



HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: [Human Rights: attitudes to enforcement](#), HC 669

Wednesday 14 March

Written evidence from witnesses:

- **Richard Miller**, Head of the Justice Team, [The Law Society](#)

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Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Alex Burghart; Joanna Cherry; Jeremy Lefroy; Baroness Hamwee; Baroness Lawrence of Clarendon; Baroness O’Cathain; Baroness Prosser; Lord Trimble; and Lord Woolf.

Questions 26–42

Witness[es]: **Richard Miller**, Head of the Justice Team, The Law Society; **Nicola Mackintosh QC (Hon)**, Sole Principal, Mackintosh Law; **Gareth Peirce**, Senior Partner, Birnberg Peirce and Partners.

Q26 **Chair:** A very warm welcome to Richard, Nicola and Gareth, and thank you for fighting your way through the demonstrations to get here. We are the Joint Committee on Human Rights, so you will understand that we completely support demonstrations, but we apologise for any inconvenience that they have added to your coming here. We are very grateful for you coming here to give evidence to our inquiry into the issue of enforcing human rights. As you know, we are a Joint Committee of half Lords and half Commons. Lord Trimble has the first question.

Lord Trimble: As has already been said, we are looking at the enforcement of human rights. A lot of people, when thinking of that, will think of lawyers and legal proceedings. That is fine, but may there not be other ways in which human rights can be enforced, rather than just by courts? There is the Equality and Human Rights Commission and there are other ways in which people might seek redress, but I am trying to explore that and looking for your reactions to it.

Gareth Peirce: It is imperative, through any forum or opportunity, to begin to educate. National comprehension is at a very low level. We do not have a written constitution, so in our schools we do not grow up thinking, "I have rights", with an understanding of why. It is partly that construct that is missing in our country, which would enable us to think conceptually sometimes without the need for litigation or lawyers. The whole selection of component parts that allow society in different forms of conflict resolution to achieve a different way of solving problems is totally supported by lawyers.

Richard Miller: Throughout litigation, whether it is related to human rights or otherwise, the aim of most lawyers is to try to resolve the issue as quickly as possible. If it can be resolved by mediation or by exchanges of correspondence, that is by far the preferred way.

Where there is no effective means of enforcing things through the court, those other means of resolving disputes tend to be far less effective. If, for example, you have a matrimonial dispute and one party is more powerful than the other, if they do not think that the weaker party has the ability or the will to go to court, they will see no need to make any sort of settlement through mediation. Courts should always be the last resort, but they have to be there as a realistic resort for the other alternatives to be effective ways of resolving these problems.

Nicola Mackintosh: I completely agree with my colleagues. Public legal education is extremely important but, unfortunately, despite a number of recommendations in a number of reports, it has not been implemented. I would like to see a system of public legal education that educates people about rights and responsibilities, not only for schools and younger people but when they become adults in the community. That is a means of preventing the problems from arising in the first place and enabling people to resolve their legal problems without recourse to law.

Ultimately, however, we all encounter cases on behalf of clients where, despite our best efforts, correspondence with the opposing party, or the other party, does not result in a satisfactory enforcement of the client's rights. Therefore, there has to be recourse to litigation in the background, if needed.

Lord Trimble: There is one other thing that I would throw into it. I am thinking particularly here of politicians and government. Government is very good at enacting legislation, but I wonder if it is much good at following up and making sure that the legislation is actually complied with. That is an area that one can think about.

Nicola Mackintosh: That is a very good point. I represent disabled people—people with dementia, learning disabilities, autism, physical disabilities and so forth. The Care Act was implemented relatively recently. In my experience, from listening to my clients' stories, because of austerity there are widespread cuts to their care packages, regardless of the level of need. There is an urgent need for a review of how the Care

Act is being implemented and whether the principle of everybody's well-being is being implemented on the ground. In my experience, it is not.

Q27 Baroness Hamwee: This question is quite close to Lord Trimble's question. You have referred to an imbalance of power between parties. Is that a particularly stark issue in the area of human rights, where the state is quite often a party to a dispute?

Richard Miller: Yes, very much so. For example, you have cases in which a death has been caused and an ordinary family that does not understand its way around the legal system is up against the state. That is an obvious case of an extreme imbalance.

The other issue is that very often the people whose human rights are being infringed are the more marginalised, the more unpopular, members of society. Where more educated and middle-class people might have support networks around them to enable them to enforce their rights even without legal assistance, those whose rights are infringed are very often the ones who are least able to rely on those sorts of networks and support systems. Therefore, they are the most in need of proper professional support in order to be able to bring their cases.

Nicola Mackintosh: If you imagine somebody who is not confident, who is in a care home, who is concerned about the abuse or the neglect that they are suffering, it is incredibly difficult for them to even speak out or recognise that they might have any form of remedy or legal rights. That is a very stark example of where the imbalance of power is at its greatest.

Baroness O'Cathain: Can I ask about that last point about somebody in care? This is very, very common, so is anybody doing anything about it? I am not necessarily saying that we should do a report on it, but are there any remedies that, if known about, could relieve that situation? It is extraordinarily common.

Nicola Mackintosh: The short answer is that, yes, there are things that can be done. Not all require litigation or a legal solution. One of the main concerns for my client group is that they do not have a voice at all.

Lord Woolf: On the same point, the lawyer is a very valuable but usually expensive commodity. I am thinking about specialist issues and those who are dealing with social security matters, which are highly technical. A well-trained lay person can sometimes be of great assistance to people who would not have help otherwise. There does not need to be the expense involved with lawyers.

Gareth Peirce: Accessibility is important. It is being investigated now but, from what we read, had the Grenfell Tower residents had access to housing lawyers, they could have dealt with the complexities of the things they observed. It is one example of a need to get to someone who knows what they are doing. That is the point you were making regarding specialist understanding.

Lord Woolf: I am assuming that it is not on the great scale of Grenfell, which I should perhaps declare an interest in. I live very close to the tower. Putting that on one side, in so many areas now the Government are saying, "No legal aid outside scope". We will come on to that later. I do not want to jump ahead. Perhaps not enough is done. If the decision is that we cannot afford to help people get lawyers, should we not look at alternatives of having trained lay people to help, perhaps retired people who know the regulations and can give good assistance in those circumstances?

Richard Miller: There are a number of aspects to that. It is absolutely right that a well-qualified lay welfare benefits adviser, for example, can provide an excellent service, which is invaluable to those who are in that situation. For a lot of routine appeals against benefits decisions, that can be by far the best way to resolve those issues. There are, however, a number of issues with that.

First, you have to make sure that these people are suitably trained. Secondly, you need to make sure that there is sufficient redress for people if things go wrong, which is one of the advantages of lawyers: that there is a full system of regulation and redress, whereas there is not for lay advisers.

Thirdly, even if these advisers are less expensive than lawyers, or even though the advice is being provided pro bono through law centres and advice networks, there is still quite a significant cost to the infrastructure. There tends to be a view that, if you can marshal some of these pro bono or lay services, it makes the service almost free. That simply is not the case.

Fourthly, any lawyer will tell you of cases where the person, by themselves or with the assistance of a lay adviser, has said exactly the right things in correspondence with the other party and has made exactly the right arguments and it has all been ignored. After one letter on a lawyer's headed notepaper, the other side takes it seriously and deals with the issue. Sometimes it can be as simple as the fact that a lawyer's headed notepaper proves that there could be consequences for not addressing the problems.

Q28 Fiona Bruce: To declare a right, I am a partner in a law firm. What should the role of the Equality and Human Rights Commission be, with particular reference to human rights' cases?

Chair: Does it have a role? It is the Equality and Human Rights Commission. What is it doing for human rights in relation to court cases that you can see? If it is not doing anything, what should it be doing?

Richard Miller: One of the real challenges it has had in recent years is resources. It has had very little money available to provide the sort of services it would like to provide. One thing it has tried to do, which could be valuable, is to provide a secondary support service, so that where

people have a client with a human rights issue it can provide expert advice on the human rights aspects to the front line lawyer or adviser. That is a really valuable service that it can provide.

It can also take casework, particularly in test cases that might set the law and clarify the law in areas. The commission is in a really good position to take some of those high-profile test cases that will have much wider implications.

Chair: Just to get it established and on the record before we move on to the next point, are you saying that there is impunity if there ultimately no legal jeopardy? Somewhere along the line there has to be legal jeopardy, otherwise there is impunity for those who might abuse other people's rights. The people whose rights are most vulnerable to being abused are the people who are the least powerful. Therefore, you need the court system to stand behind them and their rights. Is that what you are saying?

Richard Miller: That is a very good summary, yes.

Nicola Mackintosh: More needs to be done for those vulnerable groups to facilitate the enforcement of their rights, because people who are able to enforce their rights without much assistance will still require some legal advice. More needs to be done.

Chair: We will get on to that, but it was about what the point is of all this anyway, which you have established.

Q29 **Joanna Cherry:** Could all three of you give us an indication of what impact the introduction of the Human Rights Act had on the ability of individuals to realise their rights effectively?

Gareth Peirce: It was a fundamental revolution in our legal thinking in this country, so that we all, including judges, had to have training courses, for the first time in all our careers, on the concept of how you enforce inalienable human rights. It has been a steep, extraordinary learning curve, in which one could observe judges attempting to weave the Human Rights Act back into the concept of the common law, finding that, yes, they married up more often than not, and then trying to bring in the European Convention on Human Rights. The legal profession in the past few decades has helped to transform its understanding and we all educate each other. It has been a learning process.

It is also a process by which you become very well aware that the Government of the day, like any Government, have extraordinary power, can exercise that power and, on the whole, can achieve legislation in ways that intrude upon those rights. Then there is no way out but a battle royal through the courts, to articulate the rights and see whether the litigant is in fact enforcing the rule of law or whether the Government are saying something absolutist that holds good. This has been a fundamental jurisprudential clash in the courts day after day, and is continuing now.

Yes, the Human Rights Act is centre stage and essential for us to be using as the basis on which we develop arguments.

Q30 Ms Karen Buck: Whatever other paths are open to people, in many cases, as you have outlined, people will need to seek legal advice or go to court to enforce their rights. Could you explain to us how you see the legal aid situation at the moment, particularly in the context of LASPO, and how it impacts on people's ability to get the kind of legal representation they may need?

Richard Miller: In our view, the cuts introduced by LASPO were a mistake, and there are many ways in which we think that the cuts need to be reversed or rethought. The number of people who are helped has plummeted. We published a report last year looking at the impact of LASPO after five years, or four years as it was then. We identified numerous ways in which it was causing serious problems.

In our recommendations, we focused on three particular areas. One was the importance of early advice so that people understand their rights, can decide on the right way to take things forward and can often nip problems in the bud. We looked at the means test, which is biting at way too low a level, leaving people who are in poverty unable to get legal aid but clearly unable to afford legal services.

We also looked at the exceptional funding scheme, which is absolutely not working in the way Ministers told Parliament it should work when LASPO was being introduced. For example, at the time, the Government said that they thought that, for somewhere in the region of 5,000 to 7,000 cases a year, there would be applications for exceptional funding and that somewhere between half and three-quarters of those would be granted. In the first year, there were fewer than 100 applications, and hardly any of them were granted.

Ms Karen Buck: Could you explain why you think that is so and why that impacts on human rights in particular?

Richard Miller: It impacts on human rights, because the exceptional case funding scheme is expressly set up to grant legal aid in cases that are otherwise out of scope, if to refuse legal aid would be a breach of the person's human rights, primarily their right of access to the courts. It is directly saying, "This is a human rights breach if we do not provide funding".

One of the main problems with the way the system works is its sheer complexity. Lawyers say that it takes a good three to four hours minimum to complete the application forms here. That is work for which they are not entitled to be paid. Most lawyers feel that they cannot do this work. They cannot afford to do those many hours of unpaid work.

There is a provision for people to make an application in person for an indication from the Legal Aid Agency as to whether the case is likely to be funded through this system. However, almost by definition if you have

managed to navigate your way through the form you have proved that you do not need legal help. It is the ultimate Catch-22 situation. As a result, we are now at the stage where, in the last quarter for which figures are available, 638 applications were put in. That would work out at about 2,500 over a year. We are still at only about half the number of applications that the Government were expecting.

Ms Karen Buck: Nicola, what about your client group?

Nicola Mackintosh: It has been devastating. Even though some of my clients' problems remain within scope, the changes that have been brought about as a result of LASPO, to use the acronym, have been devastating. Pre-LASPO, we had a network of advice centres, CABs, law centres and specialist high-street practices. It was not perfect, but it was pretty good. Within our local areas and communities, we knew where to refer cases if we could not help, at different levels of need. Not all cases necessarily needed to be dealt with by a highly qualified solicitor.

Now we have a complete decimation of the advice and representation network. Particularly for my client group, if it was difficult to enforce their rights before, it is even more difficult now. Not only are they facing the reduction in the number of people who can help them and the number of routes to getting help, but the new means test has applied disproportionately to them.

For example, the value of a person's dwelling house is now taken into account, subject to a capital disregard, in the means test. In the welfare benefits system, when the state means tests people it ignores the value of their dwelling house, recognising that they have to live somewhere, but the legal aid system takes that into account and presupposes that they can raise money on the value of that property to pay privately for their legal advice.

That is not realistic. It is not living in the real world. As a result, quite a few of my clients have been caught by this changed means test on the basis that they own, for example, a flat in London, part shared with the housing association, and they are ineligible for legal aid because they have too much money, despite the fact that they are on means-tested income benefits for state purposes. One arm of the state has means tested them saying, "You do not have enough money to live on", and another arm of the state has said, "You are not entitled to legal aid, because you have too much money".

Gareth Peirce: Many firms of solicitors have simply disappeared in the face of the changes that were made. Areas such as prison law and immigration law have been so radically affected that many lawyers who had long experience gave up practising. There have been one or two challenges, particularly in relation to prison law. There is a modicum of advice in restricted areas. This was an important and growing part of the law, with people deprived of their liberty articulating a growth of understanding of due process rights on adjudications, tariffs or the length

of sentences. Prisoners now have to advise each other, because lawyers are not accessible in most of the areas that they need advice on.

We have lost a generation and a future of legal understanding and experience that was essential to where we had got to. It is not only that we have stood still; we have gone backwards in certain areas. In areas such as immigration and prison, the community that has needs is stuck with its position.

Equally, if you are considering judicial review of executive action and you are debarred for reasons of funding or the insertion by the courts of extra obstacles to your ability to have funding—for instance, a permission hearing in judicial review—you can never challenge the predicament that you are in.

This Committee knows the importance of challenges to executive action, as the brake that gets put on the exercise of power. It is an incredibly important aspect of our democracy that there is the ability not just to bring challenges but, as we were discussing, to educate society on what is at stake in a complex area that is not familiar to most people all the time.

Baroness O'Cathain: Is this general or is it just outside London? Is this problem of not being able to access advice general throughout the country?

Gareth Peirce: Yes. London is probably richer in access to lawyers. There are many parts of the country, in two or three counties, as my colleagues will know better than I, where you cannot find a family lawyer or other lawyer for your needs at all.

Nicola Mackintosh: The number of community care lawyers is extremely small. It is a complex area of law with people who present with a plethora of problems, which include welfare benefits, housing and disability needs. Pre-LASPO, there were not many firms specialising in assisting disabled people to enforce their rights, which is what community care law is all about. Now we have an even worse situation, because there are so many additional barriers for people who are trying to seek that advice from a diminishing pot of lawyers.

Sorry to speak for us all, but we are all getting older. I have a firm with eight people and I am trying to train up the next generation, but I cannot do it on my own. The willingness is there among young people who desperately want to help other people who are in need. They recognise that they are not going to be paid a great deal of money, that they are not going to be paid at City rates, and they are more than happy, as we all are, to be paid at much lower rates because we believe in the job that we are doing, which is helping people to enforce their rights.

Richard Miller: We have been monitoring the position in respect of housing law in particular over the past 18 months or so. We found that there have been at least 12 areas of the country—procurement areas, as the Legal Aid Agency calls them; we are generally talking about counties—that at some point in the last 18 months have lost their last housing adviser. In most of those, the Legal Aid Agency has then run a

tender process and been able to get a replacement, but it has meant that for a number of weeks and months these areas have been without any housing adviser on legal aid whatsoever. That is one law area of law that we have been particularly looking at.

We are also very concerned about the criminal legal aid profession, which is very much an ageing profession. There are several dozen criminal law duty solicitor schemes around the country where the youngest lawyer is over 50 years of age. We are getting to the stage where criminal lawyers in some parts of the country are at risk of going extinct.

Nicola Mackintosh: Even when there is one provider in an area, such as my firm, we are still turning away cases every single day. These are people who are in desperate need of advice, who are eligible under LASPO, where the state and Parliament have recognised that they are entitled to legal advice. To be honest, I do not know where they are going, because there are not enough providers to meet the demand. You have a group of professionals who are very willing to work at legal aid rates to offer that service. At the same time, you have a demand from a client group that Parliament has decided is entitled to legal aid, yet that need is not capable of being met.

Q31 Alex Burghart: What could Government do to reverse that?

Nicola Mackintosh: There are a number of things: remove the existing barriers that are unnecessary; reduce the administration, the extra hoops that we have to leap through.

Alex Burghart: Can you give us a few examples of administration that is particularly onerous?

Nicola Mackintosh: The application process for legal aid goes through a digital platform called the CCMS, which is the client and cost management system. It does not work properly. It takes ages and it is not geared towards the particular application for legal aid. I am all in favour of any systems that will make it easier for us to help clients, but this one does not.

There are also significant evidence requirements for people to show that they are eligible for legal aid: for example, three months' worth of bank statements from each bank account. It is very difficult for somebody with learning disabilities or dementia, somebody who is homeless or somebody with mental health needs to produce their file of bank statements. That prevents and deters them from accessing legal advice in the first place, and they may well give up. There are a whole range of simplifications to the legal aid scheme that should be made urgently.

Alex Burghart: You raise a very important point about people with learning disabilities having to produce documentation. What

alternatives to producing documentation might be available? Some evidence will have to be produced to show that they have eligibility. What alternative methods would be useful and viable?

Nicola Mackintosh: Going back to my previous point, where the state has already assessed them as being eligible for payment from the state because they do not have enough to live on, that should be sufficient. If there is evidence that they are in receipt of that means-tested benefit, one arm of the state has already gone through that exercise, so it should be very, very simple.

At the moment, we have a system that is not cost effective. We have additional costs to the taxpayer and we cannot afford that. Money is being wasted when it should be going to the people for whom it is intended.

From the perspective of the client or the public, they need to have a system that means it is much easier for them to access legal advice. They need advice centres. They need CABs. They need law centres. They need all the different community groups that there were and that now do not exist. That is what we have seen.

Lord Woolf: Why have they ceased to exist? Why do you have the deserts?

Nicola Mackintosh: It is partly because they face a double whammy from local authority cuts and the cuts to legal aid.

Baroness Hamwee: I am well able to understand your point that disappearing lawyers means disappearing clients. I can hear it being argued by those who might want to argue it that the clients are not there, so the need is being met. Do you know if this is part of the government review? There may be things that we could add about this.

Richard Miller: We are still waiting to see the exact details. We have been given the general terms of reference now. The first meetings of the working groups are due to happen in the middle of April. We are very much hoping that this will be part of the review. I certainly recognise the scenario that you paint. I have had that in a meeting with officials where they asked for the proof of the people who are slipping through the net, and I said that it was basically asking us to draw a picture of the invisible. It is so difficult to identify these people, because they slip through the net and disappear back into the woodwork somewhere. Getting the evidence of who they are, where they are and what they need is very difficult indeed.

Baroness Hamwee: Can I deal quickly with a point on similar ground? I can hear a similar argument about pro bono work being provided. When I was in practice as a solicitor, I used to think, "I wish I could do this work". But I do not think I would be technically qualified, quite apart from the financial consequences. Am I right that relying on lawyers providing work pro bono is the wrong way to do it? It is not an efficient way to do things either.

Richard Miller: Pro bono has a valuable role to play. It can be very useful to staff advice clinics with people who are trained up with some basic information in areas of law. Some of the City firms are now developing secondary specialisations in order to take some cases through much more fully, rather than just giving initial advice.

Some valuable work is done pro bono, but its availability is very patchy. That is the key thing. Even where it is available, the sheer volume of need out there is way beyond anything that pro bono could ever hope to meet. The pro bono work that is done tends to come out at around £8 million to £10 million a year, depending on how you calculate it. LASPO made cuts of £350 million to £450 million. It is a drop in the ocean. It has a valuable role to play. It can help some people, but it is nowhere near a solution to the problems.

Q32 **Joanna Cherry:** Sorry, I should declare an interest earlier. I am a non-practising member of the Faculty of Advocates in Scotland, but I had a pretty big legal aid practice before I ended up here.

I am interested in the respect for judicial independence, which came to the fore across the United Kingdom at the time of the reporting of Gina Miller's case in January of last year. To remind ourselves, there was some controversy about that reporting when newspapers such as the *Daily Mail* referred to the judges who made the decision as "enemies of the people". The Mail Online thought it was useful for us to know that one of the judges was a gay, ex-Olympic fencer. The *Daily Express* exhorted readers to "rise up and fight, fight, fight" against the judgment. I am sure that as lawyers you will all remember that there was some criticism of the Lord Chancellor for not defending the independence of the judiciary at the time.

Do you have any comment to make on those incidents? This is the real question I have for you. Where should the line fall between legitimate criticism of the judiciary and unwarranted attacks? It is quite a difficult question to answer, but I wondered if you had any views on that.

Gareth Peirce: An understanding of the judges' decision is important, but that is completely lacking in some of the commentary. Many of the cases I do are for people or issues that are unpopular. When a judge has found for the person I represent, the judge has come under attack but from an entirely inappropriate perspective, as if it is somehow a football game and the judge was on one side. You would have headlines such as, "Abu Qatada – 2, Theresa May – nil". It is not helpful or intelligent, but it becomes customary to be allowed to do it.

It is thinking that it is fair game to go for judges who have to take difficult decisions on complicated cases. If there is a feeling as a judge that to do

so will mean that you are pilloried, we have created a wrong understanding in society of a judge's role.

I might not like a judge's decision at all, and I believe I would be entitled, if I wanted to speak publicly, to say why I thought it was wrong, but not to talk about an "enemy of the people". That is absurd, but it is increasing. It is not just one case. That puts pressure on everybody in the court, including the person who is before the court—the defendant or the litigant—who thinks, "I am not meant to win. The whole of the edifice of the state is against me".

Joanna Cherry: If a politician is attacked by the press and is lucky enough to get a right of reply, they can justify themselves, but the judiciary cannot do that, can it? It cannot justify its decisions in the way I might be able to. That is part of its oath of judicial independence. It issues a judgment and it cannot get into a dialogue with the press. Is that correct?

Gareth Peirce: It is customary that judges do not. I think Lord Thomas felt that he should speak out about what was going on after that particular onslaught. I think it was that particular onslaught.

There should be a way for the complex decision to be better explained. The press have a responsibility to achieve some understanding of what a decision means, and not simply that someone in society who should not have rights at all, which is how it is often perceived, has being given a special gift by a judge who does not know what he or she is doing. That is the wrong level of comprehension to be articulating.

Richard Miller: In some cases, the Supreme Court publishes a statement for the benefit of the press to explain what a decision was about, and that is a practice to be encouraged. That is not going to help in a situation where a media outlet has its own agenda and is not interested in that but just wants to make the headlines.

In part, this comes back to the issue of public legal education. If we had a population with a better understanding of the role of judges, who they are, the importance of their independence and why they do what they do, those sorts of media headlines would not gain the same traction or have the same power that they do, because the response from the general public would be: "But they are just doing their job", as we all know they were. There is a role for public legal education in this, which would help to improve the environment overall.

Joanna Cherry: Whose responsibility would it be to facilitate that public legal education?

Richard Miller: The Department for Education would have a role in this, because it is partly to do with the citizenship element of the school curriculum. I am not entirely sure how one starts having those discussions with that particular department.

Nicola Mackintosh: I was fortunate enough to sit on the Bach commission, which published its report last year into the right to justice. It recommended a right to justice Act, but it also focused on public legal

education and building on the work that the Citizenship Foundation has done in schools and colleges. It also analysed what has gone wrong with that, and the answer was that there has not been enough political and financial commitment to bolstering that within schools. That goes a long way to creating understanding of what the rule of law is all about, because if you are making personal derogatory comments about individual judges you are not recognising the importance of the rule of law, the role of the judiciary and the job that that particular judge has done.

Gareth Peirce: Judges should not be exempt from criticism of what they do and say. In part, we lack the idea that you can scrutinise what a judge has done. Was there a pattern of decision-making by a judge or a number of judges that should be analysed and criticised? Perhaps, with the Supreme Court in this country, one has a greater idea of the individual judges and their trajectory of legal history. Everyone in the United States tends to know what a particular judge's career has been. Some of them held elected office. A greater awareness and ability to critique effectively would be good, not bad, but this simplistic vilifying and not comprehending in any shape or form is unfortunate.

Baroness Prosser: This conversation is focusing on the importance of people learning about the law and making themselves aware. Your last comment made me think: is there not some responsibility on the judiciary to be a bit more transparent about the ways in which appointments are made and the backgrounds of newly appointed judges, et cetera?

Gareth Peirce: I would say so, definitely. A lessening of the rather theatrical nature that our legal system presents as a public image would help.

Baroness Prosser: We must not forget that the headline that was so derogatory about the judges was made by people who understand the law inside and out. They were not in need of lessons about who is responsible for what. They knew precisely what they were doing.

Gareth Peirce: They had an agenda.

Q33 **Chair:** Can I ask about the role of the Government in all this? Often the Government are a party to a particular case. Do Ministers and the Government in general have a role in setting the tone of respect for and recognition of the independence of the judiciary, and the importance of them being allowed to get on with their jobs? Is there a proactive responsibility on the part of the Government to assert the independence of the judiciary and defend them when they are facing an onslaught in relation to any particular case? That is the first point.

Secondly, when the Government are a party to a case, as they have been over the years, that involves human rights, prisoners, detained immigrants or people the Government are seeking to deport, is there a particular responsibility on the Government to accept the judgment and not to use their position to whip up a frenzy against that court's decision?

Gareth Peirce: We may move on to a different aspect of that where the Government will litigate cases that legal aid authorities would never give funding for because they have deep pockets, and they can go on even if they have a bad case.

Chair: Sorry, I led you astray on that. I do not mean accepting decisions at first instance and not appealing. I mean ultimately accepting the view of the court wherever it gets to.

Gareth Peirce: Sorry, I understood the question but came to that first, rather than secondly. There have been some immediate knee-jerk reactions by a Minister, after a defeat in the courts, saying, "I am not accepting that. I am going to undo it. I am going to try again", without even stopping to accommodate what the ruling says.

We have an adversarial system, but a Minister has a duty to absorb what the court is saying, to reconcile that with the decision and to analyse whether the decision was right or wrong before immediately saying, "That is utterly wrong. I am going to reject the idea and find another way".

Chair: Leaving aside the consideration of it and the detail, are they not sometimes in two places at once? They are a litigant, but they are also supposed to be, and they are, an important part of the system that should be creating a culture of respect for the independence of the judiciary. When a case goes against them and they have appealed it as far as they are going to, should they be setting an example and saying, "That is the judiciary. That is the thing about the rule of law in this country. Even though we are the Government, and even though we think that we are right, we accept that, because it is the rule of law, and if it says that somebody's human rights have been breached by us, we accept that", rather than immediately castigating the judgment? Would that be asking too much of the Government?

Nicola Mackintosh: The Government have a duty to promote and respect the rule of law. That is all part of it. The Government may disagree with the decision, but they have to accept it, and that is the system. The Government have a heavy responsibility to set an example to everybody.

Richard Miller: It is difficult, because the Government have a role as the Government to put forward their view as to what the law should be. They may well feel that the law should be X. When a court says, "No, the law is Y", there is no reason why the Government should not say, "The law is Y; we think the law should be X. We are going to bring forward a law to

change that". It is difficult if there are then claims that the courts were wrong in saying that the position is Y. That is the distinction you can make. It is perfectly okay for the Government, as the Government, to say, "We think the law should be different. We think the law should not be what the court said it is". But if they say, "The court got it wrong. The law always was what we now say it is going to be in the future", you are potentially getting into more difficult territory.

Q34 Baroness Lawrence of Clarendon: It sounds as if the Government will change the law to suit themselves. Last week, we heard from families about inquests and the mere fact that the state can get funding at an inquest where the individual cannot. In some cases, especially where a hospital is concerned, it is blatantly negligence, yet that family have no means of getting legal aid in order to support their case from the Government. It sounds as if the Government can pick and choose to suit themselves, so the law can be changed in their favour.

Richard Miller: Unfortunately, that is the nature of politics in a system that gives a majority to a particular party. I am a strong supporter of the recommendations of the Bishop of Liverpool in respect of inquests that families generally should be funded to be represented at inquests. He was exactly right in that. It is a serious imbalance that, in cases where there has been a questionable death, the family are generally expected to represent themselves, even though every other party involved will be represented by lawyers there. I would very much like to see the Bishop of Liverpool's recommendations implemented.

Q35 Lord Woolf: I would like to pick up the remark Ms Peirce made on lack of knowledge about who judges are and who has been appointed. It correct, is it not, that all judicial appointments are advertised and it is said what qualifications are needed? They all have to go before a selection committee, which does not just consist of judges; it consists largely of people who are not judges, who make the recommendations for appointments. Things are improving. Do you agree? Your freedom of speech applies particularly here.

Gareth Peirce: I am not commenting on the question of how judges get appointed or the openness of scrutiny. I am talking about how we in this country have little understanding of a judge, his or her thinking and where that thinking comes from. I am not talking about a personal background; I am talking about a process of legal thinking that is completely outside the understanding of many of those who come before the courts.

Lord Woolf: You are talking about education for the public as a whole.

Gareth Peirce: Yes, in part, through more two-way transparency of what goes into a legal opinion, its origins and whether that judge has made decisions in the past. This should not be the exclusive province of a few interested lawyers. It is more interesting and important that, in society, we understand it.

Lord Woolf: Mr Miller referred to the fact that the Supreme Court now provides a summary of the issues for journalists to make it easier for them to report. I do not know if you know this, but that is not limited to the Supreme Court. It happens regularly in the High Court. The whole purpose of giving a judgment in public is so that the public should know exactly how the decision was reached. Unfortunately, because of lack of resources, newspapers are also no longer sending local reporters to sit in court and take a note of what is happening. Do you agree with that?

Gareth Peirce: I agree that there is practically no reporting, not just of judicial decisions but of important trials. When the jury comes to a decision, no one is there to report anything other than the verdict. Often that leads to complete incomprehension of why someone has been acquitted or convicted. That is a huge loss to the understanding of what goes into making a decision, which is questionable to someone who only knows the result. Society only knows the result.

Q36 **Joanna Cherry:** I suppose this is the flip side to the question I asked you earlier. On occasion, people have criticised judicial decision-making by saying that it has strayed too far into matters that are for policy, for Government and for Parliament. I am thinking about the UNISON case about employment tribunal fees. You may be aware that Lord Reed founded his speech in the Supreme Court on the importance of access to justice as an aspect of the rule of law in striking down the fees. But then an organisation called the Judicial Power Project was very critical of the decision. It felt that Lord Reed had been wrong in invoking the principle of the rule of law and had strayed too much into policy-making.

That decision was of huge importance for many litigants who felt that the fees had been set at such a level that they were not prepared to take the risk of litigating. I wonder if you have any views on where the balance lies there. Was Lord Reed right to invoke access to justice as an aspect of the rule of law? Was the Judicial Power Project correct to say that he had strayed too far into policy-making? Does the correct analysis lie somewhere in between?

Richard Miller: That judgment was probably my favourite piece of reading from the last year. Lord Reed did a fantastic job of embedding the concept of access to justice in the British common law going back over

many centuries. He established, step by step by step, that this judgment was entirely within the history of the British common law. In this case, no, this was not random judicial policy-making. This was embedded in the constitution and the system of this country.

I can see that, when the court has to make decisions based on precedent in circumstances that had never been considered by law-makers or previous judges in other similar cases, there will be situations where the judges have to make a novel finding. That can be quite difficult to distinguish from making a new law, but because a case has been brought in circumstances where the law effectively has a gap there is not really anything else the judges can do. That is what the system requires them to do in that situation. While sometimes they will step back and say, "No, we are not going to find in your favour because it must be for Parliament to do that", there will be times when they feel there is enough precedent and enough reasonably similar scenarios that they can say, "Yes, by analogy, this should be covered".

There is always going to be scope for argument one way or the other. I certainly do not think we have a judiciary that blatantly goes in for policy-making and oversteps the bounds.

Nicola Mackintosh: The right of access to justice, if there is such a thing, is the most fundamental right, because without access to justice there is no other right to healthcare, to social care, to education, to life. It falls into a different category.

Gareth Peirce: The Human Rights Act was a child of Parliament. It was a decision by Parliament and enjoined judges to use their best initiative to interpret what they were dealing with in the context of human rights. It is positively what Parliament intended judges to be doing.

Q37 Chair: Can I just move on from the issue of respect for judicial independence, how the Government should behave towards judges and their independence to the question of the relationship between the Government and lawyers or solicitors who are taking cases where the Government are a defendant. In the cases where the Government are a defendant, should they forbear from criticising the lawyers who are taking the case and not use their position in the House of Commons, at the Dispatch Box, as Ministers, to criticise the lawyers, but respect the fact that the lawyers are taking the case on behalf of the client, undesirable or otherwise, and that is their job? Do you think that the Government should not use their position of power and authority to denigrate lawyers who are taking cases? It is a bit of a leading question.

Gareth Peirce: One has to remember that, yes, they should not denigrate the individual lawyer, but much more important is the whole mindset. By international standards, neither Governments nor bodies should equate the lawyer with the case they represent. It is a question of

whom you are representing and the case you are representing. This is more important. If you are representing many people from a community to which the Government have a particular attitude, it is not simply the lawyer who is somehow categorised as being outside of the society and an outlaw; it is the perception of those they represent as being outside of society. This is an entirely wrong premise on which to start. The lawyer is just a component in that.

Chair: I want to focus on the issue of the lawyer or solicitor. Perhaps, Richard and Nicola, you could respond on this as well. We are looking at the different aspects. We are looking at the role of the courts, the judges and legal aid, but there is also the aspect of a lawyer going to court on behalf of the claimant, claiming their human rights. The question is whether, when the Government are a defendant, as they often are in human rights cases, they should not elide their view of the case with their view of whether the lawyer is an improper person or not fit to be a lawyer.

Richard Miller: Lawyers are well used to the fact that they have to stand up robustly on behalf of their client's position, regardless of the impact on them. We also have a judicial system that is very clear that it must be independent of government and free from any sort of governmental interference. Where a court feels that there have been public statements that are prejudicial to a fair proceeding, the court has powers to take steps to deal with that matter. We have a system that is geared up to deal with those situations. Where a lawyer is believed to have overstepped the bounds, there are processes for dealing with that. We have a regulatory authority. We have the disciplinary tribunal. There are appropriate channels there, where any legitimate concerns about the role of the lawyer can be dealt with. In our view, that is the way that those issues should always be addressed.

Lord Woolf: There have been cases where the Government have made complaints about lawyers. I am thinking about lawyers who brought cases against the Army, and it was thought that they should not have been brought. It went to a tribunal, which examined the conduct of the lawyers concerned. That is what you are saying should happen.

Richard Miller: Exactly, yes. As we saw, in the case of one firm, the tribunal found the allegations to have been proved. In the case of the other, they found that they were not proved. The system seemed to work very effectively there.

Chair: There are some self-denying ordinances. In a case where the Government are involved, the Government would not be expected to email the judge to communicate their views about what should happen. There would be a real disapproval of that. It would be regarded as highly inappropriate if the Government were sending secret emails to the judge, using their position as the Government,

because they have to respect the independence of the process. That is right, is it not?

Nicola Mackintosh: This is only one example of a number of changes that have been introduced, which are indicative of a very worrying trend. I have a set of post-it notes in my drawer in my office with the slogan, "Do right. Fear no one". From time to time I look at that, because having been in practice for almost 30 years and knowing that lawyers are not very popular, and that legal aid lawyers are less popular than the vast majority of lawyers, I have seen a number of quite worrying changes brought in in relation to interference and our independence in fighting for and acting for our clients.

There are a couple of examples. One of the clauses in the contract for criminal legal aid is what is now called the embarrassment clause, which essentially says that the legal aid provider shall not do anything that might reasonably embarrass the Legal Aid Agency. There was a proposal that that contractual clause be imported into the civil contract for legal aid. Whether it will eventually turn out to be, I do not know. It was only because a letter before claim threatening legal action was written by a lawyer that the Government thought again and clarified that that embarrassment clause did not relate to the actual carrying out of legal aid cases. I am not quite sure what it relates to.

Another example is that, when applications are made for legal aid, if they are particularly sensitive or political or might involve an appeal to the Court of Appeal or the Supreme Court, alongside a whole range of other criteria, the application for legal aid is referred to specialist team, part of the Government Legal Service, which analyses the risk in relation to the grant of legal aid. That policy was not previously published. It was produced as a result of a Freedom of Information Act request. That is deeply worrying. A decision-making process about how gets legal aid, meaning who is able to bring a case to court, is being carried out partly by the same Government Legal Service that is advising the government department on the receiving end of that legal action.

Chair: When it comes to the issue of the Chinese walls and the independence, complaints against solicitors and adjudication of those complaints all used to be done by the Law Society. Then it was decided to make it more independent, because of the value that everybody placed on the independence of the legal profession. You had the Solicitors Regulation Authority and the Solicitors Disciplinary Tribunal.

Is it right for the Government to be sending emails, in relation to a case when they have been a defendant, to the Solicitors Regulation Authority, or should they be stepping right back and saying "We respect the judiciary but we also respect the independence of the legal profession; we should not be leaning on the Solicitors Regulation Authority, which is taking a case to the Solicitors

Disciplinary Tribunal, because this all has to be very arm's length and independent"?

Richard Miller: It is essential that regulation of solicitors is independent of government as well as of the representative body for solicitors. You might imagine circumstances where the Government have relevant evidence that the tribunal appropriately wants to hear, and that that evidence might be handled in the same way as other evidence before the tribunal. If there was a suggestion of communications between the Government and a decision-making body, that would be looked at a lot more closely.

Q38 **Joanna Cherry:** To go back to what you said about this special process for reference to a unit within the Government Legal Service, Amnesty International has given written evidence to this inquiry to say that it is very concerned about this policy. It says that it is a policy of the Legal Aid Agency to refer certain sensitive or political cases through a special process where legal advice appears to be given by the Government Legal Service about the grant or refusal of legal aid and the merits of the case. Amnesty has told us that it is concerned, because it is obvious that there is a risk of interference in decision-making here. It has said this lends further support to its view that the legal aid system should be administered by an independent body without political interference. I can see you are nodding your head. Would you like to comment on what Amnesty has said?

Nicola Mackintosh: I firmly support that. Pre-LASPO, the legal aid system, the operation of legal aid and the decisions about grant or refusal of legal aid were managed by an arm's-length body. I would argue for a body that is wholly independent from government. The Legal Aid Agency is an agency of government and, whatever happens on the ground, there is a real risk of perception of bias, perception of influence and perception of interference. It is important to bring an end to this, so that there is a truly independent operator and administrator of legal aid.

Baroness Hamwee: On this same point, I am assuming that in this context the basis for decisions is not made public. Did the FoI request reveal criteria for the advice to be given in the way that is described?

Nicola Mackintosh: The process has been updated this year. I have a copy here if anybody would like to see it. It sets out a description of the types of cases that would be referred through this high-profile case referral system. I was asked outside this room before we came in, "Have you had any cases that fall into this category?" I said, "I would not know, because nobody would tell me if any of my cases had been the subject of this process".

Gareth Peirce: The firm I work in has had a lot of cases that would fall into that category, where national security underpins the accusation. For many of those cases, the decision-making on legal aid is so prolonged that in effect there is no remedy for the person. There has in some cases been a new intrusion, which is the Legal Aid Agency deciding on the merits of the national security case, based on secret evidence that the person affected does not know, that legal aid should not be granted. That creates a chilling extra dimension to all this.

The Legal Aid Agency would always be sensitive to what might be called a high-profile case in which the only press intervention or scrutiny is to come to the door of the Special Immigration Appeals Commission and say, "Is he on legal aid?" If the answer is yes, they go away and write the headline. Everyone who has dealings with the public purse is responsible, but executive actions in relation to things that affect one particular community, the Muslim community, are now proliferating at such an extreme rate that there is often no legal aid available in relation to them at all, or there is no appeal process, and new systems are coming into place that nobody understands.

What was quite understandable and manageable when legal aid worked—the funding, the accusation, and the executive action taken, such as the deprivation of passport, the deprivation of citizenship, exclusion from the country—has now become confused, but you can come back if you engage in a process of exposing yourself to being deradicalised. That is the basis on which you are allowed back into your own country.

It is almost impossible to unravel these extraordinary extensions of executive action, which are based on secret evidence the person does not know. It is almost impossible to access the process, and to access appropriate funding or any funding at all. I appreciate that this is not what everyone faces every day in their working lives, but what now confronts us is extraordinary.

There were exceptional judgments in the House of Lords, in a case called *A and others*, which abolished internment and said that we should never, in courts in this country, make use of evidence from torture. They were heroic judgments some years ago, but the fundamental core of extreme executive action that was fought in the courts has now become normalised. Their secret courts and their secret evidence have become normalised, and I am afraid that it is becoming normalised that people in those positions have an almost insuperable difficulty in getting funding to fight it. It is a black hole that people in the community, which includes children, are falling into under the Prevent programme.

Q39 Alex Burghart: To follow up on that, I see where you are taking this, but I wonder if you could spell out for the sake of the Committee the process the Government should put in place so that they can maintain their national security interests but see to the needs of the sorts of clients you have just described.

Gareth Peirce: The danger is that, in relation to human rights, it is very easy for any country to say that there is a crisis and to move to exceptionalism whereby there are people who should have human rights, and people whose human rights—either their access to them or their entitlement—should be altered. There is endless capacity for moving the powers of government to deal with individuals, all under that concept of exceptionalism. The concept that people have rights and ought to articulate them gets lost. One understands how it can get lost, but it is harder to fight for and reclaim the concept of rights for many groups of people.

Alex Burghart: Would you dispute the paramountcy of national security in those circumstances?

Gareth Peirce: No. There should never be a concept of primacy. You take a crisis, you address what the Government have said and you analyse whether it is right. That is what happened in the case of A and others when internment was introduced, and it is what happened when the Government said that they were happy to use evidence from torture. Eventually, in those cases, the court said, "It's very wrong". There were extraordinary judgments by Lord Bingham and others that said, "What we have to fear is not terrorism but laws like this". It is a restatement of what we wish to be in society, so that we do not have a stampede towards ever more extraordinary procedures but use what we have, which is plenty in this country, to deal with perceptions, many of which may be completely wrong.

Q40 **Joanna Cherry:** I want to return to what was said earlier about the term in the contract for criminal legal aid that says not to do anything that would embarrass the Legal Aid Agency. It seems a rather odd use of language. Has any guidance note been issued to explain what that means?

Nicola Mackintosh: I have the clause here. It is not very long. "You shall ensure that neither you, nor any of your affiliates, embarrasses us or otherwise brings us into disrepute by engaging in any act or omission which is reasonably likely to diminish the trust that the public places in us, regardless of whether or not such act or omission is related to your obligations under this contract"—that is, the contract for legal aid. "Any operation of this clause is subject to our obligation to act as a responsible public body and any sanction must be proportionate".

There was great consternation among the lawyers who were signing this contract. "What does that clause mean—anything we do that might bring the Legal Aid Agency into disrepute or embarrass it"?

Joanna Cherry: "Embarrass" is an odd word.

Chair: Did you say that had been changed, though?

Nicola Mackintosh: Following the threat of legal action, the clause has been clarified. The Legal Aid Agency has conceded that it must not rely on

that clause to stifle criticism of the Government, and it does not relate to the carrying out of functions under the legal aid contract, which begs the question why it is in there at all. I am hoping it will not be in the new civil contract in September.

Q41 Baroness Lawrence of Clarendon: Looking through the papers here, I see that one thing we have not covered is the telephone gateway. Advice can come through that, but it also throws up barriers. Could you tell us a little about the effect there can be on individuals trying to get legal aid through the telephone gateway?

Nicola Mackintosh: Would it help to give some background to the telephone gateway?

Baroness Lawrence of Clarendon: Yes.

Nicola Mackintosh: It is called the mandatory telephone gateway, and it is mandatory because the Government decided that were certain areas of law whereby the public could access legal advice only through the telephone, not by post, save in exceptional circumstances, and most importantly not face to face. If somebody needed advice, they could not just pop in to their legal adviser's office and say, "Please would you give me advice on this?" They would have to use this mandatory telephone gateway.

The areas of law that were originally selected were: discrimination, which is a relatively new construct for legal aid contracting; special educational needs, which you have already heard about last week or the week before; and what everybody calls "what remains of debt", which is what remains of debt in scope, which is mortgage repossession.

The Government also decided to include community care, which is advice for disabled people and others—carers, people who do not meet the definition of disability and so forth—about their rights to health and social services. To be honest, for that client group, the notion that one size fits all, that everybody could use the telephone and nobody needs face-to-face advice, is ludicrous. Mine was one of a number of firms that threatened judicial review proceedings and had to issue proceedings, which we did pro bono, in our own right as a firm. That eventually resulted, through a tortuous route, in community care not being part of the telephone gateway.

We were left with the three areas, and we are still left with them. The Legal Aid Agency's recent tendering exercise has, I understand, resulted in a bit of a problem, because there are not enough people or organisations wanting to tender. That may be because it is not economic for that system to be run, but the result of the telephone gateway is absolutely clear: a whole load of invisible people—invisible members of the population, large categories of the population, particularly the vulnerable people who need the advice most—will not be able to access advice through the telephone gateway.

A lot of my older clients find it very difficult to use the telephone, particularly if they have hearing problems. A lot of my clients have learning disabilities. In fact, people with many different disabilities find that face-to-face interaction, as we are having now, is the most effective way to communicate. The relationship of trust between a client and their lawyer is of the utmost importance, because the advice that I would give a client face to face has to be trusted by the client in order to be valuable advice for them.

The telephone gateway has resulted in large numbers of people—and I cannot say how many, because they are invisible, as I said; we do not keep statistics on people who do not seek advice—not accessing the advice they need. I would like to see different means of clients being able to obtain advice by telephone—through the internet, face to face, or however they choose is best for them.

Baroness Lawrence of Clarendon: It is mandatory, but how would the public know about it? Is it well advertised and something that people are aware of? That way they have a choice, if it is what they want. How publicly advertised is it?

Richard Miller: We have tried on numerous occasions to persuade the Ministry of Justice to publicise the telephone helpline and it has refused point blank. This helpline might as well be a state secret for all that the general public know about it. It has been one of our real frustrations. It is one of the things that we hope the LASPO review will reverse. I fully share Nicola's view that telephone helplines can be a good route for some people. They should never be the only route into the system.

Q42 Joanna Cherry: You have expressed a number of concerns about how the Legal Aid, Sentencing and Punishment of Offenders Act is operating in England and Wales at the moment. The Government are carrying out an in-house review of legal aid at present. In Scotland, we have just had an independent review of legal aid, which reported on 28 February. Given the concerns you have expressed today, would it be of benefit for there to be an independent review, rather than an in-house review, of how legal aid is operating in England and Wales?

Richard Miller: Yes.

Nicola Mackintosh: Yes. It is also very important for the review to learn from the past. We have had a number of reports about what the impact of LASPO has been. I am very glad that the Government finally, belatedly, announced the review—and then put it back. I regret that it is not going to be undertaken by an independent body, for all the reasons that we have given.

Richard Miller: We would urge a review of the economic viability of the system as well. Even if legal aid is available, if solicitors cannot afford to provide the service it will not be available to the people who need it. Legal

aid remuneration rates have not increased since the 1990s. That is how bad it is. For most firms now, it is simply not economic to do it. There needs to be an independent review of the economics of the whole system, as well as the issues to do with scope and eligibility.

Chair: Thank you very much indeed for coming to give evidence on this. Thank you also for the work that you have done over the years helping people enforce their human rights. Thank you very much indeed.