitiveness?

Mr Vara: Given that we have already measured it recently in the report that you referred to, I am not in the business of duplicating work that has already been done very recently. I would simply say that whenever fees are introduced, we look at a broader overall picture. I come back to the earlier point that court fees are a tiny, tiny proportion—

Alberto Costa: We have heard you say that.

Mr Vara: But it is important to put it in context. To start doing whole reviews on a specific issue without considering the bigger picture would not do justice to the subject. We continue to keep an eye on matters as they progress, but given that, as I said, the report was recently made public and that it looked into court fees, I do not see that we should be commissioning another report immediately.

Chair: We will move on, with Ms Rimmer and then Mr Hanson, to money costs.

Q414 Marie Rimmer: The Government recently announced that they would not be increasing the cap on money claims from £10,000, but they may revisit it in the future. What were the main reasons behind that decision?

Mr Vara: We took the view that, for the moment, we want to continue to see the impact of the existing rules. There is the cap of £10,000 at present. That has been in place for some 10 months, and we would like to see it over the slightly longer term—the medium to longer term—to see the impact of that before we institute, if it is felt that we want to, a higher sum. Right now, we want to reflect on what the position is.

Q415 Marie Rimmer: Sir James Munby told us that it would require two years, or more likely three years, to properly measure the effects of the cost of the fee increases from their introduction. Do you agree with that? Could it take two or three years?

Mr Vara: I am not going to commit to what is a suitable period. We need to look at the evidence that is coming in at the moment. It certainly needs to be in steady state. It has been there for 10 months at present, and that is not the right time—it has to be longer. Whether it is two years or three years I do not know, but it certainly needs to be longer than it is at the moment.

Q416 Mr Hanson: We have looked at the impact of fee increases, and we know that you have done some impact assessments and some consultations on the likely impact. Could you remind the Committee what they were?

Mr Vara: The impact assessment that we had initially took the view that there would not be a huge impact on the number of cases. Experience has proved otherwise. I will say that 90% of the cases are unaffected, because they are for a sum less than £10,000. They are unaffected. As far as the balance of cases is concerned—the 10% or so—we found that in the period immediately before the cap came into being, there was a surge in the number of cases that were brought in the courts. Not surprisingly, after the introduction of the fee, there was a significant dip in the number of cases appearing. That dip has subsequently risen, but I accept that it is not back to the level it was before.

Q417 Mr Hanson: Could you outline to us what consultation you took on the likely effect of fee increases prior to the fee increases coming forward? Who did you consult?

Mr Vara: Five reviews were carried out. If you are referring to the Ipsos MORI review that the judiciary were critical of—

Q418 Mr Hanson: They called it “lamentable”, I think. The Master of the Rolls called your consultation “lamentable”.

Mr Vara: It is not a criticism that I agree with. I have huge respect for our judiciary, but on this issue the criticism was of one specific piece of research, as opposed to the other four, which he did not refer to. The criticism that he directed referred to a particular piece of research carried out by Ipsos MORI, a highly reputable organisation, I hope the Committee will agree. They carried out the research in the normal way such research is carried out. I think that the conclusions of that research were that, among both the individuals and the SMEs who were interviewed, while some said that they would need to reflect on whether to go ahead because of the court fee, many of them nevertheless felt that they would go ahead and do so.

Q419 Mr Hanson: How many discussions or interviews did Ipsos MORI undertake? Are you aware of that?

Mr Vara: I believe there were 31 or 37. I can confirm that in writing later, but there were—

Mr Hanson: I suppose the point is that the Master of the Rolls said—

Mr Vara: There were 31. Thirty-one civil claimants were interviewed, of which nine were SMEs.

Q420 Mr Hanson: The Master of the Rolls said that the research base was “lamentable”. The Bar Council and the Law Society were before us this morning, and they backed that up. Nobody has come here today and told the Committee that the research was adequate in any circumstance. I suppose the question we have to grapple with is whether the evidence on which you suggest you are basing the decision for introducing the charges is adequate. Can you defend that to the Committee?

Mr Vara: Yes, I can. I am sorry if that defence has not come across as robustly as I would have liked. I mentioned that the specific criticism made by Lord Dyson was with reference to one piece of research, but he has made no comment, as far as I am aware, on the other four pieces of research. We carried out more than that one single piece of research. We looked at it and we considered it, and we then went ahead with what we thought were the correct decisions.

Q421 Mr Hanson: One of the defences that the Ministry and you put forward in written evidence is that the access to justice issues will be dealt with by conditional fee arrangements or after-the-event insurance. Can you help the Committee in citing evidence you have that that proposition would be feasible?

Mr Vara: The conditional fee agreement is a concept that exists. People are using it. Many people who otherwise would not be able to progress their cases are able to do so because of the CFA arrangement or after-the-event insurance. If we are looking at people being able to progress cases that they would otherwise not be able to do because they do not have money, the CFA system actually works to help them.

Q422 Mr Hanson: The Committee would be interested in what current physical evidence the Ministry of Justice has examined that conditional fee arrangements and after-the-event insurance would be of assistance to those who would otherwise be denied access to justice.

Mr Vara: I do not have to hand the evidence that you seek, but I am happy to write to the Committee with any further information that I can subsequently obtain. I would simply say that it is a fact that people who would not otherwise be able to progress their cases are able to do so because of the availability of conditional fee arrangements.

Q423 Mr Hanson: The Committee would like to have that. Among the papers we have, there are research papers from 2013 and there is a research paper from 2007, but that is long ago—I was the Minister in 2007. It is not exactly current, up-to-date research in the Ministry of Justice. The question for you, Minister, is that we would like to know on what basis conditional fee arrangements and after-the-event insurance have been proposed, based on research, and whether or not there is anything more than the relatively “lamentable” research on the impact of court fees—the Ipsos MORI research. Those are the concerns that have been put to us. For us to accept your point of view, we essentially have to have an argument put slightly more strongly than it has been in written form by the Ministry of Justice to date.

Mr Vara: I am happy to supply the Committee with any further information that I can, but I simply say to the Committee that these are difficult decisions. They are not decisions that are going to be welcomed with open arms, but we have to recognise the economic reality of the climate that we live in. It is necessary to raise fees, tough though those decisions are.

Q424 Chair: Lord Dyson’s evidence to us in terms of the evidence base, which was what was being criticised by the senior judiciary, was that there were 18 telephone calls the first time round, of which 12 were court users. The second time there were 31, as you said, Minister, and he said that “only a very small number were people who had experience of or were going to bring larger claims.” Perhaps you will be able to set out in your evidence, when you supplement it, exactly the sort of people those telephone calls went to. He went on to say, and these are his words, “I am afraid that we warned that the research was hopeless. The impression I have is that there was a need to rush this thing through, because there was a great big gap in the Department’s finances that had to be plugged. I got the sense that it was almost a desperate way of carrying on.” That is the Master of the Rolls saying that, Minister.

Mr Vara: I simply repeat to the Committee that the Master of the Rolls is making reference to one piece of research, whereas we actually conducted additional research, and I am not aware that he has commented on the additional research.

Q425 Chair: You have made the point, and I understand your point that there were financial constraints and you had to deal with the deficit. A lot of us in this room would agree and sympathise with you about that, but there may be ways in which you deal with it that are more efficient than others. What he is being very critical of is the way in which this bit was dealt with, that it was done in a rush, with very little proper evidence to back it up. Is that something worth reflecting on?

Mr Vara: I hear what the Master of the Rolls said, but I do not accept his criticism. I hope that the Committee will understand or appreciate the very difficult economic circumstances that were prevailing. We had to take decisions with as much advice and research as we were able to undertake at the time. We acted in good faith. Sadly, the timetable was not one that was to the liking of the Master of the Rolls. We acted in good faith and we took decisions. We did more research than the Master of the Rolls refers to.

Q426 Chair: I do not doubt the good faith, but sometimes the shrewd advocate or lawyer will tell their client, “Well, we acted in good faith, but the judge has told us our evidence is pretty lamentable. Maybe we should go away and reconsider our position.” Isn’t that something to do?

Mr Vara: Mr Neill, with respect, I suspect that, on appeal, they might say that actually the judge referred only to one piece of evidence when we had four others that he completely ignored.

Q427 Alex Chalk: Isn’t there a perfectly defensible position, which is to say, “We were faced with a crisis. We had to act fast. We had to plug these finances and, frankly, it was not a Rolls-Royce consultation, but a clapped-out Morris Minor one. That is simply what we had to do”? Why can’t one be straightforward about that, and say, “It was the best we could do in the circumstances. Over time, we will review it, we will do better consultation and we will try and get it right. Those were difficult, emergency times, and those were emergency measures. It was not the best, but it was adequate. It was all we could do”?

Mr Vara: Yes, we had to act quickly and we had to take tough decisions. We took those decisions with the evidence and research that was available when we had to take them.

Q428 Alex Chalk: You are not saying that this was a Rolls-Royce consultation, are you?

Mr Vara: Decisions taken by Ministers are always taken with the utmost integrity and with good faith. They act with as much information as is then available. Hindsight is wonderful. Even with decisions that are taken in a leisurely manner, and with the comfort of having done as much research as anyone out there could ever complain about, with hindsight there is always going to be something that comes up to show that actually we missed that little bit. We had to act quickly, we did so, and we did the best that we could under the circumstances.

Q429 Chair: You have kindly indicated that your officials will come back to us with some more information about that matter, on the evidence base. In doing so, it might be helpful if they have in front of them the written submission from the JEB—the Judicial Executive Board—which contests the whole of the evidence base, not just one particular point. I am sure that they will want to deal with that broader accusation. Thank you for agreeing to do that.

Mr Vara: I am grateful for that point, Mr Neill. We will certainly look into it.

Chair: For completeness, that is only fair. We now move on to the question of employment tribunal fees.

Q430 Dr Huq: The impact assessment predicted that there would be very little change. Has that been borne out?

Mr Vara: I refer to the comments I made earlier, in that there has been change. There has been a significant change in the usage of the employment tribunals, for the reasons that I mentioned earlier. Some 83,000 cases went to the ACAS early conciliation process in its first 12 months. The economy has picked up, and there are more jobs out there. Those are all factors that need to be considered, rather than just fees.

Q431 Dr Huq: What do you make of the argument that access to justice could be improved with sequential fees, rather than enhanced up-front fees for money claims?

Mr Vara: Are we talking about money claims now, or employment tribunals?

Chair: Employment tribunals.

Dr Huq: Within employment tribunals—if it was substantial.

Mr Vara: We took the view that it was best to have a fee, and that is the process we have pursued. There are all sorts of ways of determining those fees, depending on the sums involved, but we felt that the system we used was the appropriate one.

Q432 Marie Rimmer: The post-implementation review of employment tribunal fees was expected to report by the end of last year. Why has it not been published?

Mr Vara: Ms Rimmer, you are absolutely right; we had hoped to make public the findings before the end of last year. It has not happened. I can assure the Committee that the review is well under way. There has been a lot of evidence that we have had to consider, and we want to make sure that we get it right. I am particularly mindful that a lot of attention has been focused on the issue. We are therefore keen to ensure that the final announcement is done comprehensively. I can assure the Committee that it is well under way, and I hope that it will not be very long before we make that announcement.

Q433 Marie Rimmer: So the cynics are wrong: you are not sitting on it; you are saying that it is not complete.

Mr Vara: It is correct that we are not sitting on it.

Q434 Marie Rimmer: When will the review be published? What timescale do you have? It is going on now, isn't it, although it is not completed?

Mr Vara: I hope it will be sooner rather than later. It is well under way. I do not want to commit myself to a specific date and find that we overshoot it because I have been over-optimistic. I can, however, assure the Committee that this is something that I am personally following through, and I am urging officials to make sure that we have some sort of announcement as soon as we possibly can.

Q435 Marie Rimmer: Will you provide the Committee with the details of that review? We would like to use its results to inform our report on this subject. It is very important. There is a lot of concern about employment tribunals.

Mr Vara: I accept that there is a lot of concern, and I have taken a lot of questions on the subject during Ministry of Justice oral questions in the House, but I have to say that I cannot recall too many occasions when anybody asked a question in the broader context in which the subject should be considered. I very much hope that, when the outcome of the review is made public, people will take on board that it is a much bigger issue than simply saying that court fees have been introduced, there has therefore been a straight reduction and it must all be down to the court fees. It is not.

Q436 Marie Rimmer: You accept that it is very important—something significant.

Mr Vara: Completely. I accept that it is very important. As I say, I have asked the officials to work at pace, and I will reinforce that point. In fact, some of them are with me today, and they will have heard loud and clear what the Committee is saying.

Marie Rimmer: Right. You have no date for it as yet, but you will inform the Committee. Our report will need to consider the impacts of your review. Thank you.

Q437 Chair: I am grateful that Ministers and officials are working at pace. We have seen some documentation—the minutes of the employment tribunals national user group on 7 October 2015—which said that the review was with the relevant Minister. At that stage, it was hoped that the position would be known by the end of the year. That has clearly not happened, has it?

Mr Vara: It has not happened. As I say, the review is well under way. There is not much more I can say, other than that I hear loud and clear what the Committee is saying.

Chair: I understand.

Mr Vara: I hope it is sooner, rather than later. In fact, it will be sooner, rather than later. I just do not want to commit myself to a date.

Chair: I get your sense.

Q438 Dr Huq: A suggestion has been made to us that the types of cases that would be deterred by these employment tribunal fees are the kind of high merit but low value ones. Rather than deterring vexatious claims, there are actually claims of merit that are being deterred. What would you make of that claim?

Mr Vara: I would like to think that some of those are part of the 83,000 figure that I quoted. I would like to think that, if that is the case, the Committee would welcome the fact that people are not incurring legal fees or court fees, but are instead using a service, the early conciliation process by ACAS, that is free.

Chair: We heard a bit of evidence about Scotland's procedures. Perhaps Mr Arkless can pursue that.

Q439 Richard Arkless: You keep repeating this figure of 83,000 cases at ACAS, Minister. While, of course, some kind of ancillary mediation service that is free is desirable, I would like to put that in context and compare it with the number of cases that have perhaps dropped off since the tribunal fees increased. That 83,000 figure is in a vacuum if we do not consider it alongside the drop-off of cases since employment tribunal fees were introduced. Could you put it into some kind of context and give us an indication of how many cases have dropped off and, therefore, how far that 83,000 figure plugs that gap? Surely if you keep repeating the 83,000 figure, it has to be done in context.

Mr Vara: What I am trying to say is that people are regularly saying that the number of cases has gone down—they keep repeating that number, that it has gone down by X—and I am asking them, in like manner, to consider things in context. I am simply trying to add to the context. We have repeatedly heard the number of court cases by which the figure has gone down, and I am simply adding to the context by putting in the figure of 83,000. It was not that alone. I also said that the economy has picked up. It was the case, before the

court fees came into place; that the trend in the number of cases going to the employment tribunal had been going down. Employment law has changed, which means that the circumstances for cases going there have changed, too. Mr Arkless, you are absolutely right to say that it is a matter of context, and that is precisely what I am trying to do—to say that there are a number of factors involved, and it is important that we consider them all in context.

Q440 Richard Arkless: I am trying to put your 83,000 figure into context, which is precisely why I am asking this question. If you cannot tell us what context it is in, can you agree to write to the Committee and give us an indication of how the numbers have dropped off and how that 83,000 fits within the overall context?

Mr Vara: You will be aware that we have a review, and one of the things that the review will be doing is to put everything into context. It would probably be better for the Committee to wait for the review, rather than me writing a letter.

Q441 Richard Arkless: Is 83,000 most of them?

Mr Vara: There are a number of factors. The 83,000 is one of those factors.

Q442 Richard Arkless: Yes, but is it most of the cases?

Mr Vara: I do not know but, as I say, it needs to be put into context.

Q443 Chair: Out of interest, I want to move on to a couple of other areas, one of which is the immigration and asylum tribunal. We have talked about the recovery rate. It was set at 25% but, as it was, it came in at about 9%. Upon reflection, is it likely that the sort of people who generally make applications for immigration or asylum would be able to meet the level of fees that you would require to achieve a 25% cost recovery? When you have your review of the position, is that something where you are perhaps prepared to take the Keynesian approach and change your stance in the light of changed evidence?

Mr Vara: We generally have the remission scheme across the board, but that does not apply so much for immigration and asylum, because the circumstances are of course different. We have an exemption—the Lord Chancellor has an exemption—when there are certain categories, for example, people facing deportation, and the Lord Chancellor can exempt fees. The remission process applies when they meet other financial criteria—for example, if they qualify for legal aid. Then they qualify for remission as well. Certainly we have not met our target, as you rightly point out, Mr Neill. That is something we need to reflect on. As I say, it is important that the courts and tribunals system pays its way.

Q444 Chair: I understand that. With the best will in the world—I think that nobody doubts the integrity of the system—you have to take a figure at a certain point in time, although the credibility of that depends on keeping things up to date on the evidence base.

Mr Vara: Certainly. We continually review matters.

Q445 Chair: In terms of the general approach, you have the exemption system. Do you have any idea as to whether some broader extension is being considered of what used to be the remission system, which is now called help with fees, I think, and whether that would be

more applicable to some elements of the immigration and asylum system? We have heard some evidence from people suggesting that.

Mr Vara: Suggesting that it ought to be—

Chair: Suggesting that you should extend the general approach across HMCTS to this system. That is not an approach that the Government have been minded to take, as I understand it.

Mr Vara: As you will be aware, Mr Neill, there are always pressures from many groups to extend the envelope ever wider, but we have a tough job, and decisions are difficult.

Q446 Chair: Purely on a factual basis, you are very helpfully coming back with some information for us. Perhaps we could ask your officials to try, if they can, to give us an idea of the number of litigants in person who apply for, and receive, fee remission in that chamber. It is a limited number, I imagine, but it would be helpful to have the full context for that. We have heard evidence about it.

Mr Vara: To the extent that we have those figures, I will certainly try.

Q447 Chair: Understood. Are there any other questions from colleagues to the Minister? Minister, thank you very much. I hope we have not shortened the time we have given you for your explanations. I am grateful for your patience and your courtesy. Thank you for your evidence. We will confirm the various issues it was proposed to follow up, which you have kindly undertaken to do.

Mr Vara: Mr Neill, thank you very much. I thank the Committee. I will certainly follow up on matters that are outstanding.

Chair: We are most grateful to you.