



The All-Party Parliamentary
Group on Legal Aid

Westminster Commission on Legal Aid Oral Evidence Session

Civil (Public) Legal Aid

17th December 2020

In attendance:

Panel

- Karen Buck MP
- Lord Bach
- James Daly MP
- Andy Slaughter MP
- Baroness Natalie Bennett
- Baroness Helena Kennedy
- Lord Colin Low
- Yvonne Fovargue MP

In attendance

- Bob Neil
- Karl Turner MP

Witnesses

- Jo Hickman, Public Law Project
- Nicola Mackintosh QC, Mackintosh Law
- Jawaid Luqmani, Luqmani Thompson
- Henrietta Hill QC, Doughty Street Chambers
- Polly Sweeney, Rook Irwin Sweeney
- Rosaleen Kilbane, Community Law Partnership, HLP

Introductions

Karen Buck MP – Chair of the APPG on Legal Aid

Good morning everybody, welcome to our third session for the APPG on Legal Aid Inquiry into the state of legal aid, where we are going to be interviewing a number of panellists on the issue of civil legal aid. And we are very grateful to our expert panel who will be contributing today. Before we start, I'm Karen Buck, a member of parliament, I'm the chair of this APPG.

I'm going to ask the members of our parliamentary panel to very briefly introduce themselves. Some have been at our previous sessions, some are joining us for the first time. So, if I will start with Lord Bach.

Introductions - Panellists

Lord Bach

I was the last labour minister for legal aid way back in 2010 and with Andy Slaughter he and I led the fight against the LASPO bill that was in 2011-12. And lastly, I was chair of the Access to Justice report produced by the Fabian Society in 2017, whose ideas are still very much on the table.

Yvonne Fovarque

I am the labour MP for Makerfield and prior to my election in 2010, I was Chief Executive of St Helens Citizens Advice Bureau for 23 years. And we had contracts prior to the Tory government in housing, social welfare law, and debt.

Baroness Helena Kennedy

I am a Labour peer. I have chaired a number of committees on in the House of Lords, the European union justice committee. I was also on the joint committee of Human Rights. I'm a practitioner at the English Bar. I'm the director of the International Bar Association's Institute of human rights. And I am the president of Justice.

Andy Slaughter MP

I am the Labour MP for Hammersmith elected in 2005. Before that, I was a practising barrister doing lots of legal aid work. I was a shadow justice minister for 6 years from 2010-15 parliament and opposed LASPO in the commons while Willy was opposing it in the Lords. I've sat as a member of the justice select committee for the last 2 years. For the last 28 years, I have been on the management committee in the Hammersmith and Fulham Law Centre and have had a ringside seat on the cuts to legal aid over the last 10 years.

Baroness Natalie Bennett

I'm a Green Party member of the House of Lords. I've been there a year. My background really is in science, in social science and in the humanities, but I'm learning about law very fast as a member of the house of Lords. I'm very concerned about poverty and inequality and that's why I am here.

James Daly MP

I am the Conservative MP for Bury North, a practicing solicitor and I was a criminal legal aid defence solicitor for 16 years, running a practice in Bury with my wife for 10 years. I am a member of the Justice Select Committee in Parliament.

Lord Colin Low

I graduated in law and spent 16 years lecturing Law at Leeds University before I left to work in the disability field. I have been very active in the voluntary sector, on the basis of which I was made a life peer and joined the Lords in 2006. In the course of my work, I chaired a commission on legal aid which resulted in a report produced in 2014 that constitutes my main claim to be on this Commission.

KB:

We have two other panel members who I know are not present today. Daisy Cooper member of parliament and Gareth Bacon MP as well, but they are a part of the inquiry and will join us on other sessions. Now, before we start with our first witness this morning, I'm very pleased that we are also joined by Bob Neil, who is the chair of the Justice Select Committee and Karl Turner, who is the opposition spokesperson for justice. And I'm going to ask each of them if they would like to make a few introductory remarks.

Introduction by Bob Neil

I am very pleased to be invited along to the panel. Before I became a Conservative MP, I was practicing at the Bar for probably the better part of 30 years, doing almost entirely criminal work, and predominantly publicly funded work, both prosecuting and defending.

So, this is something which is important to me personally, as well as politically. I'm very keen that we try and take forward the work that we're doing around this, with as broad political consensus as possible. It's always struck me as, as being important and a point that I have made to some of my own party colleagues that the Rushcliffe report was after all the work of a former conservative cabinet minister, who joined the Wartime Coalition Government and was asked to set up the Committee which then gave rise in 1949 to the legal aid and advice act. And so, it wasn't at that time a matter of political controversy and the principle that there should be access to a more comprehensive form of legal support than previously existed was something that Rushcliffe had no problem about signing up to and it's one I certainly don't either. So, I think it's important we try and get as much consensus as we can for this. We'll always

have arguments about what the level of funding should be for legal aid and advice, that's something which has always existed, regardless of who has been in government, but the principle that this is a civic right, in just as the same way that access to healthcare or to education or to any other services are seen as a civic right is something, we do need to make a case very strongly for.

And as you know, the justice committee has done a number of inquiries already, and I'm grateful to both to Andy and to James Daly for the work that they've put in since they've been on the committee. So, we have highlighted a number of concerns around this. My personal view is clearly that LASPO took too much out of the system, and we need to start to restore that and it's quite interesting when I look back at some of the briefing that you've done on the history of it, that the Rushcliffe committee itself was already talking about a system which was already patchy and getting worse. And that chimes with some of the evidence that we have seen to our select committee about legal aid deserts, as they're called, the difficulty of getting a solicitors to advise on legal aid, particularly in some key areas, like housing law, welfare law, debt, and so forth.

I mean, I know from my constituency in a fairly prosperous London suburb, it is pretty difficult to get a legal aid lawyer in the area to do advice on housing or family law, for example, and what you're then seeing that leads to, as we have had very compelling evidence on to a number of our inquiries, to the increase in litigants in person. That I think has three immediate bad effects. Firstly, people ought to know what their rights are. Parliament gives people a right, it seems to me that it must follow that they've got to be given the means of enforcing that right. Enforcing the right shouldn't be dependent upon financial ability, should be dependent on the merits of the claim. That's what we have to get back to, to being essential in the system. The second point is that if they're not able to enforce that right, not only is that justice done to them, but to also there may be damage to broader society because civil proceedings aren't purely transactional. And I think that's something actually that the Supreme court in the UNISON judgment got right. It isn't purely a matter between the parties, there is a public good in terms of what happens and some of the changes in behaviour that come about as a result of litigation, that it's important too. For litigants in person, we've also had very compelling evidence that it can mean that sometimes just cases are not being pursued, ill-founded cases can be pursued at needless cost actually very often perhaps to public authorities who are on the other side and of course the cost to the system. And of course, inevitably litigants in person will need more help from the judges. It places much, much more pressure on the judiciary, and we've had very strong evidence from all levels of the judiciary from the high court down through to the circuit and district bench and magistrates. This actually makes their job much harder. So, a lot more stress, never mind the stress on the parties who are often litigating about difficult and sensitive issues very often when they are at a low ebb in their lives. So not only is there a social and an emotional cost, there's also a financial cost.

I think one of the problems that we have generally in the way we do government in this country is that we don't join up the various cost centres and people see it simply in terms of saving on the legal aid budget, but actually you may have costs which are

added to the court's budget and we ought to be looking in a much more holistic approach to this. That's something that we've merged in our committee reports on a number of occasions, and I'm hoping that the work of this commission and the evidence that you are getting will help make that case. The justice system is a downstream element of the things very often issues have led people into problems with their family, life and childcare, child custody and so on. These would have started much earlier on, issues that lead them into the County court around debt, housing repossessions, and so forth have started much earlier on but it's the justice systems budget, which picks up the tab for the consequences. So, a much broader approach, it seems to me, is very important around this.

So, the work that you're doing, is something which chimes very well with the work that we're doing because we're having two inquires, which we've kicked off and we'll be running in the new year in relation to court capacity because that's also a problem, even once we resolve COVID this will persist. It gets highlighted about the crown court, but it's an issue in the civil courts too, in the County court, particularly in the family court, and also on legal aid and it's very clear we need to address that issue.

That doesn't mean going back to things exactly as they were. That doesn't mean that we necessarily have to go through that physical approach that you have with the old green form good though that was at its time. With technology there may be other clever ways of delivering legal advice and assistance and particularly getting early advice and assistance is really important. Family cases are the most obvious example of that. We've had very, very strong evidence to us as a committee, that the collapse in mediation, which was supposed to be the answer to all of this was because people didn't get early legal advice who pointed them in the direction of mediation that the lawyers are actually the gateway to mediation.

So, in fact, there's again, a benefit and a cost saving in that early legal advice. And I think we can strongly make the case to government. Actually, some current ministers who have had more experience of the system themselves than their predecessors understand that. What we've got to do is to make the political weather and the evidence to help them and others make the case to the treasury, that a relaxation of the restrictions here would actually be not only a social good, but also in the long-term an economic one as well. I think this is a very valuable piece of work and I know Rohini keeps me very much in touch with what is happening here so I shall look forward to the transcript. You have a really great panel and this is a great initiative that I am very happy to come along to and wish it well and I hope to collaborate on going forwards.

KB:

Thank you very much, Bob. And I think collaboration, and certainly the fact that that we're doing these parallel streams of work and much in the same area it can only be useful in terms of making sure that the government gets as much and as good evidence base as it possibly can. So, thank you very much for those remarks.

Introduction by Karl Turner MP:

It's a great privilege to be invited again this inquiry is incredibly important and I just want to say, what comes of this really must matter. It's a privilege to be joined by so many esteemed colleagues and indeed Sir Bob who I think is a brilliant chair of the justice select committee. He does that, I have to say beautifully in a way that I would probably not be able to manage, because he works cross party, he does it without fear or favour and sticks, in my view, rigidly to his principles that legal aid should be afforded to those who need it most. And I'm hugely grateful for his work.

Civil legal aid is fundamental to ensuring equality before the law, but it's failing and there is very definitely a justice gap in England and Wales. And I think it should be recognised as a national sin, frankly, legal aid lawyers perform a critical public service and it's disgusting in my view that the prime minister and other senior cabinet ministers allow this hatred of what they're describing as do-good lawyers to continue.

The reality is that no government, including the previous labour government, have been overly generous when it comes to paying legal aid lawyers for the work that they do. I find it remarkable, frankly, that legal aid lawyers have not had an increase in pay since I think 1994. So, in that sense, it's not just this current Tory government that have been behaving this way, it's the previous labour government too. but I'm afraid to say this, this government in my view have deliberately savagely attacked the system. I didn't vote for it. I'm glad to say I didn't vote for it. But the legal aid, sentencing and punishment of offenders' act has torn apart legal aid. It's savaged it to the point where it is unrecognisable in my view, and I am confident that with Keir Starmer as the leader of the labour party and the prime minister, eventually and my boss, David Lammy, we will restore it.

But my real concern is this I'm afraid, it's failing badly and I'm very concerned about what will be left when we eventually have the honour of governing in this country. So, I'm worried. I've made the point that legal aid lawyers effectively keep the system going. The jobs they do day in, day out, without them it would already be gone. So, I just want to thank legal aid lawyers for continuing to do the work, very often above and beyond what would be expected of anybody, frankly, but they do it and they keep the system together.

I'm really, really worried that we are truly at a point where it is beyond repair. So, we must work together to sort this out before it's too late. And I'm prepared to put political differences aside to work with government ministers, to put something back into the system where it can be functioning again. I've made the point about the fact that legal aid lawyers have not had an increase in pay since 1994, And that's why I'm very warm to the idea of an independent peer review, because I think we need to take the politics out of this as well. Thank you very much indeed Chari for what you're doing, it is a great privilege to be invited to say a few words. I will very keenly be looking for what comes out of this report and advocating for better change to the system.

Questions to Witnesses

1. Jo Hickman, Public Law Project

Karen Buck:

Jo is the director of the national legal charity, the public law project. she's a member of the civil justice council and the law society access to justice committee. can I ask you just start by introducing yourself a little bit, and then I'm going to ask Baroness Kennedy and Natalie Bennett to start the questions to you.

Jo Hickman:

I am the director of the public law project and more importantly, the public law project is a national legal charity that focuses on public law, which I think we're going to talk about, but which is the law that governs how public authorities use their powers and discharge their duties.

So PLP, which I know has a different meaning for most of you, but PLP for us as the public law project, which is kind of overtly nonpartisan. PLP's formal charitable objectives are to ensure that those marginalised by poverty discrimination or other forms of disadvantage have access to public law remedies.

And currently the priorities that we're working on are to preserve and to promote the rule of law at this time of massive constitutional change, to try and ensure that systems for the discharge of public duties are fair, and to improve access to justice. So, in the context of those kinds of big priorities, judicial review, which we're talking about, and legal aid, which obviously we're talking about are really important to us.

So organisationally we try and take an evidence led approach. We've got a multidisciplinary team of academics who produce empirical research to us at an extremely high standard. And we have a team of specialist solicitors and barristers who provide services, both to wider civil society and to representative individuals to try and ensure that we can, we can only provide a sort of very, very tiny part of what, of the need that is out there, but we try and ensure that we target it effectively.

So, the case work team have acted in a number of really quite high-profile public law cases. And that includes a number that relate to the LASPO scheme. The one thing that I just wanted to flag is that although those cases, many of us here might have our own views about whether LASPO is good legislation or a piece of law that has met its policy intent, but all the cases that we've done were about ensuring that the way that LASPO was implemented, didn't have adverse impact on access to justice beyond those that parliament had mandated. So, there's a kind of, there's a, there's a double thing. There's what LASPO has done and then there's how it has been implemented.

Helena Kennedy:

Jo it's very nice to see you here. And the work of the public law project is, in my view, very important. So, I'm sure that you would be called a do gooder by certain persons in politics. and that would be the description that would be applied to many of the

people who give the time, both as academics and as practitioners, to enable the work that you do to be done. You've mentioned a number of cases, and sometimes it's important for people to hear the sort of the small print on that. What are those cases you, you said that your role in the modern state is to provide access to justice. What were the cases? give us examples.

JH:

Sure. Well, there's, there's a couple of more, very recent cases in relation to the, to the means test, but looking back a couple of years, some of the key issues that we were working on were issues for victims, survivors of domestic violence, who parliament had very deliberately intended to maintain access to the legal aid scheme because of the very specific needs of that group of individuals in, in private or family cases.

And what was happening was that the sort of evidential requirements to prove that you were in fact, a survivor of domestic violence had been set so extraordinarily high, that people simply as a kind of matter of administrative burden, simply couldn't access the scheme. So PLP acted with a number of affected individuals and with a small and tenacious charity called Rights of Women to bring a judicial review saying that the regulations that were setting these evidential requirements, weren't within the power and intention of LASPO, that the purpose of parliament had been to give legal aid to the victims and the survivors of domestic violence, and that the sort of implementation of this through secondary legislation had been to effectively deny them precisely that support that parliament had intended them to have.

And that sort of takes us in one of the key points that we're here to discuss. judicial review gives effect to parliamentary sovereignty. And that's a huge part of what it is. It's not a merit assessment, it's not the courts saying substitute in their own view. It's looking at what parliament has intended and are decisions being made under it are Fair.

HK:

I mean, for example, that case that you've mentioned would require a real understanding of what happens in domestic violence, where often those who are the victims of domestic violence avoid going to doctors, avoid seeking help. And in fact, sometimes are even prevented from doing so by, by a controlling partner. but even when they do go to doctors with injuries will often say 'I slipped in the bathroom floor or I banged into the door'. Providing evidence that you're someone who has been subjected to domestic violence can be difficult.

JH:

That's right. And I mean, there's that nuance, which is absolutely right. And it, it goes further than. I mean, we saw individuals who, I mean, there was one, one woman in particular, her ex-partner's conviction, in a British court for her attempted murder, wasn't adequate evidence of her status as a, as a victim of him because it was over two years old.

So, because that had happened more than two years prior to the date of the legal aid application. She could not evidently evidence herself as a victim of domestic violence. So, so that, that nuance is absolutely right. And it's really important that we try and create sort of structures for these things that are human.

HK:

Can you give us any other examples?

JH:

So, some other examples of cases that we've worked on. I think PLP was involved for a group of lawyers who were very concerned about the implementation of rules to transfer the risk of judicial review cases to providers pre-permission. Now that sounds like a technical thing that's in no-one's interest, but one of the reasons that it matters so much, and I think some of the latest speakers can probably sort of articulate that with cases from their own knowledge, is that if you have someone who needs to communicate through an interpreter, if you have someone who is mentally disabled, And I have acted for clients who had cerebral palsy and have needed to communicate through quite basic electronic systems, that can take a really, really long time. And so, you're automatically significantly increasing the risk, the financial risk that you take on that to run cases for anyone who is not 'standard'. So, for anyone who has additional needs or additional vulnerabilities that kind of risk increases. So PLP acted in a case saying that, again, the regulations in that go too far, and that they're better now. I mean, they're still problematic, but they've been significantly improved as of this case.

So that was one, we did another case about the exceptional case funding scheme, which we can talk about in more detail again later, but that was intended to be the safety net that prevented people from falling through the gaps in cases where you had huge swathes of the social welfare scheme being taken out of scope. PLP acted for a blind person, he lacked legal capacity, he'd been found rummaging vomiting in a bin, looking for food and was about to be made homeless. Had the proposed residents test for legal aid been enforced at that point, he wouldn't have been eligible for any legal aid. But because he was eligible for a community care lawyer at that point they put him in touch with PLP and what he really desperately needed to do, he'd been in the UK for a really long time but it was before the days we had the terminology of the Windrush Generation but he didn't have regular status and he needed to make an immigration application to regularise that status, but he lacked capacity and he was blind and he was elderly and he had health complaints and the position at that time was that he wasn't entitled to exceptional case funding, that his need for assistance to make that immigration application wasn't within the system.

HK:

What you're describing here are cases where people have been denied legal aid. And so, the challenges in relation to decisions by a public body, those who administer the scheme, challenging those decisions through the courts, to see whether they can be revisited, but they are decisions that have been made wrongly. It's important for people to understand that judicial review, is a very powerful and important resource, many

would argue especially in a democracy, democracy because it's a way of challenging, public bodies, decision-making bodies, governments decisions, and so on. And so, it's been characterised as a tool that is used for political purposes. That's how it's been characterised. And that's the rationale for wanting to reduce support for people to take cases and that's why it's being characterised as a tool that is used by lefty lawyers. And I'd like you to just explain. Are the lawyers who, for example, volunteer their time to assist in these cases, are they politically motivated? Is that a proper characterisation?

JH: The evidence is that public law holds governments to account and that that's a really fundamental part of our democratic settlement. It has that fundamental purpose and that fundamental benefit, whatever the cue of the government and governments of different political persuasions have had different relationships with challenge, but the idea that it is inherently political to say to a government or to a public authority 'you need to act lawfully. Not, you have to make the decision that I would make, but you need to make the decision that you are making lawfully, within the powers bestowed upon you by parliament'. It's not a controversial proposition and the decisions and the acts and the omissions of public bodies, including central government, in the modern state they impact directly on people's lives in huge numbers of ways. So, education, health, victim protection, social security, licensing, they impact on businesses and consumers.

And what judicial review does is, it enables everyday people access to a fundamental mechanism to say, okay, and those decisions need to be lawful. And if they are not, as a matter of last resort, no one's going to issue judicial review as their sort of their first port of call, there's a constitutional function in everyone having the entitlement to challenge an exercise of power that is not appropriate.

HK:

It is an area of law that has developed over the last probably people would say the last 30 years. I just wanted to ask you, has it, in your view been of benefit to, for example, the victims of crime, the victims of bullying, harassment?

JH:

Judicial review and the, sort of the principles of public law developed over a really long period. So not, not just the last 30 years and they've developed in tandem with and in response to a modern state whose, whose powers and duties and respective individuals have grown and developed and shifted. If we take one example of a case, The John Worboys case. The parole board were held to account for a decision to release an extremely dangerous person that wasn't properly taken. The point there wasn't 'you can't release someone' but rather, if you're going to make decisions about that, you need to do that properly. And that it's a really sort of straightforward decision where one looks at the consequences of decisions like that it's a really neat example of the type of area where having a mechanism to check that decision-making is transparent, is appropriate, its lawful, is taking the right things into account. That's so fundamental. And in that example, that was victim's rights and their right to be heard. But there are many.

HK:

On the 31st of July, the Lord chancellor, announced a panel of experts to consider options for reform. To re-strike the balance between citizens' rights to challenge the lawfulness of government action and allowing the executive and local government to carry out the business of governing. What they're suggesting is that this is preventing them doing what they want to do and what they've been elected to do on a manifesto of commitment. Did you warmly receive that announcement?

JH:

So PLP submitted a detailed and evidence-based response to the, to the IRAL and interested to hear what the panel do with the evidence that they received. The evidence, all the evidence, suggests that JR is effective. We've talked about its importance as a constitutional mechanism, and it's also highly effective and it's a really low volume jurisdiction. So, there were two kind of key points in there, like in the context of IRAL, but that perhaps might stand to be drawn out a little.

The first is that it's a false juxtaposition to suggest that you can enable citizens to challenge here and you have effective government over here, effective government isn't unlawful government. And all the evidence suggests that judicial review increases and improves good governance that it improves the quality of decision making. And it improves substantive outcomes as well as improving the sort of processes. So that dichotomy just doesn't exist. That's kind of the first really important point.

And the second is to put it in context because judicial review represents an absolutely tiny number of challenges when you compare it to the scale of government decision making that happens in this country on a daily basis. It's absolutely tiny the numbers that are challenged by way of judicial review. And if, even if you compare it to other public law mechanisms where people have got a problem with a decision and they go to the ombudsman, half a million complaints are made to the ombudsman every year.

The numbers for judicial review are really, really low. I mean, I've got them here in the administrative court, the numbers are low and they're dropping. Dropped below 4,000 in 2017 for the first time, since 2000 further declined in 2018. And in the first half of 2020, it was 1,448 applications. So, put in the context of the millions of government decisions that are made on a daily basis, there's simply no evidence to suggest that that, that, that that's in any way precluding efficacy.

As sort of another important part of that pulling apart some of the sort of suggestions in creating that tension is that the evidence demonstrates that judicial review not only works effectively as a mechanism when judgment is given. But it works effectively as a mechanism full stop. And so, Bob spoke about that kind of wider societal benefit of justice. So, some of that plays out in that in having a mechanism that is backed up if necessary and where necessary and where appropriate, by a set of formal procedures. And the analysis that not only PLPs conducted, but wider empirical analysis suggest that up to 60% of cases settle as a sort of pre-action basis. And the majority of those settle in favour of the claimant. And they may also settle because it's established that it's not an appropriate case for whatever other reason, but it operates as a really, really effective check on problematic and poor decision-making.

I think those are, those are the key points really. That, that it's not, it's not a dichotomy that there's any basis for and as a mechanism to promote good governance and to ensure that equality of access before the law, it works.

HK:

Natalie Bennett is going to ask you a little bit about the legal aid means test, but on any of this are you suggesting that there are ways in which the system could be improved?

JH: One of the things that we said is it's a really important constitutional mechanism. So judicial review plays this fundamental democratic role than any reform, including of procedure, whether sort of positively intentioned or intended to curtail, can have significant and far-reaching constitutional implications. So, it's really, really important that any proposals are evidence led that they're justified and that they're proportionate.

And the evidence that we've seen suggests that they're positive reforms would help to ensure that judicial review properly sort of realises its constitutional potential. We identified six areas that could be thought about more teased apart more in our formal IRAL response. But two, for our purposes now are costs - And costs represent a significant barrier to judicial review because of the sort of usual rule in litigation that usually loser pays for the winners' costs in JR or in, in civil litigation, full stop. Lord Justice Jackson performed a really detailed, really thoughtful inquiry into civil litigation costs in 2010. And then again, carried out a sort of further review over an eight-month period into 2016-2017. And his recommendations, his conclusion was that many claimants of modest means were deterred from bringing legitimate and proper judicial review. So effectively they were barred from exercising their constitutional right to do that because of the adverse cost risk and recommended changes to that So the cost rules in respect of judicial review acknowledge the constitutional function that JR played. Those recommendations haven't been taken forward. That seems like an easy win that if you've got a thoughtful evidence-based inquiry with a very senior body having made that recommendation that's there and that's for the taking.

Then the other ones are in respect of legal aid. So, I think we're going to talk a little bit about the means test, but that's the other place where there's low hanging fruit in terms of making judicial review work better as a mechanism. It's a good one already, but to work better, the evidence suggests that legal aid, where it applies in the judicial review context, it improves outcomes. So that if you are a claimant who has bought a judicial review funded by legal aid, you're more likely as a final hearing to get the outcome that you were seeking, than your sort of average claim. For example, there's quite a lot of evidence tracking through the data to suggest that legal aid is correlated with high quality cases and good outcomes in the, in the judicial review context. But as we've kind of heard about, there are lots of problems in practice with the way that the legal aid scheme applies to judicial review. There are problems around artificial boundaries in terms of legal issues people very understandably don't identify themselves as having a public law problem that needs to be resolved by JR. There are advice deserts in huge parts of the country, there are low rates of pay, which are aggravated by the

introduction of the rules that I spoke about earlier about the providers acting at risk of complete non-payment in judicial review, and there's the sort of means testing issue.

So, there's a lot of work to be done to ensure that legal aid plays the role that it can and should in facilitating this kind of, the constitutional function of judicial review, which from all the benefits flow that we've talked about. from which good governance, better decision making and that, that sort of fundamental principle of equality come from.

Natalie Bennett:

Thank you very much Helena and thank you very much Jo, for all of the expert evidence you've provided this morning and thank you for everything that you and the PLP do.

I will get to the means test in a second, but just for clarity and for the evidence, just going back to the three cases that you mentioned. The domestic violence, the transferring the risk of JR and the exceptional case funding I think it might be useful for the inquiry to hear, where the financial resources for those cases came from. Whether that would be available now, I note what you said about the number of judicial review cases this year, which if we go through the whole year is down 25% on the 2007 figure. Would those cases be able to be taken now, what do you see as the direction of travel? Where's the money coming from? Where will it come from in future?

JH:

It's a really interesting question. As the PLP we're in an unusual situation. So, we are not a typical provider of legal services and we get a significant part of our income from charitable trusts and foundations. So, in those cases that we talked about, where they were individuals. So, in the case of our exceptional case funding, IS who was our client, our clients they weren't entitled to legal aid because it wasn't available in the context of the scheme.

And what we were able to do, which is not an option that's open to many people, is to say well because these issues have such systemic relevance for other people, and because we're a charity, and this goes to the fundament of our objectives, we can take the risk of running these cases and on a no win, no fee basis and losing them. and that's what we need to do. So that's what we did in those cases.

I think I'm right in saying that in all those cases, the Law Society stepped in to help indemnify the individuals concerned and the Official Solicitor in the case of IS, against the risk that they lost, because they were bringing these proceedings that were big and significant for the benefit of other people. And so, the, the Law Society assisted that. So, they're not typical examples of cases that could have happened five years ago and can't happen now. Now, those examples do exist and in sort of lots of different cases, but because those are kind of quite highly specialised cases that we were able to do because of our privileged set of circumstances and funding arrangements.

NB:

Obviously, this year COVID is going to have some kind of impact, but there's a downward trend in the number of judicial review cases. Do you think that's primarily a funding issue or is it something else?

JH:

Well, it's really interesting and we need to understand that more. And I could hypothesise, but we sit here saying, look, this is a really important area and we need to understand it and we need to get the data right. And now there are sort of lots of spaces, there were lots of things that we could point to and say, well, we think that's likely to be having the impact and the massive problems around advice deserts are likely to have an issue. The pressures on individuals and providers, courts that we've seen this year as well, and everyone that we've seen this year as a consequence of COVID. I mean, there are highly likely to be, to be reasons, but we would be really keen to see some careful neutral evaluation of what is going on and why, what does it mean that those figures are going down and they're going down sort of regularly and so much. Because like I said, the numbers that we were starting off with were absolutely tiny and they're decreasing more, which makes it sort of all the more interesting that it's sort of, in some quarters it may be characterised as a problem.

NB:

Which kind of brings us on to the ministry of justice legal aid support plan, review of the legal aid means test, which was paused as a result of the pandemic and supposed to be now be coming in the spring. What would you hope to see coming out of that? obviously we'd love to see everything properly funded and it all sorted, but what realistically, perhaps would you like to see coming out of that?

JH:

Well, obviously we welcome the support action plan. We welcome the work that's been done. It's looking at the right things and the indications are that there are some moves in the right direction. You've got that comprehensive pack from Rohini and from LAPG, And I don't want to sort of simply repeat things that are in there and that, that people know, but the income and capital thresholds, it probably does bear repeating that they haven't been increased for over 10 years and that one pound in 2009 was the equivalent of only 1.35 pound in 2019. So, the difference is the squeeze in real terms has got, has been growing that whole period. In that period, there are vast numbers of people who can't access justice right now. And there are relatively straightforward things that could be done to make that better. And the economic modelling suggests that, the most optimistic economic model suggests that, things aren't going to get a great deal better for the majority of people. And, and so one thing that we would hope to see, and we can sort of talk a little bit more - I think it'd be worth talking a little bit more detailed about some of the income and capital loss-, but one thing that we'd hoped to see is it being treated as urgent and the sort of recognition that well, you can do something and if you do something and then you think about it and review it, analyse it, and then do something better or tweak what you've done. That that is preferable to conducting reviews over a period of years, while you're sitting with a status quo that you accept is resulting in significant problems in access to justice, for

any number of people and the two sorts of big issues, the walls in terms of eligibility are fairly complicated.

We can characterise the problems with income as being that the income sort of standards and thresholds is that they simply don't reflect a cost of living that is reasonable and adequate. So, there's an expectation that's kind of hardwired into the means regulations that people will be able to make contributions out of their income, that they simply, as a matter of some sort of evidence undertaken by external academics and by the Law Society, that they just cannot afford to meet. So, the consequence is that even if you have an offer of legal aid, even if you're one of those individuals, who's been able to find a lawyer your offer of legal aid is just not affordable, because you're being asked to make a choice between paying your rent or not or clothing your children or not.

That's a real problem in terms of the sort of income thresholds as they currently exist. And then in terms of capital, the current capital is much stricter than they are even for sort of means tested benefits. And they permit only a very modest level of savings. So that's at £3000 at the moment, but historically what's happened is the assessment criteria have failed to take into account the reality of individual circumstances. So that people have been artificially treated as having money that's available for legal fees that just sort of simply isn't there. And because this kind of means test is such a problematic issue, an increasingly problematic issue, over recent years it's been a focus for us and we have had a couple of judgements quite recently, that are relevant.

One that is quite illustrative as an example of exactly the type of issue that's affecting so many people across the country. Again, it was the law society study on legal aid contributions found that 20% of callers to the national centre for domestic violence who were eligible to apply for help to attain the injunction that they needed to protect themselves couldn't proceed with that application because they weren't able in practical terms to afford the contributions that they were being asked to make towards their legal aid. I can tell you a little bit about this from one of our clients, she is absolutely representative of the issue this is, this is not an isolated case. We acted for our client the cases is reported as GR, let's call her Claire, but she needed legal aid to be represented in proceedings, private family law proceedings against her abusive ex-partner. And as we've sort of acknowledged before, parliament had very deliberately intended that that would be legal aid that was available – this a priority for parliament. Having escaped that abusive relationship Claire was living outside what had been the family home, with her children on universal credit. So, subsistence level benefits. She was treated as having capital that rendered her ineligible and she ought properly to pay privately for her legal fees. Because she had an interest in the property that she'd fled, which was owned jointly with her abusive ex-partner. Now he wouldn't consent to her borrowing against the property, even had a lender been willing to lend against the property, and there was a legal dispute about who was entitled to the proceeds from the property. So, in that case, PLP acted for, for Claire in a judicial review that ultimately was successful of the legal aid agency. This is a recent judgment and we're really pleased as it is a really significant step forward that that judgment makes it clear that the director of legal aid does have a discretion to value assets of people like Claire

and the many others like her equitably and she since has been awarded the legal aid she needs.

what we need to see is that acknowledgement, that discretion to act equitably, which one would assume is now established exists, which is good. And that needs to be written into the regulations themselves. And it needs to be written into the way that decisions are taken in that context.

So, in terms of our asks, those are the big ones really we would ask, we said very clearly that we think that the income standards need to properly recognise the income that's necessary to have a sort of minimum acceptable standard of living. We're not suggesting that people should be extraordinarily rich and still be entitled. Although in the sort of early days of the legal aid scheme, sort of 78% of the population were entitled. I'm not suggesting a return to that point, but the numbers have decreased so much that you have to be so poor these days, that it effectively rules out such a large number of people who are doing their best on modest incomes and simply cannot afford to pay for representation for themselves. So, there's an opportunity to address that, and we would like it to be done sooner rather than later.

NB:

Thank you, Jo. I think we could obviously keep going, but we're out of time. And I'll hand back to Rohini and the Chair. Thanks very much.

KB:

Thank you, Natalie and Jo. I don't know if any of our witnesses or any of our panel members have any burning questions. I'm keen not to overrun too long, but if anybody does have anything that they would like to pick up on, please just flag up now. I think we've had some very comprehensive answers from you though Jo. I am really grateful for your evidence. So, can I thank you very, very much for giving up your time this morning.

Questions from other members of the panel

James Daly:

Can I ask a question? I'm a practicing solicitor and I'm a former legal aid lawyer. So, I must disclose that when I'm asking these questions. I'm going to ask this question, not because it's not a lack of sympathy for the position that you're outlining it's just so an understanding of the whole position. We talked about the means test and whether people are eligible for legal aid, if you are eligible for legal aid, in some of the cases that you've been talking about, could you give us an idea of the rates that firms or organisations, such as yourself, are paid under legal aid rates for the work that you're doing?

JH:

We heard at the outset that the rates haven't increased since 1994, I think I was still at school when the rates were updated. And in response to the Lord Justice Jackson's inquiry, we actually conducted an assessment looking at PLP's recoverability. And we

worked out that, although there's a fixed fee now for public law work. Sort of up to a cap and that that fixed fee is £259 for all the work before you sort of move to formally issue proceedings. So potentially quite a lot of work. The nominal hourly rate on which that fee is premise is, or was then, £51.18 pounds, and our internal modelling suggested that our actual recovery for fixed cost work was less than £36 an hour. And so, you'll be aware of the 2010 guidelines rates, which themselves haven't been not rated for 10 years suggesting that a grade A fee earner in central London can expect to recover £409 an hour. So, the modelling in respect of that element of work was that we were recovering less than a 10th of the published guideline rate. And I've said before, we do generate some income through our sort of legal aid contracts and through our fees, but we subsidise our casework very heavily through charitable income from other sources. And that's just not an answer for the vast majority of the sector. So, the sums that are now available are not economically viable in a for-profit model. All the evidence suggests that creates some kinds of perverse incentives and contributes to the advice deserts.

James Daly:

Thanks, Jo. Thanks Chair.

2. Nicola Mackintosh QC, Mackintosh Law

Karen Buck:

Welcome Nicola Mackintosh QC. I know Nicola, you set up your own company 10 years ago to specialise particularly in the area of disability. And you're a vice chair of the legal aid practitioners' group amongst other things. You also have a wealth of experience to bring. So, can I just ask you to introduce yourself and then I'm going to ask you a few questions initially and bring in other panel members afterwards.

Nicola Mackintosh:

Thank you very much for inviting me to speak today. It's a real privilege to be able to explain the kind of work we do and the importance of legal aid in our area. Karen as you said, I founded Mackintosh law 10 years ago, in fact, I've been a partner in a previous firm as well and working in the system for almost 30 years. Mackintosh law is a small specialist legal aid firm in, based in Southeast London, but we accept referrals from all over England and Wales as well. Our objective is to help our clients to enforce their legal rights. And I sit on various committees as others will know, and I was very privileged to be able to contribute to the work of the Bach Commission Report.

The day job for me is acting for my clients and supporting the excellent team that I work with to bring justice to our particular client group. I've also been involved in some of the judicial reviews, which Jo has spoken about in relation to access to justice, particularly for disabled people. and those have been funded and supported by our firm or me, because they're so important. That's by way of introduction.

KB:

That's brilliant. I mean, actually, I'd really like you to give us some examples of that work and explain how the funding operates. But can I just ask you, first of all, just particularly because it's an area of law that I don't know very much about just to tell us about the particular challenges of mental capacity and community care law and what are the specialist demands upon that service. how do they impact upon the access to legal aid and the various constraints upon legal aid provision and funding?

NM:

Well, I don't know whether it might help just to say something about the client group that we advise, and we represent. Essentially everybody that we advise has a disability and quite often very severe disabilities. Clients present with a range of needs and disabilities ranging from dementia, learning disabilities, autism, head injuries, mental illness, mental distress, physical disabilities and any other serious illness and disorder, which affects their ability to participate in society. And they really are the most marginalised people in society. when clients come to us, they're almost always in dire need. it's not an exaggeration to say that the cases that we deal with often involve life and death issues. They involve quite fundamental rights about people's independence, their autonomy and their quality of life, their relationships with other people and society and where the state makes decisions for people about their lives. Quite often and increasingly so unfortunately, the cases that we deal with are often about abuse or neglect of disabled people.

KB:

Just on that particular point, do people come to you directly or is this often a secondary referral? If so, how does that work?

NM

It's often a secondary referral. We get referrals from, social workers from charities, from lay advocacy organisations. And we're also instructed by the official solicitor to the senior courts to act as litigation friend on behalf of people who lack mental capacity to conduct their own litigation. but I can explain perhaps a little bit more about that later.

Some of the other cases that we deal with are about the state depriving people of their liberty, placing people in care homes, and that's particularly where they lack mental capacity to reach their own decisions. Whether that deprivation of liberty is in that person's best interests and whether it is actually justified. So, a lot of our cases, for example for the official solicitor, acting for the person who's at the heart of the proceedings, are in the court of protection, where if a person lacks capacity to make a decision, the court of protection has the power to decide what's in that person's best interests under the Mental Capacity Act.

Community care cases, which Jo has mentioned, sort of overlap with the mental capacity side of things. It's a little bit of an artificial distinction between the two, but it's mainly concerned with people's legal rights to access social care services, health services, mental health services. That's for clients who live in the community in their

own homes, but also for people who live in care homes and other kinds of sort of supportive placements. as I've said, other people may lack mental capacity to reach your own decisions and they're even more vulnerable because of that. The kinds of issues are really around unlawful decision-making and poor decision-making by local authorities by clinical commissioning groups and so forth, making decisions which fundamentally affect a disabled person's life.

We advise a wide range of people with a wide range of disabilities about their rights. We try and negotiate on their behalf, and where we can't resolve the issue through negotiation or persuasion, then we may have to make an application to the court. Some of the cases need to be before the court anyway, because they concern deprivation of liberty, which should be authorised and needs to be authorised by the court, or quite serious medical treatment decisions and end of life decisions. Some of the other cases need to go to court via judicial review, which is our only tool, but that's pretty much impossible at the moment because of the lack of any payment, unless you win. So, there have been, as Jo has mentioned, very few judicial reviews and in particular, in the community care sector a significant reduction in a number of cases that we can take simply because of the payment regime.

KB

Could you just tell us a little bit more than about the kind of fees that you might get for some of these cases? and also again, if you can give us an idea of cases that you might've thought should go to judicial review, that you are unable to.

NM

There are, as you might expect, many cases around cuts to care packages, leaving very, very vulnerable people without essential services. And there are important legal issues about where that line is drawn in relation to state obligations. Perhaps if I mentioned one of the most significant community care cases, which you may have heard of, which is the Coughlan case which we took many years ago and established very important principles of law, about two aspects, one which is about the status of a promise given by a NHS body to a disabled woman that she could remain in her home, Which the NHS body then sought to resile from and whether that promise had to be kept. The courts determined that it had to be kept and it would be an abuse of power not to do so. But probably the case is most well-known for the principle that nursing care remains a healthcare service within the NHS. So, for some people with extensive healthcare needs, the NHS is legally responsible for providing and funding their care package. And you'll probably have come across this in terms of the definition of NHS continuing healthcare. And that case has benefited thousands of people. That's a very good example of a case, which we would not be able to take now because of the complexity of the legal arguments and the sheer amount of work that we would have to do all without payment, all without any guarantee of payment, unless we win at the permission stage.

So, the way that the judicial review payment structure is actually devised now provides a clear disincentive, a clear barrier to access to justice because we can't bring those cases.

Just by way of example, on the mental capacity side, we do many cases which concern abuse or neglect or vulnerable people, but one of my cases was I represented a young man with learning disabilities who was living with his family at home. But he was being kept overnight in a kennel, outside his house, in the backyard. and he was being assaulted and he was being beaten by his family members and he was being starved. that was only picked up because he came to his day centre, which he attended a couple of days a week, He was looking in bins for food because he was starving and he arrived one day at the day centre with his bag packed, he had a split lip because he'd been hit by a family member with a stick. We represented him in the court of protection and despite his family's vigorous fight to return him to the family home. We put his case before the court that he wanted to live alone away from them and not being abused. and that was successful.

Just talking about the fees. So, for a community care case, such as the Coughlan case, that would start under legal help And as Jo has mentioned in relation to public law, that's at a very low rate. It's a fixed fee, £266 for an entire case up to the stage, if we can, that we take the case to court and the kind of work that that involves is reading the papers, meeting with the client - Usually we have to meet the client because of their disabilities and we need to see them in their home setting, often at home, we have to travel there. We have to identify the legal issue we have to correspond with the other side, the other party, identify and prepare the legal arguments. All short of issuing proceedings, all for £266. There is an escape fee if you get over three times that, but actually it's the vast majority of cases are between that. So, it works out sort of around or lower than the kind of level that that Jo was talking about. If we start court proceedings, the rates are £71.55 in London and lower outside London. and the rates as Jo has mentioned were fixed in 1994, which is when I was two years qualified And I remember it, 26 years ago. but what Jo didn't mention was that they were then cut again by 10% in 2011 And there's been no inflationary increase.

Colin Low:

I have a question here. Can you tell us on average, how much time are we talking about in the run-up to court proceedings?

NM:

Thank you, Lord Low. It does vary quite a lot, but community care cases tend to be more time consuming, because unlike other kinds of legal advice where you might be advising on one discrete issue, community care is very much a sort of holistic way of addressing a person's needs and their rights to services. So, it involves a comprehensive knowledge of community care law, which itself is very complicated, housing or mental health law, healthcare law, benefits, etc, etc. Usually people present with a variety, a cluster of problems. One of the unique things about community care as an area of law is that we address people's needs holistically, but we often discover

that they present with a variety of legal problems, which means it's much more time consuming, not just 10 hours, not just 20 hours, but 30, 40, 50 hours, etc. And that's, that's at the initial legal, legal advice stage. The other thing is, as Jo has mentioned about judicial review, it is a last resort mechanism. So, where there are complaints procedures, we support clients through complaints processes, where there are ombudsman schemes we use ombudsman schemes, but there are some cases where there either is a clear illegality of decision-making or the person's needs are so urgent and they are immediate risks to themselves, such that we need to take very urgent action, but that's increasingly more difficult and more limited in terms of what we can do because of the payment structure for judicial review.

CL:

Well, that's, that's helpful, that that's a lot.

KB:

You think in addition to the points about complexity of cases and in addition to the kind of question of specific points of law, that the system accommodates the fact that there can be additional costs and demands on the service because of the needs of people with disabilities. you kind of touched upon it, but I mean, could you give us some examples of that?

NM

Well, it is more complex because one of the things about acting for disabled clients, particularly clients who lack mental capacity - I mean, imagine somebody with dementia client with dementia, who's in the care home - I can't simply, call them on Zoom, and have a brief conversation with them to take instructions. They may not be able to give me instructions because of mental capacity issues, but there will certainly be cognitive impairment issues because they've got dementia. And so it takes much longer for me to meet with them, develop a rapport with them, explain to them if they are able to understand, in either simple terms or more complex terms, what the court proceedings, if they're involved in those court proceedings and the court of protection are all about. So, with all of that it actually takes much more time for us to be able to do the job properly. if that answers your question. And also, home visits as well, because we have to travel and often, we have to travel to rural areas, travel quite far. And remote working, has been a great benefit in some ways, because it's enabled us to speak with some of the clients more frequently than we would have been able to do so otherwise. But for other clients it's been a significant disadvantage. We can't deliver advice, we can't give advice to every single client through digital means it just doesn't work for some clients. They desperately need that face-to-face advice. And for us to be able to read their non-verbal communication.

KB

Thanks. Thank you for that. just going back to the issue of funding when we were taking evidence on the family law cases in our last session, we were hearing about how firms were having to rely on the privately funded work to make the firm financially

viable, to be able to continue to do this vital legal aid work. Is that something that you think also applies in these areas?

NM

I've run my own practice and have done so since 1999. So, I know how every penny is spent. and I know that they've never been the same rates for legal aid and the private sector, nor would I expect that to be the case, but we've now reached a stage where legal aid rates really don't even cover the basic costs of employing staff, together with all the enhanced expectations of what we have to do and IT systems and regulation and so forth. I want my solicitors and my trainees to be paid properly for the very complex and challenging legal work that they do. These are some of the most difficult cases, legally and emotionally. There aren't any private cases in community care so, there is actually no possibility of cross subsidy. So, in terms of looking at the proportion of the cases that I've been dealing with over the years, we have had to move away from doing community care work, because we simply can't afford to do them.

So, we've moved towards mental capacity where there's still an enormous need. It would be misleading for me to give you an impression, that we are cherry picking cases because we're not. The fact is there's a dearth of suppliers and unfortunately there are so many people who need advice that we are having to choose those cases based on what we can do capacity wise, who's in greatest need, but also, we have to have one eye on the fact that we do a lot of free work. We do pro bono work. We do an enormous amount of work on even legal aid cases, which isn't paid for by the legal aid agency. And we do take on some private mental capacity work in the court of protection, but ideally, I would love our entire firm, and I know other firms feel the same way, to act for the poorest in society because they are in most need. The demand is definitely there. We are turning away several cases a day and I don't know quite frankly where they're going to, but there is limited potential for us to cross subsidise.

KB

Very helpful. Just last question from me, how has COVID impacted on both your areas of work that you're involved in and on the business?

NM

We are busier than we ever have been, but that means that we are turning away more cases than we ever have been. And that's a sign of the demand, the level of demand, which is out there. the kinds of cases and the issues which people are presenting with, are that people are even in more dire need than, than they were previously because disabled people tend to be more disadvantaged from the very start and it has hit them particularly hard disproportionately so. Accessing essential social care and health services has been difficult at the best of times, but COVID has been particularly harsh. and when lockdown happened in March, the widespread application of restrictions has impacted them quite severely. More recently we've seen TV pictures of vulnerable people in care homes who are more isolated than they were before, with visits being stopped or restricted, but what hasn't come across perhaps as starkly is that people, other people living in the community, people with learning disabilities, people in

supported living, have been equally really affected. And these are people who desperately need human contact with their loved ones and are less able to cope with not having that. And there's an increased concern about poor decision-making, the poor quality of decision-making and people being moved from their homes, taken out of their homes, or being totally isolated without legal protection and without being able to get advice. So, I would say, unfortunately, fear, loneliness, isolation and a real risk of an entire vulnerable group being left without any real voice or access to justice to enforce their rights. There's a real pressing need for the system to be reformed so that we can meet that urgent need and just, just picking up on one of the things which Jo said, which was about the means test. There's an anomaly, which needs to be corrected and urgently, which is if somebody is being deprived of their liberty in a care home or a hospital, they're eligible for non means tested legal aid. That is a good thing and rightly so. But if they are in their own home in supported living or there's an application to remove them and deprive them of their liberty, they're only eligible for means tested legal aid and a lot of my clients have completely missed out on any legal representation and any voice at all, any right to be heard before the court, simply because of where they are living. that's an anomaly which needs to be corrected urgently.

KB

Thank you so much.

Questions from other members of the panel

Andy Slaughter

Just carrying on that point looking at it from the practitioner's viewpoint, you set up your current firm about a decade ago presumably because you saw that was the best way of catering for the client base that you have now. Given the financial constraints, I know we're trying to tackle that problem, is that still how you see the way forward, that practitioners finding ways of addressing, representing people, do you think there's more need for that now and do you think it's more or less difficult for practitioners to set up in the way that you have? I.e. would you find it more or less difficult to get going now?

NM

I think as legal aid practitioners, we've always had to be nimble and we've always had to adapt. I wonder whether, I mean I set up the firm really in 1999, if I had been able to see into the future, whether I would have done so. I think probably on balance because I'm obstinate and I'm utterly committed to my client group the answer is yes, but I think that there are lots of other practitioners who have decided not to go into legal aid for all the reasons that you will know about but they won't go into this area particularly of mental capacity and community care because it's particularly complicated and time consuming. And I think one of the concerns that I have is about the next generation. There are so few community care lawyers and mental capacity lawyers out there. You know, I talk about us turning away cases. We are turning away people who are in desperate need of advice. And I know that those people won't be

picked up by other firms, so they will simply not get advice and they will certainly not get representation and that cannot be allowed to happen any longer. There are old hacks like myself and others who are still really keen to make a valid contribution and to train the next generation of legal aid lawyers, particularly in community care, where there's such a desperate need, but we need to be able to be supported to do so. We need to be able to retain and recruit staff. And at the moment there aren't any community care lawyers out there. We recruit and we train our own. I've taken on three trainees solicitors, and I'm very proud that they're now qualifying as community care and mental capacity solicitors. But you know, this isn't about me as one firm. This is about an entire system that needs addressing so that everybody who needs advice about these very fundamental issues is able to access it when they need it.

AS

And then that's a very heroic but slightly bizarre way to organise the profession. Do you think there's anybody out there at the moment – MOJ, judiciary or other professional bodies - which is looking ahead and is trying to plan for how similar areas of underfunded work can be catered for in the medium to longer term.

NM

Well, I mean, there is starting to be work in relation to sustainability, but it needs to be done very urgently. And I think, because otherwise we will just go and we are sort of, kind of the last bastions of this very important area of law. and so, I think that there needs to be urgent work done, urgent research, but there also needs to be an understanding and a willingness and the ability to understand the complexity of this area and the complexity of the kind of problems that people present with because they do present in this sort of multidisciplinary problem way. I've always felt that community care law and the way that client's problems are detected and addressed holistically is a very good way of addressing a number of variety of legal problems.

Helena Kennedy

I have followed your work for years as I think you know, and you're one of the heroines in the law. I mean, you are absolutely doing the most heroic work and I can't thank you enough. I wanted to pick up on what Andy has just been talking about. It's the big picture and it's about whether anybody's taking a look at this, because there are some areas of our life where market forces just don't work. And here is an area of law where I would defy anybody to say that you can actually make money out of it. And we are seeing the withering on the vine of the expertise that you have. You're passing on to one group of people, but it's a tiny in many ways a drop in the ocean. Now, how can we think of a way of rolling this out? Salvaging the people like you who've got expertise? because in the universities and in the law schools up and down the country, there are young idealistic people who want to be lawyers to do good things. There are plenty of them who want to get rich and join the law for the commercial law firms. But there are others who actually do want to use law to improve society and who recognise that this is not welfare, this is about the rule of law. Access to justice is about the rule of law and it shouldn't be described as an aspect of welfare. It should be described as

a fundamental aspect of the rule of law. And so, I want to just to ask you, how do we persuade people to actually invest in the very thing that you're doing and to roll it out around the country? Because we are not seeing law firms like yours existing and surviving for very much longer.

NM

As always, all those points are extremely valid. The legal aid system has to be sustainable. we have a spectrum of providers. We have law centres and we have high street practices, specialist practices like our law firm. But post LASPO, the legal aid delivery mechanism has been decimated. So, we used to have advice centres, we used to have local advice centres addressing different client groups that have been grown organically, responding to local need. We used to have local authority funded advice centres and law centres. And we used to have a pretty comprehensive legal aid system, which enabled high street practices to deliver legal services, legal advice to people, in their local community. Now with LASPO, all of that went out of the window. the areas of law that I'm looking at are still in scope.

So LASPO didn't remove things from scope, community care, or mental capacity law. Generally, there are some anomalies, but generally is still within scope. The problem is the sustainability and the certainty. The only reason that I set up my own firm was to deliver this service. It was the best way of delivering the service, but I am only one firm as you correctly pointed out. So, what we need is a comprehensive service. I would be willing to give my time. I know that my colleagues in community care law would be willing to give their time in order to develop some kind of scheme of incentives to ensure that the next generation of legal aid lawyers are trained to do community care law both in the colleges and so forth.

But it means nothing. If, when we are qualified as solicitors, if we get that far, we can't get training contracts when we qualify as a solicitor, there isn't the amount of money to be able to pay us even a basic salary. That's what everybody needs. The businesses need that in order to be able to continue to deliver this service. This is what we are in the job for. So, sustainability means a combination of identifying the problem, training, using the scant resources we've got left, the people that we've got left and the expertise and not stopping the rot any further than it's got, making sure that the next generation of legal aid firms, law centres and so forth are saved and they are nurtured.

James Daly

I have my own firm of solicitors in greater Manchester, I'm in a position where I was a criminal legal aid solicitor for 16 years, and I had to give it up because I wasn't able to earn either sufficient money to pay the partnership or to pay myself a sufficient amount of money. So, I'm in quite a unique position as a concerned member of parliament and as a result of some of the policies which were put in place in a previous parliament, I have had to give up being a legal aid lawyer and I'm now a conveyancing lawyer, because that allows me to remain within the partnership, I think you recognise the scenario as a fellow solicitor. so, when I ask this Nicola, I'm asking this from my experience, there's only two ways If we go away from the actual principle whether

certain areas should have legal aid support, there's only two ways of increasing the sustainability of firms. It's either by increasing the scope of the work, so getting you more work or increasing fees. Now you said earlier on your evidence, and I agree with you, that you want to pay lawyers a proper amount of money. Now, one of the problems, when you're down here in Parliament, is that you get lost because you talk in generalities when you're speaking to ministers. Do you have an actual proposal in the sense of how much percentage increase in your fees that you think we should see? And secondly, the scope of how we can increase the amount of work that you've got. I mean, I think probably both of those things are linked, but I need to be able to, as an individual MP, to be able to go to a minister and say that a very eminent a lawyer in this country has said that for her firm to keep going and others, they need X increase.

NM

It's very difficult to give a percentage increase because in fact, the way that the fees are structured is probably what's at fault as well as the underlying rates. There are savings which can be made in the system. It's really frustrating for us to see that because there are difficulties and pressures on the court system that then has a knockon effect on the legal aid system. So, all, all the cases that I'm talking about are in scope. when you were talking about sort of giving us more work, I was thinking, please don't give us more work because we are already turning away too much.

So, in community care, we all know that the fee structure changed from paying us under a legal aid certificate to issue proceedings and because the nature of judicial review cases is that you have to do pretty much all of the work right at the beginning of the case. So, it's all front-loaded. So that means that if we're preparing a judicial review case, we're doing the vast majority of the work, but we don't get paid and we don't have any guarantee of payment unless we get permission i.e. unless we win at the permission stage. So that's why those cases aren't brought. Jo has already talked about the number of cases which have been absolutely minimal. Even within that community care cases are such a tiny number you could probably count them on one hand maybe two, a tiny proportion. Reintroduce payments for us to bring cases in judicial review. It's less of a percentage increase then reintroduce that payment, which was only relatively recently removed.

JD

Is there a different payment structure for solicitors compared to barristers? and how is there anything we can do in respect to that?

NM

The short answer to that is yes. Barristers tend to be instructed when a case is actually in court. So therefore, they're paid at certificated rates, which we are paid as well at certificated case when a case is in court. But of course, solicitors do all the preparatory work, including trying to resolve the case without the need for proceedings before it even gets to court. And that's paid at the lower level. In relation to your point about percentage increase, if we were just given an inflationary equivalent to 1994 rates, that would go an enormous way to making the legal aid scheme in civil law sustainable.

KB: Thank you very much, that was incredibly compelling evidence and I am really grateful to you for your time this morning and everything you do in such an important area with very vulnerable clients.

3. Henrietta Hill QC, Doughty Street Chambers

KB

Moving on to our third witness who is Henrietta Hill QC from Doughty Street Chambers. I know Henrietta you specialise in cases involving the police and inquiries and inquests and have led on some very high-profile cases such as the Jean Charles de Menezes case, which no doubt will be referred to. Can I just ask you to introduce yourself and then James is going to open the questions.

Henrietta Hill

Thank you very much, indeed for inviting me to give evidence. I'm very privileged to be able to contribute. I hope I can give some assistance to the inquiry. I am a barrister. I've been at the bar for 23 years. The Human Rights Act was passed in the year that I took tenancy and that's been a defining feature of my practice. So, I've done human rights cases in some form for the best part of the last two decades. I specialise in claims against the police. Almost exclusively acting for individual claimants. And so, the clients I represent in claims against the police are generally very vulnerable individuals, often with psychiatric injuries, often they have been discriminated against by the police or wronged by the police in some way and I'll bring in claims of false imprisonment, malicious prosecution, wrongful arrest, and things of that nature. I've got a particular expertise, I think, in discrimination and equality law, because I do also conduct cases involving equality and discrimination in other spheres. So, for example, in relation to the provision of services. I bring judicial review claims involving equality issues. And also conduct inquests, generally on behalf of the bereaved. I do also conduct a public inquiry and inquests work, as counsel to the inquest or to the inquiry, and that's been a change in my practice in about the last four or five years. But the vast majority of my practice before that was in representing, individual claimants and also the bereaved in inquests. I should also indicate that I do sit part time, as a deputy senior coroner and as an assistant high court master. but I'm very much giving evidence today in my barrister capacity. And I should just make that very clear.

James Daly

I'm not going to ask you any questions regarding the nature of your work in the sense that as we accept that the work that you do it should be legally aided and your clients should receive legal aid funding. The question that we are concerned about here is the sustainability of the profession in terms of being able to deliver the services that you do now, the profession is quite different. You're an eminent QC. There are there's the junior bar, the solicitors that we just heard about. So, there are different sustainability issues facing different people at different stages of the legal process. And I just wanted to get your view, if you could just give your views on what we need

to do to ensure that we can create a system where enough money is put into the system to allow solicitors, junior bar and others can make a good living whilst carrying out a very necessary public service.

HH

I think there are issues at different stages of the barrister profession and at different parts of in different parts of the profession. One of the issues is about how accessible legal aid work is as a career and so while we certainly find in my own chambers that we are deluged with applications of people who want to do human rights work and are committed to doing that, we are concerned that increasingly ensuring that those from less traditional backgrounds who will bring their own lived experience to this kind of work is more challenging and because inevitably those who are entering this kind of practice must be able and willing to work at lower rates than they could secure in other fields. I think there are challenges in ensuring diversity and access.

I think there are issues in retention of people in this kind of work. I've done a lot of work in recent years around wellbeing and this kind of work and the pressure to do Conditional fee agreement work and to do other kinds of work to subsidise legal aid work, as well as the inevitable challenges of constantly representing very vulnerable people, means that there are difficulties with retention.

So, I think there are some problems within the profession. In terms of the bigger questions, I'm not sure if you're asking me really about enabling wider access to legal aid. I can certainly address that. but as far as the profession is concerned, I think there are some practical things that we can do to try and support and maintain practitioners. We've certainly thought quite carefully about this. I should indicate that I'm an active member of the police action lawyers' group, which is our national organisation of lawyers representing claimants in police claims. And I've tried to take some soundings from colleagues about the sorts of things, that I thought I might be questioned on.

And so, some of the examples, perhaps I can give of things that might support the profession going forward and support legally aided lawyers group are things like considering reinstating funded training contracts for solicitors in legal aid firms, funding pupillages in legal aid sets of chambers.

I mean, just as a side comment, I think many chambers and law firms have been adversely affected by COVID. Obviously, many of the courts were not operating for some time, so there's been a drop off and work. There is going to be pressure on income for firms and chambers.

Interestingly this year, of course, we've seen a massive increase in the use of technology. I'm sure there are innovative ways in which technology can be used to help upskill young lawyers.

JD

Is that not going to impact the junior bar? May it not be the case that QCs and more senior barristers are able to keep more work to themselves rather than junior barristers picking up briefs.

HH

I'm not sure that technology will impact the junior Bar negatively. There has been a massive use of technology this year which has completely transformed the way in which we are delivering justice through hearings. And I think different members of the profession have accommodated that in different ways and there are differences across certain types of cases. So, some courts have been more able to accommodate technology. So, for example, the coroner's courts have perhaps found it more challenging than other courts. But in terms of supporting the profession there are clearly, as Nicola has said, issues around whether or not people are attracted to this kind of work, partly because there is less education given to students about this kind of work. Certainly, when I was at Bar school, we were taught nothing about inquest and inquiries. And I think that's probably still the case.

I'm sure that there is more that can be done to mentor young people as they want to come into the profession, more financial support that can be provided. I think there are concerns though about people leaving the profession and going to more stable work perhaps in government departments or in other organisations.

As a final point. I think we need to reflect on the fact that often we work in this sector in partnership with corporate law firms. So, for example, corporate law firms might encourage their junior lawyers to spend a few hours a week at a law centre. There may be other ways in which those partnerships can work in a more effective way. So, I think there are a range of ways that we need to think very carefully about how to support the profession. But I fundamentally share the concerns about sustainability. So just perhaps to get you an outline of why that is.

I did a short survey of some of the leading police action solicitors and barristers before coming today. A fairly limited pool of people, but a very respected people in the field. when I asked them in the survey, how many of them felt they had to cross subsidised legally aided work with other kinds of work? Every single one said they did. So, nobody was saying that they could only do legal aid work either at the bar or in practice. And every single one when asked about how financially viable legally aided police work was, every single one said they thought it was not. So, without that cross subsidy, there are significant risks for sustainability I think.

JD

Can I just pick up one of those points. Can we just talk about inquests, can I just ask you about what the challenges are for families who are seeking representation to inquests in particular?

HH

I certainly commend to this inquiry the very detailed submissions that the NGO INQUEST have made on these severe issues. So, I know that INQUEST have made submissions very recently to the justice select committee on the future of legal aid. and also, the justice select committee on the coroner service. And they will give you

chapter and verse on these issues. but certainly, the issues that families face in securing legal aid in inquests are very well-rehearsed. So, I think the significant challenge at the very outset, if you like, is that there are a whole corpus of inquest cases where someone has died, where the family is simply out of scope for legal aid. So typically, legal aid is most easily, although not entirely exclusively, but most easily available in cases where someone has died in prison or in detention, because in those cases often, nearly always article two of the Human Rights Act applies and legal aid agency will therefore accept that that case merits legal aid. But there is a massive spectrum of cases that are really difficult, sensitive, and upsetting inquests, where someone has died in other circumstances and where legal aid is simply not available. So short of exceptional funding applying, which it often doesn't, the biggest example I can think of biggest type of case would be where someone has died in the community for mental health issue. They're not in custody, but they're in the community and there is a massive number of those cases, sadly, and in those cases the primary challenge for the family is that they simply won't get legal aid at all. So that's the first challenge, I think the second perhaps related challenge is that. Even if they are applying for legal aid, because they might secure legal aid, there are some significant logistical challenges to getting legal aid. INQUEST have certainly put-on record how the nature of the process families have to go through. I'll just quote, one part of their evidence. Families have described having to jump through multiple hoops, answering extensive personal questions, finding it a protractive intrusive and distressing process at an already intensely painful time. So, for example, having to provide details of all family members income.

JD

I'm a member of the justice select committee in parliament, and we heard evidence from the coroner from the Northwest of England who effectively told the justice select committee that families don't need representation in inquest because the coroner is there effectively to act as a form of legal representation on behalf of families. What do you say about that?

HH

I know the evidence you're referring to, I'm familiar with it. I'll make it clear that I'm answering this question with my barrister hat on not with my coroner hat on. But having represented families in inquests for the best part of 20 years, I cannot accept the proposition that the coroner can do the family's lawyers job for them. I simply cannot accept that. The role of the lawyer and an inquest is multifaceted. For a start, if you imagine a typical inquest involving a death in custody or detention, there will be a lawyer for the state, for the prison, there will be possibly a lawyer for the mental health trust, there may well be a lawyer for individual prison officers or for the prison officers' association. So immediately you're in a scenario where the family, if they are unrepresented, is faced with a scenario where there are lawyers for all those parties who almost certainly know more about what happened to the individual that's died than they do. And so, there is an immediate inequality. Actually, if you imagine an inquest set up like that, the family are the people who need to know and they should be at the heart of the process, they need to know what happened. So, I think the role of a lawyer

is important to give the family sufficient support in an inquest. and also, very many of these inquests, although they are described as inquisitorial in nature are very complex. You're often dealing with very heavy factual evidence, very complex medical evidence, very complex expert evidence, and the lawyer needs to be able to explain that to the family and frankly protect the family from the most difficult elements of that. They are inherently vulnerable by their status as the bereaved. There is significant evidence INQUEST has pulled together that the role of lawyers assists families in quite complex legal arguments. There are some real unusual features about coronial law that are simply not, I think, easily adopted or understood by unrepresented individuals. INQUEST made very good points in writing about how involvement of lawyers substantively assists in the outcome. So, involvement of lawyers actually makes the process work more effectively and actually leads to better results, clearer outcomes, support for the coroner on legal issues and potentially preventing further deaths reports.

And I wouldn't accept the proposition that the role of a lawyer representing the bereaved - it's been my privilege of my career to represent, for example, the Hillsborough bereaved, I represented 22 of those families and the idea that they could have gone through that inquest process for two years without legal representation, because the coroner could level the playing field is not one, I can accept.

JD

Going back to the challenges of people coming into the profession, wanting and are committed to social justice and committed to wanting to do the work, in very basic terms for us to try and create a system which allows that to happen, we either have to have more cases which fall within legal aid scope, or I'm assuming an increase in the rates that you get paid or that the legal practitioners get paid. So, in terms of that sort of access to justice, how we can improve the financial support for lawyers trying very hard in the sector. Do you have any views on that?

HH

I can certainly deal with what would improve access to justice in the areas in which I practice in particular, if that's what you're talking about. Because in fact, the issue with police cases that I can just perhaps sort of headline is that the LASPO reforms have obviously led to challenges for legal aid in police cases. But can I just perhaps explain to the panel why there are particular issues that apply in police cases that don't perhaps apply elsewhere?

Very broadly let's not into the technicalities of it too much, LASPO did an array of things as well as changing legal aid. And one of the things that it did as far as police cases were concerned is that the changes it made to the conditional fee agreement regime were significant. So, before LASPO, if your client wasn't eligible for legal aid, you could represent them under a CFA conditional fee agreement or 'no win no fee' agreement, whereby they could recover the cost of the insurance that protected them for the adverse costs. And you as a lawyer, if you won the case, could get an uplift in your fees and that would then subsidise other cases that you didn't win.

Now, putting it very simply LASPO has changed all of that. So, with effect from 2013, when the changes took effect, there is a restriction on the ability to recover the insurance premium and restriction on the ability to recover the uplift. So that means in reality, that for police cases, the way that we in the police action lawyers group see it, you have the very poorest in society who might get legal aid and who face all the challenges that my other eminent have spoken about already. Then you get the very richest in society who will bring litigation come what may, will finance an adverse costs order, and will have the means to do it. But the very large majority of people between those two polar opposites simply have no real access to justice because they cannot now realistically get a lawyer as easily to represent them on a conditional fee agreement. And so, there is a huge denial of access to justice for the squeezed middle, and it is a very large middle.

That's the nature of the viability of the work there. I would just highlight that the qualified one-way cost shifting regime, which is a way that shifts costs in certain cases in personal injury cases Sir Rupert Jackson had always considered that police cases were fit for that and the civil justice council has said as much. Now that would be a significant way, bringing police cases within the qualified one way costs shifting regime would be a very significant way forward. It's been, if I can just highlight recommended on several occasions by the police action lawyers' group and in the 2016 civil justice council working party, it said there were strong arguments of principle in favour of extending this regime, for police cases. So that is a very significant recommendation that could be made in addition to bringing reforms to the means test and things like that - that have been talked about. But it's not possible in police cases to look at legal aid in isolation, you have to look at the other LASPO changes that make these access to justice issues real.

KB

Can I ask if any other panel members want to follow up?

Questions from other members of the panel

Andy Slaughter

Thank you very much for mentioning part two of LASPO there and its pernicious effects, which often gets forgotten when we're talking about part one, that Willy and I remember it very well from the year it went through in parliament. The question I want to ask you, obviously, publicly funded work is hugely affected by politics and LASPO is an example of that but the area of work that you do is perhaps more so. We talked to earlier in the session on another review of judicial review, despite the fact that it's sort of at an all time recent low level. Last week we heard the proposals for review into the Human Rights Act, and you said in your opening that was a formative piece of legislation in terms of your legal career. Have you looked at those terms and what do you think is being proposed there? Do you think that there are further risks in that review of constraining, bringing matters before the courts?

HH

I'm not sure I can get very much detailed comments on it, but I'm certainly in the school of thought that the judicial review system, as it works, is fit for purpose and that the Human Rights Act provides a very significant route to justice for individuals. That I don't really believe can be replaced with anything more composite or more effective. There are numerous examples in police work of Human Rights Act cases giving people a remedy where no other cause of action would have done. I absolutely believe in the power of the Human Rights Act and I have concerns about the nature of the reviews in to legal aid, but I'm not sure that I'm the best person to, to deal at any further detail on that but those are my headline views if that helps you.

AS

I think what I was asking is, it seems from the terms of reference that one of the questions that are being asked in the review is have there been negative effects of the Human Rights Act in terms of alteration of how our constitution works or unintended consequences in that way. It seems less in there about what positive effect would be. can you say anything about that?

HH

I'll be honest. It really saddens me that the human rights lawyers are treated in the way that we are. One of my colleagues, who replied to my little survey, said this: we should value our work and ensure the good we do is known. And just pausing there, we as human rights lawyers in recent years have had to promote our work and say, look at these cases that we have done. And she goes on to say this. We don't vilify nurses who treat drug addiction. So why do those who want to take criminal justice work become portrayed as anti-authority or lefty lawyers? Why are we treated in that way? When we are providing an important service to the most vulnerable in society. So, there are always going to be outlier cases in every legal regime, where there are some cases that are said to make bad law on harsh facts. And there are always going to be some cases that make the headlines. But overall, if one looks at the impact of the Human Rights Act in the last 20 something years it has surely, in my view, been a more positive force than a negative one, but I do think the narrative around lefty lawyers and so on that has had a resurgence recently is very troubling for constitutional reasons, and it's probably not helping in morale and entrance to the profession and retention.

KB

Thank you very much. I mean, for doing a survey and for really making a huge effort to, to come before us and give us some very powerful information to assist the inquiry. So really appreciative of all that you've done and all that you're doing. So, thank you very much.

4. Jawaid Luqmani, Luqmani Thompson

Karen Buck

We're moving onto our next witness. Please introduce yourself.

Jawaid Luqmani

I'm a partner, at Luqmani Thompson and Partners. We started in December 1998 with a focus on immigration. And throughout that time, we've acted for individuals, both legally aided and non-legally aided, who wished to regularise their status in the UK. We've also acted for a number of small to medium sized business enterprise that want to get staff to remain in the UK, for families wanting to bring members of the gang from overseas and also for a couple of charities as well, who are concerned about the implications of employing persons from overseas, always with a mixture of legal aid and private work. But of course, the ratio has changed quite significantly certainly since LASPO, but even in anticipation of LASPO.

Willy Bach

It's very good to see you. You've already described to some extent the nature of the work. Can I ask a fairly obvious question, but I think it's important to hear your reply, as to why we need legal aid in the area of work that you specialise in.

JL

I think it would be best to give some examples of our clients, I'm going to change some of the names here and also preserve the anonymity of the individuals involved.

Laura, who is the victim of sex trafficking who arrives in the UK, who is fleeing from really quite dreadful circumstances. She's 17 when she leaves her country. She's 18 by the time of a home office decision in which she's disbelieved, she has to go through the hostile ordeal of an appeal. Or so she feels it and she's ultimately successful in her case by ensuring that she can have her case put as forcefully as possible.

Abdul has a case that goes on for six years. His application is turned down by the home office. It's turned down by the first-year tribunal. It's also turned down by the upper tribunal, but he's ultimately successful in the Court of Appeal because the wrong legal test has been applied. Not only by the home office, but also by the first-tier tribunals and also by the upper tribunal. So, he has to go through a number of hoops.

Mira is the victim of domestic violence and for cultural reasons, she's unable to gather the sort of evidence that the home office would be used to seeing, partly because it's too shameful to have told her tale to anybody and it would bring dishonour to her family. So, in those circumstances, notwithstanding the fact that she's in an abusive relationship, the evidence that she has isn't considered good enough. The home office refused her application. She doesn't have a right of appeal. She has the right to ask for another home office official to review that decision, that is unsuccessful unsurprisingly. So, she is left with that option of judicial review, which Jo talked about in the earlier session this morning. And she also is ultimately successful after some hearings take place.

The weirdest one I could think of was Jenny, who has an appeal before the first-tier tribunal after a negative home office decision. And the judge decides at that hearing that actually there is no valid appeal before him and that the home office was wrong to afford a right of appeal to Jenny in the first place. Jenny maintains through her lawyers that there is such a right to an appeal, that application is rejected. She makes an application to the upper tribunals also to assert that there is jurisdiction, there is an opportunity for her to at least voice her case. That's also turned down. She has to then apply to the High Court and at the High Court stage the Home Office flip again and change their mind and say, well, actually, yes, you're quite right. There is an entitlement to appeal.

So, all of this has to be done. And in a sense, that's why you need legal aid because in each of those cases, there's quite a technical process and although lots of people would say, well, the problem is that there's a culture of refusal within the home office, I'm not going to subscribe to that view, the truth is that the provisions are really complicated. The last set of immigration rules were consolidated in 1994 and since then there have been 144 very significant sets of changes, including 6 since January of this year and the latest changes that were published had more than 500 pages of very technical changes. Lord Justice Jackson described the state of the immigration rules and provisions as having now achieved a degree of complexity which even the Byzantine emperors would have envied. So again, that is the backdrop to the way in which this work has been done, and as I say, there were lots of changes that were introduced and published in October. Most of which took effect in on the, on the 31st of December, some on the 1st of January but accompanying, those were 80 new sets or, at least 80 new sets, of guidelines for caseworkers. So, whether you think there's a hostile environment or not, or you think there's an, a culture of refusal or not, these are really difficult cases because the law changes so rapidly in relation to very technical questions. That's the backdrop against which this advice is being provided.

WB

Can I just turn briefly to LASPO and just for you to remind us what the impact of the last cuts were in this area?

JL

The introduction of LASPO was to remove various types of legal aid from the scope. And so, what remains is essentially asylum work, work for victims of domestic violence, work for those who have other protection type issues, but otherwise, essentially nothing else is in. There is detention that's covered, but otherwise pretty much nothing else is in. And again, I've dug out some statistics that might help the panel, these were published from the legal aid agency themselves, from the 27th of September. They're a new set, they're published quarterly. So, the next set will either be available at the end of December or possibly the beginning of January.

In terms of the acts of assistance, in the period 2010 to 2011, the number of people provided with assistance under what's called legal help or controlled legal representation - So that's the initial stage before formal legal proceedings in a higher

court - that number was 82,787, And then in 2011 to 2012, the number reduced to 60,792. I won't take you through every year you'll be delighted to hear. but in the period of 2019 to 2020, that figure, this is pre-COVID, that figure was 33,710. So, if you go from pre LASPO, 82,000 down to currently 33,000. That's a reduction of 59.3%. It's a very significant reduction.

We've also talked about legal aid certificates, and in relation to legal aid certificates does a similar picture. again, in the period of 2010 to 2011 the figure was 2,530, and the latest figures published for 2019 to 2020 were 1,321. So that's a reduction by 48%. So again, these are huge reductions. It's possible there for reasons other than just LASPO, but it would be difficult to avoid reaching the conclusion that that's got at least something to do with it.

Now I should also mention there is the safety net of exceptional case funding and again, that might be worth looking at as well, because the number of it, exceptional case funding cases, where despite being out of scope, it is possible to show that there would be a serious injustice if somebody was not given a legal aid assistance. And again, this is just the immigration figures. Those have increased tenfold since 2013 to 2014. But if we put that into context, the total number is 2,525, Whereas the actual number of individuals who are no longer in scope, if you look at the earlier figures is 25,000. So effectively, even with exceptional case funding working, to the max, you're still talking about a 10th of the number of people who are put back in scope, if you like.

I've also got some figures just for the most recent quarter that's been published, which includes the COVID type figures. The numbers are down by 36% between April to June 2020, on the same period for the earlier quarter. And again, that's not entirely surprising, but I anticipate for the next two quarters, the figures will also be down because there's often a delay between the conclusion of a case and the stage of which that case is billed to the legal aid agency.

WB

Thank you very much. Those figures, I think, are really important. Thank you for that. COVID obviously has played a part in your area of law as it has elsewhere. If you want to say anything more about that please do. But I was going to move on to the value of early access. Which I believe the public accounts committee in July of this year actually made the point, which the home office itself also saw the value for people to be able to access lawyers earlier in their cases, rather than later. Would you like to comment on perhaps COVID quickly. And then on the, uh, early access point that I'm asking you about.

JL

Yeah. I mean, in terms of COVID, it's been a bit of a car crash for lots of firms because, the ability to bill cases immediately came to an end because within lots of areas of civil practice, you can only bill a case, the legal aid agency at the conclusion. and there was a widescale slow down, if not halting altogether, of decision-making within the home office and also a large number of cases that were suspended or deferred or put off or delayed. And as a result, it simply wasn't possible to go. I'm sure that's not solely

an immigration type issue, but it applied across the piece to lots of firms. But it was really acutely felt. and as a consequence, there were a number of changes made by the legal aid agency to introduce some new stages for the possibility of billing for work that had already been undertaken. But it certainly had a significant impact on people. It also meant a new way of working for lots of people as well. in terms of using technology because as with lots of firms, we're not having face-to-face meetings with clients in the office because of concerns about the pandemic. there are only so many times you can scream you're on mute during the day before you go mad.

In terms of the benefits of early legal advice, I mean, this was also picked up in the opening remarks made by Sir Bob Neil earlier. I'm aware of the report that you referred to. Effectively it does say that having access to early legal advice makes it easier for returns to take place because often the role of a lawyer may be not simply to cook up interesting ways of torturing the home secretary or anybody else, it's actually about giving effective and meaningful legal advice, which can often be to say to somebody, well look you really have rolled the dice, you are out of luck, there is no point in pursuing this matter further. That's not to say that the fact that our home office has made a negative decision or indeed the first court has made a negative decision means that the person should give up all hope at that stage. But often effective advice means saying I've analysed this, there really is no point in pursuing this matter any further, it would make more sense not to continue and to exacerbate your circumstances just, this is the end of the line there are no effective remedies.

One of the things I would say is that, although there is a sense of mistrust that, that, that seems to have arisen about lawyers on the one hand being these lefty activists, or an institutional culture of refusal. As I say, there is a big difference between full and frank advice as opposed to advising in cases where actually, because the rules are so technical, it is possible for individuals within the home office or indeed for judges to simply be making mistakes. It's the nature of the process. And so early advice is certainly valuable, but it doesn't necessarily mean the end of the story.

Can I just make one further observation in relation to advice within this particular area in terms of value for money and accountability. Because in order for any lawyer to receive legal aid funding in the immigration sector, you have to have met a certain objective standard. And that is the law society immigration and accreditation scheme. And if you don't have the standard that's required, then none of the work that you can do can be charged to the public purse. And so again, that's a safeguard that the legal aid agency has to ensure that money is not being wasted on the sort of scandalous or scandalising nature of advice that simply provided people with the ability to generate claim after claim, after claim, which is a common complaint.

WB

I'm going to ask one more question and then pass back to the chair. I understand new standard fees are in for asylum and immigration appeals. Any comment you would like to make from where you sit on those fees and what led to them.

JL

It's useful to understand the idea behind the standard fees, before I get into the details. As with lots of areas of legal aid, there is this idea of a fixed fee and also, an hourly rate and some cases are paid by hourly rate in some cases are paid by fixed fees or the standard rate. As some of your earlier witnesses have identified, often the work that's undertaken does not meet the escape threshold of the three times the amount of work. And as a result, an organisation may only be paid the standard fee, even though there's a substantially greater amount of work done. And when this was initially introduced, the idea was that it would be like swings and roundabouts on some you win and on some you lose. But I'm afraid that my experience and the experience for lots of people, is that it is more like a slide where you end up on your backside. And so, it doesn't always work and often it works against the more competent lawyer, because that's the boy that's making more of an input.

So in terms of the changes that were introduced, they were introduced in recognition of the fact that when the court itself decided that lots of cases would go through an online appeal process, and there would be the necessity for a lawyer to advance their case at an earlier stage – therefore skeleton arguments and other documents are filed to much earlier stage in the process - Lots of barristers chambers were extremely unhappy because the amount that was available for them for their work would be subject to the standard fee. And the more effective their work was, the more likely the case would settle. And they would end up with an even lower amount than if the case had gone to a full hearing and had escaped the fixed fee. And so, in a way it was penalising the more competent. And so, changes were made and there was a false start with initially part of the fee going to be through the standard fee and part of it through something else. But now there something a bit more realistic, where the whole of this is paid at an appeal stage through an hourly rate basis rather than the standard fee. Although the cost of the advocacy element itself is still subject to a standard fixed fee that can't be changed. I genuinely applaud the willingness on the part of the legal aid agency and the ministry of justice to get this right after considerable effort and sort of will input.

It certainly cured the immediacy of the problem but the problem itself remains. So, it's like we've sorted out the ingrown toenail, it's just a shame about the amputation, because essentially, you're still left with a difficult situation. And as a result, even with those changes, lots of firms are moving away from legal aid, because the rates are so comparatively poor when compared to the private client rate.

WB

Thank you so much. Thank you for answering my questions. Can I pass back to you now, Karen?

KB

Thank you very much. thank you very much for joining us.

5. Rosaleen Kilbane, Community Law Partnership, HLP

KB

We are now going to move on to our next witness, Rosaleen Kilbane of the community law partnership. Rosaleen is a deputy district judge in the County Court, founding member of the community law partnership and won the legal aid lawyer of the year, in the social and welfare law category, a few years back. Could I ask you to introduce yourself?

Rosaleen Kilbane

I am partner in the community law partnership and I'm also speaking on behalf of the housing practitioner's association who have prepared a briefing paper that I think you'll have. Community law partnership, CLP is a firm in central Birmingham. We have eight partners now, five of whom are women, three of whom joined the firm as trainee solicitors. We've been going for 21 years. I've been a solicitor for 32 years and I've always specialised in housing. We used to have contracts in welfare benefits and debt, as well as the ones that we have now in housing, public law and community care but post-LASPO there were no contracts available in community, welfare benefits and debt. So, we had to make our very experienced debt and welfare benefits supervisors redundant. We run the duty possession scheme at Birmingham County courts under contract with the legal aid agency. It's the largest such scheme in the country and prior to lockdown, we were seeing around 300 people a month at court and assisting them in that scheme. We have a Travellers' advice team which provides a free telephone advice line to travellers and gypsies across the UK. We also have contracts, as I say, in community care and public law, and we do a lot of possession work in housing and we do judicial review and I would endorse everything that my colleagues have said about how important judicial review is for our clients. It's often the remedy of last resort for poor people, and there are real problems with it in legal aid. And we are that very rare thing, a private practice that does no privately paying work. So, all of our work is underwritten by the legal aid agency or it's free. we have no other income streams.

KB

Thank you very much. Yvonne, can I invite you to start the questioning, please?

Yvonne Fovargue

Yes. Thank you. And hello, Rosaleen, you mentioned about the fact you did have social welfare law contracts as well, and debt contracts, the loss of those. How do you feel that's changed the role of a housing solicitor?

RK

Well, we can't offer the same holistic service that we used to be able to offer. it's well known that poor people have clusters of problems and we can't solve them all now. And sometimes the lack of legal aid to deal with the welfare benefits problem can mean that the housing problem is not solvable either and because where we can sort out housing benefit problems, if they're part of a defence to possession proceeding - So if, for example, the local authority has issued possession proceedings based on rent

arrears and those are actually the result of a failure to properly process the housing benefit application, that work we can do as part of defending the possession proceedings. But if the underlying problem is one of eligibility to welfare benefits in the whole, then we can't use legal aid to address that because that's regarded as a discreet welfare benefits problem for which legal aid is no longer available. But if you can't solve that problem, then you can't solve the possession problem. It won't just go away. So, the quality of the service that we can offer has gone down, and people are suffering as a result. I mean, welfare benefits are, it's a horrendously complex area of law and the idea that people can navigate the system on their own, whilst the government spends lots and lots of money on lawyers to contest tribunals it is a bit ridiculous, really.

YF

Yeah, I don't disagree. I know you want to take solely legal aid work and have no other forms. What particular challenges have you got in doing that?

RK

Well, we have to be very careful what we do, and I'm afraid that we have to limit the amount of early advice and pre-litigation work that we do, because you heard how little colleagues are paid, doing community care, work on a fixed fee. Well, for housing was it's even worse. we get paid a fixed fee of £157 per case as housing lawyers outside of London. You've got to escape that, to get to an escape fee you have to, on an hourly rate basis, do three times as much work as is as allowed for, and as my colleagues have said, most cases fall between the two.

If you do the case properly, it's very, it's impossible to do it for £157, but you don't always get to the next stage, which will allow you to charge your hourly rate. Those cases are just not viable for us to do. And so, we limit the amount of early advice work we do. We tend to only take on legal help work, as it's called, that's the fixed fee work for homeless people who have to go through a statutory review process. So more or less all of our fixed fee work is homeless reviews. To be quite honest, we don't take on people who've been served with a notice to quit or a notice of seeking possession, because we know that if possession proceedings are issued, we will be able to help them at that stage and we simply cannot afford to do more work at fixed fee rates, then we absolutely have to.

If somebody doesn't put in a review in a homeless case, then they lose their right to challenge the decision. Whereas if somebody doesn't respond to a notice of seeking possession, they don't lose their right to contest the proceedings. So, we ration what we do in terms of the fixed fee work. We also have to make sure that we win a fair proportion of our cases, because if we win in litigated cases we get paid by the other side. And instead of being paid the hourly rate of £59.40, which is the out of London hourly rate for housing legal aid work, we will be paid a minimum of £118 an hour and going up to £217 an hour which is the highest rate for outside of London. So, it's the work that we win, which cross subsidises the work that we don't win, because if we don't win, we get paid by the legal aid agency and we get paid at £59.40 an hour,

which is not viable, and if we do win we get paid at a commercial rate. So, it's the cases that we win which allow us to keep going. That is under threat from the fixed recoverable costs proposals, because if the cost that we can recover are fixed, we simply will not be able to continue to do legal aid work. As we will have nothing to cross-subsidise it with.

And I did respond to the consultation on that, and it was clear that whoever wrote the consultation document has no idea how legal aid practices run, because it actually said that they didn't think that the proposals would have any impact on legal aid firms because fixed recoverable costs are likely, or not likely to be less than legal aid rates, which misses the point entirely that it's only because we can recover at commercial rates that we can keep going at all.

Profit margins are very tight. Our average profit margin to the three years that ended in March 2020 were 3.6%. So, with margins that narrow there's absolutely no slack. We have to nail overheads to the ground. We can't afford to pay people decent salaries. We would love to pay people more, we are a living wage employer, because we don't think it's right, that anybody should work for less than the living wage. So, our admin staff are paid the real living wage, but in terms of solicitors and qualified solicitors and experienced solicitors, we can't afford to pay them what they're worth. So, we are wholly dependent on people like us who have a vocation for this work to keep going. We do take on trainees, we run a placement scheme where we take on 13 students from Aston university and we pay them a paid placement for a year to bring them into social welfare law, to allow them to see that there are alternatives to the career path and we, we do bring on our own lawyers. But once they qualify, sometimes it can be difficult to retain them because there is much better job security and much better pay elsewhere.

YF

So, if the new reforms take place and you can no longer claim the costs and you can't provide the services, where would your clients go?

RK

I don't know. At the moment we turn away about four people for every one that we take on because there is such a shortage of housing lawyers. There was a change to that with COVID because prior to COVID, 50% of our work was possession work. We had the duty scheme of Birmingham. We were seeing 300 people a month that was bringing in income of £22,000 a month. In March that just stopped. There was quite rightly the moratorium on possession proceedings and they were all stayed. That was absolutely the right thing to do, but it hit housing lawyers very hard because our income dried up from that work, the income from it dried up and the work in progress that the work that we would normally be doing wasn't there because all the proceedings were stayed and we still had to keep paying our rent and set up people to work at home. It's a term of our contract with the legal aid agency that we have to have an office yet we weren't given any sort of help in replacing that income. Some things were put in place to enable us to claim for work more quickly but the drying up of that work and the lack

of any help from the government, in terms of replacing that income has hit housing lawyers very hard. And if fixed recoverable costs come in, then we will have to stop doing possession work because it's only the cases that we win that enable us to do the others. And some possession cases, it's impossible to win because of the particular vulnerabilities of the client, or if it's nuisance based sometimes the best thing that you can do is get to a situation where somebody doesn't lose their home. You can't get the other side to pay the costs as well. So, I don't think that we could survive to be honest in our current form if fixed recoverable costs are put in.

I don't know where the clients would go. If we turn people away, I don't know where they're going. The shelter legal have an office in Birmingham, but they employ one and a half housing lawyers. There is one other firm in Birmingham that does housing work. Whereas pre LASPO, there were loads of housing lawyers. We used to have a thriving West Midlands housing law group. Now it would only be us and our staff who would be there and there are 22 of us, and we turn people away every day. We've now had to say to people, we're really sorry, we can't take on any more cases until after Christmas.

YF

Yeah. I mean I sympathise with that. Having had contracts in four areas of law, which all completely went after LASPO. What do you think the biggest issues are facing the clients without the means to privately pay for legal advice with their housing issues?

RK

Well, I think that fundamentally the problem is the lack of decent affordable housing. You know, if there was enough affordable decent housing, I'd be out of a job and very happy to be out of a job. But for as long as there isn't then people who can't access a legally aided housing lawyer, they can't enforce their housing rights. If Karen's fantastic Bill becomes Act then human habitation becomes dead letter law if nobody can enforce their rights.

If nobody can enforce their rights, there is a real problem with disrepair cases because they were taken out of scope in LASPO most of them, for reasons which I do not understand because they cost nothing to the legal aid agency. If, you win, then the costs are paid by the other side. If your client gets damages, the legal aid agency has a charge over them anyway if the other side, for whatever reason don't pay, it actually costs the legal aid agency more now because you can use legal aid to get the repairs done, but once the repairs are done, the problem becomes out of scope. Legal aid is discharged. Client is left to fight on their own. You bill the legal aid agency for the work that you did. If the legal aid continued, you would secure damages as well as works and get the cost paid by the other side. And it will cost the legal aid agency Nothing. That is something that I really don't understand.

So, housing standards are declining. They went up in the '90s, not in small part due to mass casework on the part of housing lawyers, but we now see housing standards declining. Bodies are not being held to account for bad decision-making. we do judicial review cases, in the past year we've had a woman who was placed in temporary

accommodation by a local authority. She was a wheelchair user, the property that she was put into she couldn't get her wheelchair into the toilet. one of her medical conditions meant that she had to irrigate her bowels daily. And because she couldn't get into the toilet, she couldn't do that. And at the stage that she came to us, she was starving herself so that she didn't need to go to the toilet. The local authorities' position was COVID, we can't do anything. And we judicially reviewed that and got a mandatory order that she'd be rehoused in suitable accommodation. And suitable accommodation was found for her. in desperate cases, desperate people need judicial review. And the fact that you have to do the work at risk before permission has meant that fewer and fewer solicitors are prepared to do judicial review, you see the numbers dropping.

As people lose the skills to be able to do it, even in cases where you are going to get paid, because if you get interim relief as it's called, if you get an interim order, as we did in that case for that a woman, then you will get paid. But people are becoming deskilled because legal aid is not generally going to pay unless you get permission. So, it becomes unattractive for people to do, because we can't afford to do an awful lot of work at risk. We have to stay in business to be able to provide that service and that is our biggest challenge at the moment, is staying in business because of the cut that we've had to our income as a result of possession proceedings being quite rightly stayed.

And the moratorium on evictions, that is absolutely the right thing to do. But the threat is that when possession proceedings start again, as they inevitably will, there's going to be nobody left to pick up the pieces because the housing lawyers will be gone.

YF

Yeah. I mean, you've made the point really clearly there. So, what changes would you make to the legal aid system in order to improve it for the clients and for yourselves as practitioners solely dependent on it?

RK

Well, one thing that could be done, which would be cost neutral would be to reintroduce disrepair in its entirety. I mean that, that would cost nothing, very, very little if anything. That would mean that firms like ours could use the costs that they get to cross subsidize the work where we're not going to get costs. That might enable us to try to pay people a bit better so that we can keep them. Recruitment is just impossible at the moment, which is why we're all training our own, so that would be something that wouldn't cost very much.

I mean, something that would cost the ministry of justice, but I think would probably lead to great savings elsewhere would be to re-introduce welfare benefits to the scope of legal aid. Cause if you could sort out the benefits problem, which is often at the root of so many other problems, then there'd be costs saved elsewhere, whether it's at social services level or in terms of legal costs for possession cases. If you could get welfare benefits back, although it would cost, it would have knock-on savings elsewhere.

Bring back payments for judicial reviews, even in cases where you don't get permission, so that statutory bodies can be held to account by poor people who can enforce their rights. Those are the three things that I would suggest. The disrepair, bringing that back in, and payment for judicial review, wouldn't actually cost very much because there's not much judicial review work going on and disrepair doesn't cost the legal aid agency anything anyway.

YF

Yeah, thank you for that. So really sort of looking forward, you're fairly gloomy. Could you see the advice deserts increasing and housing and social welfare law actually not being sustainable? Should this continue?

RK

Absolutely, absolutely. We are very worried about our future as are many other housing law firms, even those that do cross-subsidise. The one where we have recruited in recent years is that we have taken on some housing lawyers from the firms in Birmingham who stopped doing legal aid. So that there are so few of us left and the need is huge and we can't meet it.

And we, we do our very best to train, our own housing lawyers and three of our former trainees are now partners, which is brilliant. But when I came into the law, I didn't have all of this huge amount of debt to pay off, newly qualified solicitors nowadays have got huge amounts of debts and some of them may well want to do social welfare law and don't feel that they can afford it. Given we can't, we can't pay the going rate.

YF

Yeah, I think we will be looking at some points on recruitment. but how difficult is it to get the courses in social welfare law now? Because I know Manchester stopped the welfare benefits course pretty quickly.

RK

Well there was never very much anyway. I don't think it's on the new super exam syllabus at all. So, this is why we asked the university, which is just across the road there, and this is why we are anxious to work with them, to show students that you can come into social welfare law. But we can't lie to them either we can't tell them that they're going to earn what they could get elsewhere, or even close to it. It's just heart-breaking really.

YF

Well, thank you very much and thank you for all the work you're doing. Continuing to fight against it for the people who need it most. Thank you very much, indeed.

Questions from other members of the panel

Andy Slaughter

Thank you. You have told a very familiar story to MPs because so much of our casework is housing work. I think it tells me that there is such a gap that's opened up. And that really, you're coming in at a very late stage or coming in just before eviction or when a lot of the damage is done, when a lot of costs may have been incurred and you make the additional point that the lack of scrutiny and challenge to the process is having a marked effect in the quality of housing that there is out there as well.

I mean, these points don't appear to be accepted by government that there is an opportunity cost here. My question was, we knew about recruitment. Are you finding people want to come forward and do housing work? It used to be quite a prominent part of the not-for-profit legal aid network, going back into the eighties and nineties and it just isn't there anymore. It's been hollowed out. And where do you see that going?

RK

We don't have any difficulty in recruiting trainees. In fact, two of our three, most recent trainees actually came to us as Aston student placements and one of them qualified as a solicitor last week and she's still with us. So that's great. It's very difficult to recruit experienced housing lawyers, because we're a dying breed. There just aren't the numbers coming through that there used to be and some firms have moved away from legal aid and people become quickly de-skilled so, it's very difficult to recruit experienced people and it can be difficult to retain good people too.

We recently lost a very good assistant solicitor who, said, look, I love the work, but I am at a point in my life where I need financial security, and so she left, to go and work somewhere else and we'd put quite a lot of effort in training her as well. So, it's really, it's really difficult. I don't, I don't know where the next generation is coming from.

AS

Your community partnership does a lot of work with marginalised groups, and you've done quite a lot of relation to travellers with your practitioners. Are you finding that that is also becoming more difficult? That it's more difficult to sustain practice in more niche areas and where there is a higher level of need and a higher level of input needed.

RK

Partly, yes. If you're doing work for travellers, because most work involving travellers is outside the scope of our housing contract, because preventing loss of the home is only inside legal aid provided that you didn't enter onto the land as a trespasser and given the dearth of legal sites in the country, most traveller encampments are not legal and therefore they entered as a trespasser and therefore, they're outside the scope of legal aid when it comes to defending their home. So, the only way to challenge decisions in relation to moving people on perhaps where there's children with health needs, where they need to be in a particular area or there are other welfare considerations, judicial review is your only remedy. And then that's at risk. So, you're sort of being squeezed from all sides. and it makes it very difficult to continue.

AS

Thank you.

KB

Thank you very much Rosaleen, this is certainly very dear to politician's hearts because we pick up more housing cases than certainly other specialist areas. Thank you for all you are doing and for your time this morning.

6. Polly Sweeney, Rook Irwin Sweeney

Karen Buck

So, we now move on to our last witness, who is Polly Sweeney. She is a partner and cofounder of Rook Irwin Sweeney, which is a specialist public law and human rights law firm. and Polly is also chair of the law society's mental health and disability committee. Do you want to just introduce yourself to the panel briefly?

Polly Sweeney

Thank you, Karen. As you said, my firm launched earlier this year, and we specialise in education, health and social care and mental capacity law, and I have a personal interest in cases involving the rights of disabled children and young people. So, my firm is in between legal aid contract tender rounds at the moment. So, we don't yet have a legal aid contract, but prior to this, I was a legal aid practitioner for over a decade at a large national law firm that had contracts in public law, community care and education.

I also continue to do some legal aid work as a consultant for Scott-Moncrieff & Associate. As you said, I'm the chair of the law society, mental health and disability committee and I have previously been a committee member for the legal aid practitioners' group. so, my views are drawn, not just from my own practice, but also wider experiences of practitioners in this area.

Andy Slaughter

You said you practice across disciplines, but could I ask you specifically about education law? Because that's something we haven't covered previously and it also, maybe something that's not as familiar for members of the panel. What would typically be your caseload and what does that involve in terms of their practice?

PS

For an education law solicitor, the core work is broken down into three main areas. So, first of all, you have special educational needs cases. And the majority of this work is, so the disabled children and young people who have got the most complex needs, the way that public bodies discharge their duties towards that group of children, young people are through a legal document called an education health care plan that runs from birth to the age of 25.

Now the legal framework around said law is complex but put it at its simplest. Essentially children's legal rights and support are attached to these EHC plans and so, they're very important documents and where there are disputes about them, the disputes are resolved by a specialist tribunal called the special educational needs and disability tribunal.

So that's the first, the second then is disability discrimination cases within schools. and again, they are now also determined by the tribunal. And then finally, um, the other area of practice that we do most routinely in education law is judicial review. So, in an education context that can range from cases like failures to provide a child with education, through to challenges of local authority's policies, and budget cuts, and then all the way up to national challenges. And so, I was instructed over the summer on behalf two disabled children to challenge the government's downgrading of rights for children with special educational needs during the pandemic. I think what I would say though, is I would echo what others have said already is that our clients don't come to us with these neat legal issues in the way that I've just described them, they come to us in crisis often and require really specialist advice to unpick the issues and to work out what their legal remedies are and to work out whether we're even the right people to be addressing them.

Just in terms of our client group, as you said, education is an area of law, which often doesn't get a great deal of focus during discussions about legal aid. But in fact, it is a really large client group. So there's currently around 390,000 children and young people in England with EHC plans. And this number has increased year on year since they were introduced in 2014. And this is also an area where it's really likely the child is going to experience a problem where their legal rights have been breached. So, the local government and core ombudsman issued a report just in October last year, looking at SEN complaints in particular and found that nine out of 10 complaints - So 87% of cases - involving education and health care plans were upheld. And so that's a really startling figure compared to the usual rate the ombudsman looks at and it was found in that report that children with special educational needs and disabilities have increasingly been failed by a system that's designed to support them.

This is also born by the statistics in relation to the cases that are appealed to tribunal. So, there were almost 8,000 appeals registered with the tribunals last year, which is 13% up from last year and the largest number ever recorded. So, what we have is a client group that are increasing in size but with a system to support them, which is in crisis. And so, there was a huge demand on the need for education law solicitors in this area.

AS

I mean that figure it is that relating to poor decision-making based on shortage of funds from local authorities and other bodies? I'm wondering why it's that high? And my next question was going to be, if you go on the one hand, the services themselves being cut back, not be able to provide the quality of the higher education necessary and you yourself in difficulty then what are the typical problems that you're experiencing in terms of function and getting funding?

PS

I agree with you. The figures from the ombudsmen are astonishing and I think it must be the case that year after year of cuts to local authorities' budgets is a significant contributing factor to that. I don't suggest for one moment any local authority wants to breach the legal rights for disabled children, but we see far too often that that's happening routinely.

Just in terms of the, the particular pressures on legal aid in this area, I think we saw as a result of LASPO a removal of most areas of educational from scope and most notably the removal of advice and assistance for school exclusions. Just last year or the year before there were 8,000 permanent exclusions, which is an increase of 60% over the last five years and a disproportionate number of these children are living in poverty, have special educational needs, are from ethnic minority groups. We know from research that children who are excluded from schools are more likely to end up in the criminal justice system, are more likely to be exploited by criminal gangs and I see this in my own cases. And so, one of the opportunities that providing advice for exclusion offered was that you were able to support a family at a very early stage when they're initially excluded from school before things start to go badly wrong and of course, because of LASPO removing that from scope, that opportunity is no longer available.

Also, I think one of the other pretty devastating effects of LASPO was the introduction of the mandatory telephone gateway for this area of work. So previously this area of work was provided on a face-to-face advice contract basis. Overnight that provision was removed and replaced with a mandatory telephone gateway. and under that scheme, although it was initially ordered to three, there were just two providers nationally doing all of this work. So significant concerns were raised about that gateway, including the legal aid agency having to announce in 2018, that it wasn't going to be awarding any civil legal aid contracts for the telephone gateway for education because there were insufficient compliant tenders.

And ultimately by 12th, February 2014 the mandatory telephone gateway was removed completely, but the difficulty is that it caused so much damage to the provider base that we're left in a situation where it has completely destroyed the provider market in this area. So, the legal aid agency statistics show this huge drop in education cases. So in 2006 to 2007 for legal help work, which is the tribunal work that I was talking about, there were 11,930 matter starts for those cases by 2011-2012, we saw that drop to just 3,775. And then last year, the figure was just 1,810. So, you have a significant increase in the client group, a system in crisis but at the same time, this huge drop in education cases showing I think something is really seriously going wrong with our legal aid provider base.

Another example of that, a really stark example of that, is that after the removal of the mandatory telephone gateway, the legal aid agency opened up a new tender for a new face-to-face contract for education. Now we have, as a result of that, we have just eight law firms nationally across the whole country that are able to provide advice and assistance in this area of law, under legal aid. And even in those firms where they may

have a contract, there may only be a handful, perhaps even just one or two solicitors in that firm who actually have the expertise to advise in this category of law. So, it's really hard for clients to be able to access legal advice. And it's sadly been a consistent feature of my career that I have to turn down huge numbers of new inquiries, because we just don't have capacity to take on the work.

And it genuinely is heart-breaking that you can see a legal issue and, you know, you can do something to help, but you just don't have the time. And so, you suggest other the firms, but you know they will be facing exactly the same challenges. and you never quite know what happened to those clients. You just, in the last few weeks, a client approached us to advise on an education matter. And I made some suggestions of firms with legal aid contract, but I asked if he would keep me updated, as I knew I was coming to speak to you today. And he reported back to me to say that he tried 10 firms nationally. 2 had said that they potentially could take his case on, but he was still waiting for them to confirm.

AS

Just be clear on that point. You're saying that the introduction and then the removal of the mandatory telephone gateway has had a catastrophic effect in terms of the actual ability to provide the service to that. And I'm assuming that is an unintended consequence of the way this has gone about, has there been any response from legal aid agency or MOJ to try and address that?

PS

Certainly, none that I'm aware of. I think though that you have to look at why it is when the legal aid agency opened this back up to tender again so few firms applied. We know there are lots of really good education law firms. You are doing this work, but when the list of contracts was published, the names weren't on there.

And I think it has to be the case that the significant factor in all of this is the remuneration levels to this area of work are just not financially sustainable. They don't even cover the very basic overheads of employing a solicitor. And so, the result is that you leave firms with three choices, either they do work at a loss, and many firms do that because they believe in this area of law and it is important to offer this service.

Or work has to be done at a really junior level and I make no criticism of firms that do that because they're forced to do that because of the level of remuneration. But this is just not commensurate with the complexity and the seriousness of the work thats done in this area. Or the final option, which is what we're seeing is that is that firms just aren't bidding for a contract. And those are choices which no firm should ever be forced to choose between.

AS

Can you just get back on a couple of things? You said generously that you think local authority want to provide the best for special education needs children, but the fact remains, obviously we will then be dealing with some cases in this area. There's often an inequality of arms now between, and there are huge cost pressures for local

authorities, and sometimes the option that a parent will want is a very expensive option for them. Do you think that local authorities do take advantage of that situation? And are you finding parents of children coming under more pressure to accept less than ideal placements?

PS

I think often, and I understand why you say the option parent wants is expensive, but actually the reality is it's often that child's needs are exceptionally complex and therefore money is needed to meet those needs and so, it's not that the parent is trying to get this perfect level of service. They just want their child's basic needs to be met, within a legal system, which says that should happen. I do see very often cases where it is very clear an unlawful decision has been made, which has no relationship to the law at all. So, parents are very often told things like you can't request an EHC plan for your child until they have met some blanket criteria or we don't provide one-to-one support or we don't offer that service within our local authority area. These are all things that, as a lawyer, I can very quickly identify and say to a parent that's just wrong as a matter of law but of course, parents don't know that they will believe and trust what they're told, that that's not available. And so, I think part of the problem is that they then don't know there's a legal remedy because they think that what they've been told is correct.

AS

You also said that you talked about tribunal processes and success at tribunals. Have you got any anecdotal or statistical evidence to show what different representation makes there? What the sort of success rates would be typically, assuming that a parent could get to a tribunal, and how much that is enhanced by being represented?

PS

The legal aid is currently available to provide advice and assistance for tribunals at legal help level but that is only for the preparatory work. So, if a firm that has a contract can provide all of the support up to the run-up of the hearing in terms of preparing the evidence, but then the parents are left entirely on their own at the hearing itself, because there's no legal aid for representation at the hearing.

It is not uncommon for a local authority to be represented by a barrister at that hearing. I think that the tribunal do work really hard to try and make sure that the process is fair, but you can never have equality of arms where you have a parent on the one side, then you have a local authority barrister on the other, there potentially could be maybe six witnesses present at that hearing three on each side - who will need to be questioned and then cross examined -, there'll be been large bundles of evidence. It just isn't possible to have equality of arms in these circumstances. The law is complex. there is a system of exceptional case funding, but it is used very rarely. And I know that the public law project, who you heard from Jo already today, have been assisting providers and providing some training on how to apply for exceptional case funding.

But of course, it's only exceptional. so, it's not the norm that the parents will have the benefit of legal aid for representation in these cases.

I think the other thing that I would say is that the appeal statistics do look very favourable. You look at the, the range of appeal and the rate of success and tribunals very, very high for parents. And you might say, well, doesn't that show that it's working, but I think what those statistics don't reveal is what that win as it were actually means for parents. the appeal statistics are recorded on the basis that if any part of the parent's appeal is successful, then it will be recorded as a success for the parent. But that could mean that actually the main part that they went to tribunal, for example the school placement, they didn't get, but they got something else. So, I think you, we need to look at the success rates in tribunal with a little bit of caution as to whether they really are reflective of the benefit that's being achieved for the families and in those circumstances, I do think that parents are placed at disadvantage in it just isn't a level playing field, when the other side, the state, is being represented and being paid for their representation.

AS

Thank you. And finally, the question we've been asking all the practitioners about their area of work. One is if you can give us in a practical example of the sorts of fees that the work, you're doing in education are attracting at the moment. Secondly, it was more of a question. What do you think are changes that you would see as a priority has to be made in the system now to address the problems you described?

PS

In terms of remuneration the majority of work, the special education needs certainly is funded under the legal help scheme. And the important thing to remember about that is that in the tribunal, it offers no opportunity or inter partes costs. So, you could do a full tribute appeal at legal aid rates and win, and you don't recover anything from the other side. So, the most a solicitor is able to recover for one of these very complex tribunal appeals is the legal help rate. I suppose I briefly described what a tribunal looks like in terms of the evidence, the numbers of witnesses, the complexities of the issues. And let's not forget as well, but all the while one of these tribunal procedures are ongoing, you are trying to support the family with everything else going on and you're getting telephone calls saying, you know, my child has been arrested or my child's gone missing, or a I'm being threatened with criminal prosecution for non-attendance. And you're trying to signpost to other services and other agencies. So, you're doing all this very, very complex and really important work. And then at the end of it, as a solicitor based outside of London, you would be paid just £48.24 an hour for doing this level of work. So, for most firms, that means you're working at a loss with no potential to recover inter partes rates in comparison to that, the HMCTS guidelines solicitors' rate, which hasn't been uplifted in itself for 10 years it's £217 pounds.

So, it is really no surprise that so few providers are able to do this work. it's just not a profitable level of remuneration. And so, in response to your question about what changes, I think first and foremost, there needs to be a very urgent review of the

remuneration and fee structure, to make sure that work, particularly work that's done at legal help, level is financially sustainable.

We have a perfect storm at the moment of huge numbers of disabled children, whose rights are routinely being breached and just a very small number of practitioners who can offer legal aid in this area. And so there needs to be some urgent intervention to increase the provider base in education law. I would also say that we need to bring back in scope, legal advice and assistance in relation to exclusions, as that offers an opportunity to provide support for children and young people at that early stage before things turn into a crisis. And then as I think a few people have already mentioned, some targeted work with universities and with law schools to make sure these areas of law, not just education, but community care, health and social care are taught to students so that there are going to be adequate solicitors in the future. So that all those who need it can access legal advice in this area.

AS

That's incredibly helpful. thanks very much, Polly I'll hand back to Karen.

Conclusions - Karen Buck MP

We've had such an astonishing panel of witnesses this morning, and that was a very, very strong way to end the session. In fact, I was in part of preparing for this when we were talking about it before the session started, I was told that currently 18 civil legal aid providers are no longer in this field of work since the inquiry started in September. which gives you an idea that in real time we are, we are losing capacity in this field and therefore the ability to serve exactly the kind of people that you are talking about and so, we are in amongst other things in a bit of a race against time. A big thank you again to all our witnesses. Thank you to the panel members. And we will be reconvening on the 28th of January.

I wish you season's greetings, and let's hope that 2021 is better than 2020. Thank you very much.