---

The noble Lord, Lord Kakkar, spoke powerfully about the life sciences industry and how vital it is to the NHS—and, indeed, innovation more generally. We are absolutely committed to innovation and healthcare, both to deliver the best possible care to patients and as an important driver of economic growth. Innovation can also help to drive down costs. The healthcare and life sciences section of the Government's plan for

growth 2011 highlights that health research and innovation have a key role in the national economy as well as in improving health and care.

NHS England has an important leadership role, such as continuing to support the strategy for UK Life Sciences, and in spreading innovation throughout the NHS in line with their commitments in the innovation, health and wealth strategy.

In our current consultation on revisions to NHS England's mandate, we propose updating its objectives on growth. The aim would be to help drive forward the Prime Minister's initiative, announced in December last year, to sequence 100,000 whole genomes over the next three to five years by supporting its implementation and delivery and by preparing the NHS for the adoption of genomic technologies.

The noble Lord asked me what metrics would be applied to determine whether AHSNs are successful. I agree that there need to be robust and transparent outcome measures, and that is why there is a three-year academic evaluation commissioned jointly by the Department of Health and NHS England, which is currently out to tender. In addition, we are designing the five-year licence and building into it robust and vigorous outcome metrics, national baselines and locally appropriate lead indicators. That is due for completion by 1 September. However, all this will evolve over the five-year licence period.

My noble friend Lord Ridley said something unarguable: that the NHS needs to remove more inefficiencies. I completely agree with him and will draw attention to two specific examples: procurement, to which the noble Lord, Lord Hunt, referred and

**11 July 2013 : Column 443**

technology, which was spoken to so well by the noble Lord, Lord Bhattacharyya, the noble Baroness, Lady Lane-Fox, and the noble Lord, Lord Crisp.

On procurement, the NHS undoubtedly needs to look at every pound it spends to see whether it is giving value for money. Procurement spend accounts for around £14 billion of the NHS budget and we need to make sure that this money is being effectively spent. We will publish plans this summer to save up to £1 billion by 2015-16 through more efficient procurement.

On technology, I listened with care to the expert views of the noble Baroness, Lady Lane-Fox. We are committed to a paperless NHS by 2018 to improve services and make real efficiency and productivity savings. Better use of technology will save time for doctors and nurses, improve patient safety and has the potential to save billions. External studies have estimated that cost savings of £4 billion can be achieved, but these figures are illustrative at the moment and are subject to further work and examination.

My noble friend Lord Cormack suggested that we had reached a time when we needed a plurality of funding for the NHS. I understand the arguments that he put forward but I should make it clear that the Government have no plans to introduce any additional charges for NHS services. The NHS constitution states clearly that NHS services should be free at the point of use, except where charges are expressly provided for in legislation. Any decision to introduce new charges would need to be sanctioned by Parliament.

The noble Lords, Lord Rix and Lord Bhattacharyya, spoke about social care eligibility and the national threshold. In line with the recommendations of the Dilnot commission, the Government are committed to introducing a national minimum eligibility threshold. This will ensure that everyone has a minimum entitlement to social care, wherever they live, but councils will be free to provide services beyond the minimum level and there is no sense in which we are asking councils to be less generous.

The noble Baroness, Lady Hollis, spoke about local authorities facing 50% cuts. I recognise that local government has faced tough constraints on budgets but I do not recognise the 50% figure. Over the past four years of the current spending review, local government spending was forecast to fall by 14% in real terms and DCLG has calculated that this will fall in 2015-16 by a further 2.3%. It was that context that led us to take the decision to make significant additional resources available from the health budget to social care.

I am afraid that time is now against me. I have much more to say, particularly to my noble friend Lord McColl, who raised the extremely important subject of obesity, to the right reverend Prelate the Bishop of Derby on harnessing the voluntary sector to deliver more care, and to the noble Baroness, Lady Boothroyd, on NHS charges for migrant and visitor access. However, I fear that I will have to address those points in a letter.

I hope that this debate has brought it home to all of us, as it has to me, that the challenges facing us in ensuring that we have a sustainable, high-quality NHS for tomorrow and the long term, will occupy us for some time. They are issues that the Government in no

**11 July 2013 : Column 444**

way seek to avoid in our stewardship—which we are privileged to have—of this precious and valued national asset, the health service.

**2.05 pm**

**Lord Patel:** My Lords, first and foremost, I thank all noble Lords who have taken part in this stimulating and brilliant debate. I am not biased, but it has been one of the best debates this Chamber has ever had. Some really serious thought has been given to how we might avert the crisis that may be happening in the NHS. Kenneth Clarke said, surprisingly, that:

"Every Secretary of State for Health will find they are trying to walk up a downward-going escalator".

Despite that, he continued to say that it would be sad,

> "if we gave in to the siren voices saying that an NHS largely free at the point of use can't last".

The NHS will last and we just have to find the means of making sure that it does. There is an issue about the demand and supply side. We need to address the demand side, a point made by many noble Lords, as well as on other issues. I see that the lawyers are gathering, and if I do not give in to them, I fear my fate.

*Motion agreed.*

# Legal Aid

## *Motion to Take Note*

**2.06 pm**

*Moved by* ***Baroness Deech***

That this House takes note of the effect of cuts in legal aid funding on the justice system in England and Wales.

**Baroness Deech:** My Lords, I declare an interest as a regulator of the Bar, but not its representative. My remarks today are informed much more by my decades as an academic lawyer in the home of lost causes and a law reformer rather than by any concerns about barristers' income.

What we are debating today is the health of one of the great pillars of our democracy and liberty; namely, our legal system and the way citizens may benefit from or challenge laws which, as this House knows well, are painstakingly established for the good of the community. Access to justice is every bit as vital to our societal health as access to health services. In an ideal and affluent world, the need to fund legal services would be seen to be as compelling as the NHS and as deserving of ring-fencing, albeit with controls to prevent malicious or frivolous use. Our courts are like the NHS but with a far older pedigree. Our justice system has been the admiration of the world and a model for emerging democracies elsewhere. This is the country that litigants come to, if they can afford it, to seek justice that they feel is denied to them at home. This is the country that sends judges and barristers overseas to help new countries establish a decent legal system. I

**11 July 2013 : Column 445**

need hardly point out, in this week of Middle East chaos, how crucial and yet how fragile the rule of law can be.

The regulatory objectives for the legal profession, such as consumer protection, the rule of law and a strong, diverse and independent legal profession, are a fundamental pillar of the Legal Services Act 2007 and the basis upon which successful regulation of the legal profession is measured. My overarching concern with the proposals set out in the Ministry of Justice consultation, Transforming Legal Aid, is that they will undermine these objectives to such an extent that regulators and lawyers will not be able to mitigate the risks that arise as a result. Moreover, since the LSA is primary legislation, I consider that the Ministry of Justice should not pursue a policy which either is, or risks being, inconsistent with it without full parliamentary debate. I ask the Minister to provide that opportunity by giving the House the chance to debate primary or other legislation before such profound changes are made.

It is commendable that the Lord Chancellor has listened to the representations made to him so far and has recognised that choice has to remain in the allocation of a lawyer to a person accused of a crime. So far, so good, but in the complex area covered by the paper, much remains to be challenged.

Our system of judicial review, which it is proposed will be cut back, enables every citizen to challenge officialdom. Even when the chances of a successful JR are low, the shadow of it creates a climate in which officials know that they must stay within the legal boundaries and observe human rights; otherwise, they will be brought to book. Any diminution of this, no matter how severe our national financial situation, must be treated with the utmost seriousness. That is because everything we do, especially in this House, is built on our centuries-old acceptance of a functioning rule of law that is there to defend and protect all of us. JR is like knowing that the policeman is on the beat somewhere—if only.

The recent peddling in the media of the notion of greedy lawyers and litigants drunk on public money obscures a fundamental principle of our system. I have heard the Minister characterise the professionals I regulate as "fat cats". The reality is the perception that government can use cuts in legal aid to reinforce the application of unpopular policies by choking off challenge and redress. How are people going to be able to challenge medical negligence, housing problems and treatment in prison? The silence that will fall as the proposals are implemented will allow future Governments to say that problematic policies have in fact succeeded because they were not challenged—it will have become impossible to challenge them.

Of course the Government need to save money. Here we are talking about £220 million a year, although

some say that the sum does not take account of recent falls in the outlay on legal aid. This sum pales when one thinks of, say, expenditure of taxpayers' money on council credit cards and failed NHS IT systems, or Apple and Vodafone not paying tax. Shave a little off HS2, and we would have it, although the profession

**11 July 2013 : Column 446**

has in fact come up with other ways of saving money that would render unnecessary the Ministry of Justice proposals. It is not helpful to compare our legal aid expenditure with that of other countries because they have inquisitorial systems whereby the work equivalent to that carried out by our barristers is done by officials before the court hearing. Those costs have to be on the state balance sheet somewhere. They could be cut by putting more of the legwork of an offence trial on to other organs of the state. They could be cut by reducing the outflow of new criminal offences from the legislature. They could be cut by removing some children's cases from the criminal system and shifting them elsewhere. The organisation Justice has calculated that releasing around 6,500 prisoners from custody every year would make up the necessary savings in the justice system. We need to take a holistic view of expenditure. We need to know whether the ministry has calculated the additional costs that would be incurred if its proposals were to be implemented, quite apart from the broader balance of social benefit and detriment. I am not convinced that the deep calculations, allowing for the slowing down of the legal system and more failed cases and appeals, have been carried out or revealed. The knock-on effects may well wipe out the savings.

Others will speak about children and mental health, but I hope that the Minister will bring forward a proper impact assessment of what the cuts will really save and what they will not save. There is a clear risk to the most vulnerable and even the middle class in society. A threshold of £37,000 per household is unsubtle and will lead to defendants not having equality of arms when representing themselves against the police and a barrister acting for the Crown on the other side. Nor is there provision in the proposals for vulnerable defendants who simply cannot cope on their own. What of the impact of cross-examination on his alleged victims by an accused acting in person, about which we read so much in the media? Prisoners are to lose legal aid in relation to what happens in prison. The consultation is possibly over-optimistic in stating that the prisons complaints system can replace legally aided advice for prisoners. I have heard estimates that the complaints system is as expensive, if not more so, as using a solicitor.

Women have been especially hard hit by the Legal Aid, Sentencing and Punishment of Offenders Act, known in the trade as LASPO, which commenced the restrictions in legal aid. This is the second bite of the cherry. The impact of that first Act has not yet been observed, although we know that there has been a 27% increase in disputed cases concerning children. Social welfare law and family law have become largely ineligible for aid. Some 57% of those affected are women, who bring 73% of the education cases and, a few years ago, formed 62% of the applicants for family legal aid. It pains me to say it, but women may be less able to represent themselves than men and lawyers in general. In sum, the interests of the public could be damaged in that there may not be competent representation, and the criminal justice system may fail to convict the guilty and acquit the innocent.

The big money saver, according to the consultation, will be the introduction of price-competitive tendering. Giving out contracts based on cost alone removes any

**11 July 2013 : Column 447**

incentive on the providers to exceed the minimum standards of service. Going for the cheapest ignores the reality that defence lawyers have to work with the individuals they represent; they have to work at weekends and be ready to deal, by definition, with the weakest members of society and cope with their wider problems —rather like the NHS, which we have just debated. Tendering for this legal work cannot be an accurate or

exact measure because the length and complexity of cases are unknown. Currently, lawyers in the local community have experience and reputations that are known to the local police and courts. Mergers of small firms may destroy that, along with the availability of specialist skills, for example, in human trafficking or war crimes which are not to be found in the large new corporate pile-them-high and sell-them-cheap providers. The supermarkets and haulage companies who will hold themselves out to do this are unlikely to send the appropriate cases to barristers, thereby reducing the calibre of advocacy and future judicial material. Once they have secured the work and closed down the local firms, they will of course put up their prices.

I am particularly concerned about the tapered fee. We are all innocent until proven guilty and have the right to plead innocence and face trial. That is not inefficient; it is the rule of law. There must be no influences brought on a decision to plead guilty, such as a higher fee for the adviser or the inability of a solicitor to conduct a trial if the client were to plead innocent. The client, even now, should be inquiring of his or her representative as to whether that representative has any interest in an early guilty plea.

It is irrational to propose, as the MoJ has done, to reduce fees on a daily basis if the trial is a long one. The number of witnesses may be necessary, the jury may take time, and the legal arguments and cross-examination may be complex. Let us imagine a health system in which the longer the operation takes, the less the surgeon will be paid. We should either have fee cuts of 17%, as proposed, or PCT interference in the market. We do not need both. If there is to be a 17% cut in fees, firms should be left to work out how they will manage. If there is PCT, the price should be allowed to be settled that way.

What about the barristers whom I regulate? Criminal lawyers earn a great deal less than MPs and have to bear their own expenses. The Bar has worked hard to improve diversity but there are now only 400 pupillages a year, of which about 19% go to black and ethnic-minority pupils. I fear that the profession will become exclusively the domain of white, middle-class, self-financing advocates because young people will have no assurance of even a modest legally-aided income as they set out at the Bar. I do not see how they can survive with the education debts they are chalking up these days, not to mention the cost of qualifying as a lawyer. No wonder social mobility is less than it used to be. I do not wish to read any more exhortations from diversity tsars to increase the number of young people from underprivileged backgrounds in the legal profession. The Government want universities to lower the entrance requirements to this end, but they may be making it impossible to attract poor young people to the legal profession.

**11 July 2013 : Column 448**

I was sorry to read that the Lord Chancellor commented to the Justice Select Committee that the Bar has not engaged with the Government in contemplating the changes that need to be made. On the contrary, the Bar is putting forward its own suggestions. It will be ready, I am sure, to help in delivering efficiencies through what are known as alternative business structures. It would be ready by now, but is being held back from getting them off the ground by the excessive red tape and over-regulation that is built into the Legal Services Act 2007.

I hope the House will agree that there ought to be primary legislation for an issue of such constitutional magnitude to ensure that whatever changes are proposed after consultation will receive the scrutiny typical of this House. The proposed changes are of the order of those achieved in the LASPO statute and deserve as much attention. Even the judiciary, which is normally reticent in such political situations, has criticised the proposals. I am convinced that the protection of the profession and of the public that is enshrined in Section 1 of the Legal Services Act will be undermined by the proposals of the Ministry of Justice as they stand. I beg to move.

**2.21 pm**

**Lord Faulks:** My Lords, I begin by congratulating the noble Baroness, Lady Deech, on securing this debate on these recent and very controversial proposals. I declare an interest as a barrister regulated by the board she chairs. Although barristers are not naturally enthusiastic about regulation, the Bar Standards Board has won increasing respect from practitioners. I wish that I could say the same about the LSB, the super-regulator.

On 3 December 2012, I spoke in another debate initiated by the noble Baroness about what can be described only as the overregulation of the legal profession. I am glad to say that the Government have now announced that they have embarked on a wholesale review of legal service regulations following concerns over their complexity and the unnecessary burdens that they place on the sector. That debate clearly had some effect, and I hope that what is said today in your Lordships' House will similarly cause the Government to think carefully.

I also declare an interest as a barrister who, while not often paid by legal aid, has experience of the way that the system works, has acted with legal aid and has sat as a recorder in the Crown Court. When proposals are born out of a need to save money, there is a significant risk that cuts will be made in rather a crude way and that the legal system as a whole will suffer long-term damage. These proposals have met with extraordinarily widespread criticism, much of it admittedly from interested parties. However, it seems to me —and I may be alone here in believing this, or almost alone—that there is some good sense at the heart of what the Government suggest in the introduction of PCT. Indeed, in March 2010, the previous Government produced a Green Paper that said, in relation to the restructuring and the delivery of the criminal defence services, among other things:

**11 July 2013 : Column 449**

"Currently the criminal defence service is highly fragmented, with a large number of small suppliers and relatively few large suppliers … We believe that these market trends are not sustainable. Therefore we believe a future tendering process would ensure a more consolidated market, with a smaller number of more efficient suppliers, required to undertake the full range of the services we need".

I therefore expect that the party opposite will applaud at least the concept that these proposals contain for the restructuring of legal services.

It is of course important that any restructuring does not result in a degradation of the quality of justice or its availability. I, like the noble Baroness, welcome the Secretary of State's announcement that he will carry out a further consultation before finalising his plans. He has also said that he is looking again at the important question of choice of lawyer. I look forward to seeing precisely how he reflects this question of choice in any amended plans. I admit that I find it rather an elusive concept. Of course, it is desirable that anyone charged with an offence should be represented by lawyers in whom they have confidence. However, choice is unlikely to be an absolute matter. Indeed, I reject the suggestion that those charged with criminal offences are incapable of making informed choices. Some of them are quite experienced consumers. I can remember, on a couple of occasions when I was a young barrister, being introduced to a defendant by my instructing solicitor, to be met with the comment, "I do not want him". That, I think, was an expression of freedom of choice in terms of representation.

Some of the personal attacks on the Lord Chancellor are highly regrettable. I also find the suggestion that lawyers in this area are overpaid and are, in effect, milking the system unfair and unsubstantiated. It is the habit of all Governments to publish rather misleading figures about earnings at the top end by practitioners in legal aid. These figures never tell the whole truth. The average earnings of a criminal practitioner are extremely modest. It is vital that we preserve the possibility of lawyers doing this important work. What is at stake is not

just the standard of living of lawyers, which may be regarded by some as of secondary importance. It is much more important that we maintain the quality of justice for which this country rightly has an extremely high reputation.

Time does not permit me to examine the other proposals in detail. I can say, however, that the alarming increase in expenditure on legal aid by prisoners deserves careful examination. Some of this is explicable by the fallout from IPP sentences, abolished by this Government; I have considerable personal experience of the litigation arising from this. However, I understand that these cases, concerned with actual detention, will still receive legal aid. When it is for trivial disputes, I have some sympathy with the Government that they can properly be resolved by the alternative remedies. Similarly, judicial review, vital though the availability of this remedy is for constitutional reasons, does not mean that the availability of legal aid is not subject to some careful scrutiny. I found the evidence of the Lord Chancellor to the Justice Committee on this point persuasive.

**11 July 2013 : Column 450**

I invite the Minister and others in the Ministry of Justice to look at the suggestions made by the Society of Conservative Lawyers for further savings in costs, which are not currently included in the proposals, in a recently published article on its website. I also ask the Government in due course to look at the inquiry that is to take place by the Joint Committee on Human Rights, of which I am a member, which is looking at the human rights elements in these proposed changes. I do not think that these changes warrant the wholesale condemnation that they have attracted. I ask the Secretary of State to proceed with very considerable caution. He needs to have preferably the profession and certainly the public with him on these changes if they are to be successful and preserve our system of justice.

**2.28 pm**

**Lord Irvine of Lairg:** My Lords, I, too, congratulate the noble Baroness, Lady Deech, on having secured this timely debate. I will confine myself to the impact of the Lord Chancellor's legal aid proposals on judicial review.

The Constitutional Reform Act 2005 provides in Part 1 that the Act will not adversely affect,

> "the existing constitutional principle of the rule of law, or … the Lord Chancellor's existing constitutional role in relation to that principle".

The civil legal aid scheme supports the rule of law by making access to justice and the courts real. The Lord Chancellor himself has acknowledged that legal aid is,

> "the hallmark of a fair, open justice system".

I invite your Lordships to contrast that sound statement with the damaging effects, in practice, of his legal aid proposals on judicial review.

One is to refuse legal aid to those who do not meet a residence test—that is, those who have not been lawfully resident in the UK for 12 months—so no immigration detainee will be eligible for legal aid as, by definition, anyone in immigration detention is not lawfully resident in the UK. A second is to remove legal aid from a wide range of prison law cases. A third is to remove funding for cases assessed as having a borderline prospect of success—that is, most cases in public law.

Those changes will set the Government above the law in many areas. First, legal aid will no longer be available for those in immigration detention. The Home Secretary already has the power to deprive those individuals of their liberty by executive fiat, not court order. In 2012, more than 28,000 people were detained under immigration powers in immigration removal centres; many more were detained in prisons. Secondly, legal aid will no longer be available to destitute families with no immigration status who are waiting for a decision from the Home Office; nor, thirdly, to prisoners, who are wholly under the control of the state; nor, fourthly, to cases where foreign nationals have been murdered, tortured, or detained abroad by British soldiers.

I draw your Lordships' attention to some recent decisions of our highest court in claims that could not in practice have been brought without legal aid but would not be eligible for legal aid under the proposals. First, there is the Lumba case in 2011, the leading case

**11 July 2013 : Column 451**

on the Home Secretary's ability to detain individuals using immigration powers. The Supreme Court held that the Secretary of State was applying an unlawful policy when detaining foreign national prisoners, in that the real policy entailed a presumption in favour of detention without exceptions, whereas the published policy had a presumption in favour of release.

Secondly, there is the decision of the House of Lords in Simms in 2000, which held that Prison Service policy and instructions preventing prisoners from having oral interviews with journalists, even on questions of whether they had been wrongly convicted, were unlawful. That claimant would no longer be eligible for legal aid, as he will be excluded under the prison law reforms. Thirdly, in Al-Skeini in 2007, the claim arose from the deaths of six Iraqi civilians and the brutal maltreatment of one of them, causing his death. Each of the deceased was killed, and the maltreatment was inflicted by members of the British Armed Forces. That claim, which succeeded in the Supreme Court, could not be brought under the proposals, because the claimants would fail the residence test.

In his evidence to the Justice Committee in the other place on 3 July 2013, the Lord Chancellor admitted that the changes are, at least in part, ideological in nature. He asserted that matters relating to conditions in prison should be dealt with through a complaints system and a prisoners' ombudsman. However, judicial review is a remedy of last resort: only those cases that have arguably not been satisfactorily resolved through the complaints system and the ombudsman ever get to court.

The effect of the reforms is to make judicial review in practice unavailable to many of those most in need of its protection. No doubt, the Lord Chancellor and some of his colleagues in government find judicial review an irritant, but the critical issue is whether the proposals will in practice take a wrecking ball to our constitution and the rule of law. I am sure that many of your Lordships share my deep concerns.

**2.34 pm**

**Lord Marks of Henley-on-Thames:** My Lords, I add my congratulations to those of noble Lords who have already spoken to the noble Baroness, Lady Deech, on securing the debate and the way in which she opened it. I also declare an interest as a practising barrister. My noble friend Lord Phillips of Sudbury, who is unfortunately unable to be here, asked me to say that, as one who has fought for legal aid all his professional life, he wishes that he had been able to contribute to this debate.

In the debate on the gracious Speech, I suggested that there was a need for a fresh settlement between the Government and the professions over legal aid. I am bound to say that the past few weeks have more than

ever convinced me of that. The Government and the professions appear at times to be in a hostile stand-off. It is bad for both the Government and the professions, but it is also bad for justice and bad for the public's confidence in our system of justice.

The starting points are that we recognise the need to save money in this area and that the professions must recognise that the Government do not owe them

**11 July 2013 : Column 452**

a living. However, the Government must accept that the professions are not simply special pleading but have genuine and justified concerns about access to justice for the many who need, but who cannot afford to pay, lawyers. Of course, they include the most vulnerable in our society, but we should not forget that they also include millions of ordinary people who can meet their day-to-day expenses but cannot afford the sudden demands of expensive legal costs for them or their families.

A new settlement can be achieved only by dialogue, and it is therefore welcome that the Government have already been responsive to the consultation, particularly over the issue of choice of lawyer. For myself, I regard the right of a defendant to choose his lawyer as fundamental for three reasons. First, it is wrong for the state which prosecutes a case to choose the lawyer on the other side. Secondly, it is essential for a defendant to have confidence in his lawyer. That brings practical benefits in sensible and early guilty pleas where appropriate. Thirdly, choice in this area is a simple matter of liberty.

I confine myself in this short speech to making a handful of points about the Government's proposals. Much of the controversy has of course centred on PCT. I suggest that there is much force in the argument that competition based on price rather than quality risks lowering standards. If we set only a minimum standard, we will get advocacy of a minimum standard—the so-called race to the bottom. Tendering should be based on quality as much as on price, and that should be made explicit in the application process. A precedent for that is to be found in the Health and Social Care Act, where, on persuasion, substituting competition on quality against a tariff for the original proposal for competition on price significantly improved the Government's proposals.

The Government have invited the Bar Council to help to design a system of tendering based on quality. It is a matter of regret that the Bar Council has not accepted that invitation. Exactly that kind of dialogue is what I consider to be important. When the noble Baroness, Lady Deech, next sees the Bar Council she might consider taking that back to suggest a change of view in that area.

A further area of concern is the number of providers and their distribution. I believe that a reduction from 1,600 to only 400 providers is far too great. It will badly affect smaller firms and reduce the possibility of both choice and competition.

Attention has been drawn to the problems in multi-handed cases, where a number of defendants may need separate representation. However, I suggest that those problems could be addressed in part if we reconsidered how far the existing professional rules on conflicts of interest are working in accordance with the public interest. Should it not be possible for solicitors in the same firm to act for defendants in legally aided criminal cases where there are conflicts between the defendants' accounts but no financial conflicts of interest for the firms concerned? Of course, there would have to be safeguards in such a system to ensure that confidentiality was maintained, but barristers in the same chambers have always appeared against each

**11 July 2013 : Column 453**

other and the distinction between self-employed barristers and partners in the firm is not, in my view, an

overwhelming obstacle.

However, the present proposals risk creating advice and representation deserts where no appropriate legal advice or representation is available. This the Government have recognised, but the proposals also risk creating specialism deserts. The danger of advice deserts could be addressed by increasing the number of providers in more sparsely populated areas. The specialism issue is more difficult. I fear it may become impossible to find solicitors specialising in particular areas of crime—for example, fraud or sex offences—throughout large areas of the country. Correspondingly, specialist lawyers may find that work in their fields is not financially supportable, so specific measures are needed to allow specialists to practise.

I turn briefly to civil legal aid. The proposals on judicial review are claimed by the Government to assist in ensuring that applicants' lawyers will be paid only for cases in which they get permission, which will filter out weak cases. However, in practice many of the strongest cases are settled at the pre-permission stage where the body, often a local authority, admits fault and settles. Why should we not fund cases such as those, especially since the Government are rightly committed to encouraging early and economical settlement of litigation? The proposal to deny an oral permission hearing in all cases deemed to be totally without merit, while it may be acceptable in cases where there is legal representation, is entirely unacceptable in cases where a judge is needed to tease out the applicant's case on an oral hearing.

Finally, in the time available, I shall say a word or two about the residency test. I suppose it is possible to conceive of arguments about why the residency test may be at least a relevant consideration in some cases, but given the examples set out by the noble and learned Lord, Lord Irvine, it is very difficult to see that it can be imposed justly in a blanket way. If the Government are not prepared to reverse this proposal, I urge them at least to preserve a discretion. There are other areas for consideration, but I look forward to hearing the Government's response.

**Lord Ahmad of Wimbledon:** My Lords, before the next speaker, I remind noble Lords that this is a time-limited debate, and the limit for speeches from the Back Benches is six minutes.

**2.42 pm**

**Baroness Coussins:** My Lords, I, too, am grateful to my noble friend Lady Deech for securing this debate. I want to raise the issue of civil legal aid in relation to debt, welfare and repossession. I declare an interest not as a lawyer but as president of the Money Advice Trust, a national charity which advises individuals and small businesses via National Debtline and Business Debtline with the aim of helping people across the UK to tackle their debts and manage their money wisely.

**11 July 2013 : Column 454**

Problem debt is a severe issue for an increasing number of people and is currently affecting one in five households, according to research recently updated by Dr Gathergood at Nottingham University. If reports in this morning's news are accurate, it is set to rise even further with what has been described as,

> "a major surge in families with dangerous debt levels—especially among worse-off households".

Yet only 1.7 million people currently seek advice, while problem debt casts a shadow of wider problems affecting individuals, families and society, including mental health, the exacerbation of poverty and the repossession of homes.

Apart from the continued availability of legal aid for people at the point of repossession, civil legal aid was cut

under LASPO for debt advice. The advice and justice systems will inevitably feel the impact of this cutback. First, the free advice and pro bono legal advice sectors will not be able to cope with the rise in demand. I know that the Money Advice Trust is very concerned that services which do not provide legal advice, such as the National Debtline, will see this upsurge but no longer have anybody to whom they can successfully refer clients at the point at which the advice needed is legal advice and beyond the expertise of general debt advisers. What assessment have the Government made of the likely increase in demand for debt advice leading to legal advice, and what do they consider will be the impact on individuals in debt, often through no fault of their own?

Secondly, it is thought that there will be a significant increase in the number of people forced to represent themselves in court. This carries the substantial risk of creating delays in proceedings and greater inefficiency. There is also a high risk that many litigants in person will find themselves left with exorbitant court costs, as they are not only unable to represent their cases effectively due to their lack of legal expertise— regardless of the merits or otherwise of their case—but are unable to afford the services of costs draftsmen who would be able to negotiate costs on their behalf. This in turn is likely to lead to the perverse outcome of further debt. Indeed, court fines have already risen significantly as a category of debt problem on which the National Debtline is called to advise. It is now in the 10 most common types of problem debt and is more common even than mortgages.

I am also concerned about the implications of the additional cuts currently being consulted on, which aim to reduce the legal aid budget by at least another £220 million a year. Will the Minister give a categorical assurance that the protection for legal aid for those at the point of repossession is safe and will not be slipped into the range of new cuts?

Finally, will the Minister comment in as much detail as he is able on the proposal to recover legal aid from universal credit? This proposal is of very serious concern to the free debt advice sector, and it is likely to exacerbate problem debt among vulnerable groups. As far as I know, no details have yet been given on how this mechanism will work, and I would be grateful for any light the Minister is able to shed on this aspect of the latest round of prospective cuts.

**11 July 2013 : Column 455**

**2.46 pm**

**Baroness Scotland of Asthal:** My Lords, I, too, very warmly thank the noble Baroness, Lady Deech, for bringing forward this very important debate. I declare my interest as a practising member of the Bar, a recorder, a deputy High Court judge and chair of the All-Party Group on Domestic Violence.

It is with a very heavy heart indeed that I rise to speak in this debate. During the passage of the LASPO Bill, a number of us in this House on all Benches raised serious concerns about the likely impact of the then proposed changes to legal aid, Lord Newton of Braintree being not least among them. I think of him every time we debate these issues. Our experience over the past 30-odd years had shown clearly the importance of having legal aid available to those who need assistance to resolve often emotional and sensitive issues that flowed from the breakdown of their relationships and marriages, particularly where those relationships had produced children and the breakdown affected them adversely. The fear was that those who had been in receipt of help, advice and support would not be able to obtain the assistance they needed, which would be deleterious to their well-being, to the well-being of the children and to justice as a whole. I remember well the Minister assuring us from the Dispatch Box that our fears in this regard were unfounded and that the quality of help and support that would still be available would be capable of meeting the needs. However, your

Lordships will also remember that no impact assessment was produced to substantiate those assurances. Indeed, the indications that we had available pointed in the opposite direction. During this very short intervention, I will not reiterate the concerns I raised during the passage of the LASPO Bill. However, we were also assured that the Minister would keep a careful eye on the impact of these provisions so that we could readdress them if necessary, and that assurance gave us some comfort.

However, I have to tell the Minister that the concerns that we had then have all, tragically, proven to be true. Since the passing of the Bill into an Act, the consequences that we feared seem to have come to the fore. In preparing for this debate, I have had the benefit of reading innumerable submissions from practitioners, individuals and organisations who, with heart-breaking clarity, have set out the real consequences for the people for whom they care of what now, regrettably, appear to be quite pernicious changes in the legal aid provision rules. The speed of the downturn has, however, shocked most of us. Many solicitors have indicated that there has been a downturn in new clients of at least 50%. It has had an immediate impact on legal service provision and it is affecting the staffing levels in many firms so that they are simply no longer able to give the service that is needed.

Perhaps I may quickly give a couple of examples. Williamsons, which has offices in Hull, Driffield and Bridlington, has indicated that there has been a dramatic reduction in the number of its private clients, and even those clients are struggling to find the £50 or £100 that is needed for legal referrals. The number of referrals for mediation is down, and the reduction is commensurate with the volume of clients. The downturn in work has

**11 July 2013 : Column 456**

been in the region of 50%. The Legal Help scheme is so draconian that the clients are simply unable to show eligibility on the merits test, and the firm is unable to meet its legal help quota for any of its offices. That story is echoed across the piece.

There are instances of baby-snatching cases. In one, a grandmother had care of her grandchildren under a care order but the children were removed. Despite the fact that she had a low income, capital would be taken into account and, as such, she would have to sell her house to fight the case. There are all manner of private law children's disputes involving contact and residence, and hundreds of such cases are being turned away en masse. The same applies even to domestic violence cases. When litigants come forward and are told about the threshold, as well as the need to get medical advice and the need to pay for the certificate, they do not come back. Where do they go and where do they get their justice?

The stories are heart-breaking. One solicitor talks of secretaries who have worked for his firm for a long time being in tears over the fact that they are unable to assist some clients in difficult situations. They have spoken to clients whose children have been kept by the other party and they have had to deliver the bad news to those clients. They are having to turn away grandparents, concerned mothers and fathers on low pay, domestic violence victims and others. It is truly shocking. The impact on the courts has been dire as well—they have been flooded with cases.

I end by reminding the Minister that costs flow from many different sources and the costs on the courts are dire indeed. It was really concerning to read what was said by the Court of Appeal in a recent case where none of the parties had been represented. The consequences of delay were clear. The judge in the case said this:

"The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-

represented litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of 18 years' service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid".

That was said by Lord Justice Ward and I agree with him.

**2.54 pm**

**The Earl of Sandwich:** My Lords, I congratulate my noble friend on winning the ballot for the Cross-Bench debate and on drawing our attention to this issue. It is a situation that concerns lawyers, of course, but only in relation to a much wider constituency of clients. As a non-lawyer, I have rarely received so much material for a debate, and most of this comes from individuals whom I trust to give a fair picture of what is happening. As the noble and learned Baroness, Lady Scotland, has already said, it has been quite moving to receive briefings and advice from a range of organisations which have a genuine concern for people in need. It is as simple as that. I have the highest regard for the CAB, for example. My sister worked for it voluntarily

**11 July 2013 : Column 457**

and I know that its specialists are like personal counsellors. They are often the very last resort for people in great personal distress.

The Minister will know from his previous incarnations that organisations such as BID and ILPA not only have a good track record in their field but they are the only ones that will stand by the most vulnerable groups in society, such as refugees and the homeless. I would go further than that. In the absence of government, they are effectively the government in their particular field in that they may be the only service-providers available. Of course, one of these services is legal aid.

As the Minister is bound to point out, none of these non-governmental organisations has the responsibility that government has in a recession. We all have to recognise financial necessity on a national level but they have to deal with the finance of individuals. They know better than anyone in government what the real costs of recession are to ordinary people on the brink of survival.

All these organisations are linked by a common purpose and they are all clear about what needs to be done in forthcoming legislation. They want the Government to understand that judicial review is the key way in which people can challenge decisions by public bodies. They want the Justice Minister to reconsider his refusal to fund the initial stages of judicial review, including the critical preparation of the evidence. They want the residency test modified to extend eligibility to currently excluded groups, such as babies under 12 months of age and asylum seekers. Asylum seekers will be allowed to access legal aid while their application is pending but, once they are granted asylum, they must wait a further 12 months, even if they have already been here for more than 12 months, before they can receive civil legal aid on any new matter. This can be discriminatory because refugees fleeing persecution abroad may be denied equal access to justice for longer than those whose residency arises from other causes. These organisations also want a fairer tendering process. They want contracts to be worded to ensure that appropriate adjustments are made to meet specific cultural, geographical and financial needs. They would also like the Government to undertake a review of quality assurance schemes to help consumers of legal services to identify reputable providers.

Here, the comments of the noble and learned Lord, Lord Neuberger, on 18 June about the quality and amount of legal aid must have given the Government food for thought. Essentially his warning was about cut-price litigation leading to unrepresented litigants and worse lawyers.

All the people giving evidence to the Justice Select Committee agreed with the Law Society that a 17.5% cut in fees on top of PCT in the case of criminal legal aid was unsustainable, even for large firms. The Secretary of State seemed to accept some of the Law Society's ideas when he welcomed the model on client choice of solicitor. However, apart from the effect on the legal firms, as the noble Lord, Lord Faulks, pointed out, there is a real risk of diminution of advice at a local level. On that, the Bar Council says:

**11 July 2013 : Column 458**

"We are concerned that access to legal aid via the nationwide network of high street law firms will be undermined as 1,200 out of 1,600 firms will be forced to close or pull out of legal aid. The advice 'deserts' we already see in some rural areas will spread more widely, making it harder for millions to get the right advice and support".

On asylum-seekers in immigration detention, mentioned by the noble and learned Lord, Lord Irvine, there are many concerns that I have no time to mention. ILPA lists challenges to detention, applications for bail, judicial reviews of unlawful detention, habeas corpus applications and applications for damages for unlawful detention. I am tempted to quote from the Bail Observation Project's latest report expressing views on the lack of justice in immigration hearings but I suspect that the Minister will already be familiar with that report.

Finally, I was shocked to hear from the Islington Law Centre only this afternoon of some of the effects of the proposed legislation on the more vulnerable prisoners that it works with. It says:

"We note with dismay that there are no exceptions for children, and those prisoners who are accepted to have mental health problems, a disability or other vulnerability, including those who may not have legal capacity. For example, a detained child who will be unable to identify legal issues, will not have the financial resources to pay for lawyers ... Such a child or person of any age with a mental health problem or other relevant disadvantage ... will have no means by which to fully frame their complaint to the prison authority".

That speaks for itself. I am not convinced that the Government have sufficiently taken account of the most helpless people in our communities, and I look forward to the Minister's positive response to these concerns.

**3.01 pm**

**Baroness Kennedy of The Shaws:** My Lords, I, too, express my gratitude to the noble Baroness, Lady Deech, for securing this timely debate. I also declare that I am a practising barrister. I am the chair of Justice, the pre-eminent policy organisation working on the rule of law here in the United Kingdom and the British arm of the International Commission of Jurists. I am also the co-chair of the International Bar Association's Institute of Human Rights.

My practice at the Bar, and my work with these organisations at a high level, have absolutely convinced me of a number of things. One of those is that I do not need to persuade people of the vital role of just law here in Britain and in societies around the world. It is also a constant reminder to me of the place of the United Kingdom as a source of influence and admiration the world over. Our judges are universally admired and drawn upon for their skills. Our professionals are deemed to be of the highest calibre and international courts comment regularly on the quality of the lawyering from this country. Our legal institutions are, in my view, the finest in the world—and that is not an idle boast. It is not an accident that we have such a fine system. It is great partly because it has taken us a long time to get here; we have built our success out of the hard stones of experience over many generations. Quality, we have learnt, does not come cheap.

This issue, I emphasise, is not just some hysterical pay negotiation as it has been caricatured. Governments

wanting to cut legal aid always reach for a base

**11 July 2013 : Column 459**

argument, which is to crack the cynical joke about fat cat lawyers acting like a cartel to fix their fees. I hope we will not hear comments about the large number of lawyers speaking in this debate. The reason lawyers speak about these matters is because it is lawyers who see at first hand the impact on ordinary people of savage cuts. They also see the inevitable impact on the quality of work across the board, and they foresee the desperate effect this will have on the system as a whole, not just the risk of injustice but inhibitions on the development of law. Politicians often see cost cutting as a form of surgery, taking off some excess fat, but like the demand by Shylock for his pound of flesh, the removal does not come without real bloodletting and a very serious risk to the health of the body legal.

This debate is actually about an important constitutional issue, as others have said. It is a constitutional issue because legal aid has an important constitutional function. It is about access to justice, but it is also about the integrity of our criminal and civil justice system as a whole. Further, it is a constitutional issue because it is about holding government and public bodies to account. It is not just legal aid lawyers who are complaining, it is judges, commercial lawyers, academic lawyers who study the effects of law on people's lives, and indeed most lawyers who see that the system is of a piece and that taking the shears to parts of it has implications for the whole. Justice is a central component of any civilised society and we have to maintain trust in it.

The lack of rigour by the Government on this topic is not new. The Joint Committee on Human Rights, on which I serve, regretted the failure of the Government to grapple with the human rights implications of the proposals in LASPO. I am afraid that we are seeing it again. It was only after long and contentious arguments in both Houses that the Government recognised that they would almost certainly face successful human rights challenges if legal aid was not available to the victims of domestic violence, human trafficking or other egregious wrongs. That was when carefully crafted exemptions were created. Yet the proposals in these reforms will substantially undermine those exemptions. It is quite wrong that such important changes should come into being through secondary legislation. As the noble Baroness, Lady Deech, said, they should be subject to the proper scrutiny of Parliament, as was LASPO, and there should be primary legislation. I urge the Government to slow down and think carefully about this.

I enjoyed the account of the noble Lord, Lord Faulks, of being rejected as a barrister by knowing clients. The only time it happened to me was when a woman in Broadmoor on trial for arson looked at me and said, "She's too small". It was because she had seen the prosecutor, Tim Barnes, a man of six feet six inches, and obviously thought that the trial process involved some sort of wrestling or armed combat.

The message that in practice we send to the Government is that justice cannot be produced on an assembly line or by bulk buying. What the Government had in mind with their competitive tendering proposals was to give a contract to the cheapest tender. Those ideas about going for the cheapest are still afloat. The

**11 July 2013 : Column 460**

cost-cutting is about one lawyer doing a great number of cases and not looking for the specialist. I want to emphasise that some cases require specific expertise, an issue that has been raised. Some clients have a relationship with a particular law firm and it saves time and money to have that firm act for them. Sometimes the case may concern mental health, and lawyers come to have rich knowledge about particular subjects, especially in the interface of law and psychiatry. Sometimes the expertise is in the field of domestic violence, child welfare or counterterrorism, the area in which I have spent a lot of my life. Some specialise in cases that involve abuse of the most terrible kind. A massive reduction in legal aid will interfere with this considerably.

I am still concerned about the flat fee, where people will receive the same fee whether there is a guilty or a not guilty plea. It means that solicitors, human as they are, will have more incentive to get their clients to plead guilty since a not guilty plea entails considerably more work. At the moment, 73% of people plead guilty, but they do so because of the trust they have in the advice of their lawyers. Once they think that a lawyer might be pushing them in a certain direction for financial reasons, trust will be destroyed, and trust is at the heart of good institutions. If the Government want to see the kind of chaos that price-competitive tendering brings to justice, they need only look at the issue of interpreters. Barristers wait for days in court for Serco, which now deals with the interpreter system, to deliver an interpreter. I have heard of young barristers storing multilingual phrases in their phones so that they can explain to their clients that the interpreter has not turned up. Also, the defendant is often not produced by Serco. The waste in the criminal justice system is often about large companies bidding for and securing a contract at prices on which they cannot deliver. We then end up with no cost savings at all.

**Lord Ahmad of Wimbledon:** I remind the noble Baroness that the debate is time limited, which means that when the clock shows six minutes she should be looking to sit down at that point. That is a reminder to all noble Lords.

**Baroness Kennedy of The Shaws:** This is about preserving the quality of our system. Wonderful legal aid lawyers do that, and this is a way in which they are being undermined. They deserve better.

**Lord Ahmad of Wimbledon:** My Lords, before the next noble Lord speaks, I must insist that this is a time-limited debate. I have had to intervene for a second time. It eats into the time of the Front Bench, the Minister's time, and that of the Opposition Front Bench. I request all noble Lords participating that when the clock shows six minutes, it means that they should sit down.

**3.09 pm**

**Lord Carlile of Berriew:** My Lords, I join in congratulating the noble Baroness, Lady Deech, on securing this debate on this very important subject. I also declare my interest. It is set out in the register, but for relevant purposes, I have practised criminal law for

**11 July 2013 : Column 461**

42 years, of which I have spent 28 in one or other of these Houses of Parliament observing the rather tense relationship between politics and law.

This debate is about something fundamental: the quality of the society in which we live. It is about the clarity of the political conscience, which must be sure that our legal institutions are properly implemented and are to be trusted. One of my great mentors was the much-lamented Emlyn Hooson, a colleague of ours on these Benches and one of my predecessors as Member of Parliament for Montgomeryshire. Emlyn Hooson represented Ian Brady on legal aid at his celebrated trial—the Moors murders trial. One of the reasons why we have been able to be confident that what has happened to Ian Brady has been just is because he had the advantage of a proper legal aid defence of the highest quality. We should let go of that at our peril.

The avoidance and the remedying of injustice are dependent on a quality criminal legal aid system, which needs in appropriate cases the best advocates and the best solicitors. Without that, our consciences will be failed. We have heard some criticism of the Bar Council today. I do not hear the same criticism when the doctors in your Lordships' House stand up and rely on the representation of the British Medical Council or, at least until recent days, when a trade union such as Unite stands up and speaks for workers in this country who find it difficult to negotiate on their own behalf. I applaud the Bar Council, the Criminal Bar Association

and the Law Society because they have had the courage to say firmly what needs to be said strongly to protect our legal system in this country.

The reality is that young barristers and young advocates who are solicitors are working for smaller amounts of money than they would earn in almost any other profession. Even without these suggested legal aid reforms, Queen's Counsel—silks—are being priced out of the market by restrictions on their appearance and by the diminishing amount of work. There is now developing a divided legal profession in which some are still earning large amounts of money—why should they not because they are in the private market? Those of us who choose to remain in the public market are in an almost entirely different profession. That is not good for the health of our society or for the law.

May I specifically say a word about very high-cost cases? These are the small number of extremely complex fraud cases that come before the criminal courts. VHCC could equally stand for very highly challenging cases. They involve huge sums and massive complexity; they are every bit as complicated as any commercial arbitration. Yet it is the legal aid system that is targeted by an entirely arbitrary cut of 30% which, outrageously, is intended to be applied to cases that have already started. People who are involved—I am involved in one such case—will have to take, if they do not return their briefs in outrage, a 30% cut as they continue that case if these proposals come into force. Yet the Ministry of Justice has failed to engage with other issues about such cases. VHCCs are overadministered and, outrageously, restrained assets—the assets, until they are restrained, of defendants—cannot be used to pay

**11 July 2013 : Column 462**

for their defences. That seems to be wholly anomalous and unacceptable. The VHCC proposals are quite simply outrageous.

Let us not forget that the Serious Fraud Office sometimes gets things wrong. It took the noble and learned Lord, Lord Goldsmith, who incidentally was not being briefed at legal aid rates as far as I know, to sort out the misbehaviour of the Serious Fraud Office under its previous leadership to ensure that two brothers, Robert and Vincent Tchenguiz did not face wrongful prosecution for alleged crimes that they had not committed. It sometimes takes the best to sort out bad decisions by public authorities.

Finally, I just want to say a word about prison law because I used to be the president of the Howard League for Penal Reform. I have now been succeeded by the noble Lord, Lord Myners. The changes in prison law will not save money and will increase costs. They will undermine the principle of rehabilitation. More prisoners will become stuck in jail. They will result particularly in specialist lawyers being replaced by less experienced lawyers for the same price. There is not time to develop this, but I urge the Minister to attend closely to the submissions made by the Howard League and particularly by Laura Janes, the acting legal director, who is the great expert in these matters.

**3.15 pm**

**Lord Brown of Eaton-under-Heywood:** My Lords, if the Lord Chancellor's welcome concession last week on choice of representation is anything to go by, it appears that these proposals are not to be regarded as set in stone and are well worth debating. I join with those who thank the noble Baroness, Lady Deech, for enabling this to happen. It is much to be hoped that other of these proposals too will similarly come to be recognised as ill-judged and will be abandoned. It is on just one of these that I propose to focus—one relating to judicial review not among those identified by my noble and learned friend Lord Irvine of Lairg. It is the proposal that lawyers should not be paid for their work in making application for judicial review unless eventually permission comes to be granted. It is crystallised as question 5 on the consultation paper.

First, I want to digress just briefly to express a few heartfelt words of regret at the radically changed role of the Lord Chancellor in public life, following the Constitutional Reform Act 2005. How unfortunate it is that we no longer have as Lord Chancellor someone in the tradition of the great holders of that office which, quite recently, included the noble and learned Lords, Lord Mackay of Clashfern and Lord Irvine of Lairg. It is a great privilege to have heard him in this debate. He chooses very fastidiously the occasions when he invites the attention of this House. What huge benefits to the office they brought: not merely were they highly experienced and distinguished lawyers in their own right but, no less importantly, their voices were authoritative and statesmanlike at the very heart of government. They were voices that recognised the central importance in our democracy of the rule of law, the independence of the judiciary and rights of access to justice. Such Lord Chancellors had already,

**11 July 2013 : Column 463**

of course, achieved the summit of political life; they were not career politicians with personal ambitions still to be realised.

Let me make it quite plain that I have nothing whatever against the present Lord Chancellor. He became such after I retired and I do not know him. Nor do I have anything against career politicians. No doubt they are essential to any healthy democracy. However, I cannot pretend to have the same confidence in proposals of this sort that emanate from a career politician with no background whatever in the law as I would have felt, and indeed used to feel, towards proposals from Lord Chancellors past. Grateful though one is for the recent concession as to choice of legal representation, it does not fill one with confidence that these proposals as a whole have been properly thought through by someone with real knowledge of our legal processes, properly sensitive to the imperative demands of access to justice.

I turn, necessarily briefly, to the proposal that concerns me most, the proposal that, unless permission comes to be granted for a full judicial review, no costs at all—only non-legal disbursements—will be paid for work carried out. It is opposed, perhaps unsurprisingly, by all parts of the profession, including notably the Administrative Law Bar Association, of which I am proud to say I was president for many years. It is also strongly opposed by the Judicial Executive Board—that is, the higher judiciary—the Civil Justice Council and Her Majesty's Circuit Judges.

These responses are cogently and convincingly argued, ALBA's perhaps above all. It is very difficult to suppose that anyone could fairly reject their conclusions. Manifestly, the proposal will result in fewer challenges to administrative decision-making and there are those—I am not among them—who would suggest that this their central and cynical purpose: an attempt to insulate the Government, as far as possible, from legal challenge. However, I regard the proposal not as mischievous but merely as fundamentally misguided. It is misguided because it stems from a basic misapprehension of the place of permission in the process of judicial review and it would result in consequences far removed from those intended and very damaging to this critical part of the courts' jurisdiction—the ability to supervise the proper exercise of public power.

Bear in mind that, as of just last week, 1 July, following the earlier changes to legal aid, when the High Court refuses permission to proceed on the documents, the judge now can certify an application as being "totally without merit". In itself, that prevents the applicant requesting an oral hearing of the application; all he can do is to make one further application on the documents. If more than that is required, let the lawyers be deprived of costs in that very limited category of cases on the certification of a judge but not in the altogether larger category envisaged by this present proposal.

The problems with this proposal are so many and so various that, alas, I have no time to spell them out. All

one can say is that it may discourage perhaps solicitors taking even the strongest cases. The strongest cases are those where the defendants are most likely to respond early by making the concessions that make

**11 July 2013 : Column 464**

the Bar Council ultimately unnecessary and so inappropriate, but there are so many more objections. Read the ALBA's full letter of response and you will not persist in this ill-judged proposal. I suggest that it would damage the process profoundly; it is a rotten idea and it really ought to be abandoned.

**3.22 pm**

**Lord Touhig:** My Lords, I congratulate the noble Baroness, Lady Deech, on securing this debate. I shall confine my remarks to the impact that proposals outlined in *Transforming Legal Aid* will have on victims of trafficking and domestic violence.

Under the proposals, civil legal aid will be available only to individuals who are lawfully resident in the United Kingdom at the time of their application and have been lawfully resident here for 12 months. At first sight this may seem perfectly reasonable but then look more closely and there are some pretty bad consequences. I am extremely concerned that no exemptions to this residence test are planned for either victims of human trafficking or for women who have entered the United Kingdom as the partner of someone settled here, and then experienced domestic violence at their husband's hands. This is the more surprising considering that, in an Answer in the other place on 3 July, the Prime Minister described human trafficking as "modern-day slavery". He added:

"We are looking at legislative options, and I will be chairing a committee across Government to look at what more can be done".—[*Official Report*, Commons, 3/7/13; col. 920.]

I hope that Mr Cameron will look at this and perhaps read *Hansard* for today's debate.

Legal aid for both of the groups that I have mentioned is explicitly protected under legislation passed only last year but would be removed in a large number of cases under the proposed system. This is despite a series of statements and publications by the Government giving reassurance to those of us who are concerned. Indeed, I find it hard to discern exactly what the Government's position is, because they keep contradicting themselves.

The noble and learned Lord, Lord Wallace of Tankerness, speaking in this House on 27 March last year at Third Reading of the LASPO Bill rightly acknowledged that, given their "particular vulnerabilities", support for trafficking victims to resolve immigration matters should be available to them during,

> "a period relevant to the experience of being trafficked".—[

*Official Report*

, 27/3/12; col. 1291.]

The same noble and learned Lord said on March 7 2012:

"The ability to bring damages claims against former so-called employers is an important tool to secure reparations for victims and to punish their exploiters",

and that successful claims,

"discourage those who seek to exploit people for financial gain".—[

*Official Report*

, 7/3/12; col. 1889.]

He said that there was a risk of leaving some trafficking victims without necessary support if cases relied on exceptional funding. He admitted that the scheme was not sufficient to protect victims of trafficking.

**11 July 2013 : Column 465**

However, just two weeks ago, the Justice Secretary, Mr Grayling, said in a letter to Helen O'Brien, the chief executive of Caritas Social Action Network:

"Individuals who do not meet the residence test would be entitled to apply for exceptional funding under the power set out in the Legal Aid, Sentencing and Punishment of Offenders Act".

I invite noble Lords to contrast that statement from Mr Grayling with the conclusions reached by the noble and learned Lord, Lord Wallace, on 7 March. He said:

"We had always anticipated that legal aid would have been available under the exceptional funding scheme for these damages claims, as was indicated by my noble friend Lady Hamwee, where such cases met the test for exceptional funding under Clause 9 of the Bill".

However, he added:

"On reflection, we recognise the risk that in some cases this will not be sufficient".—[*Official Report*, 7/3/12; col. 1889.]

Perhaps like me, noble Lords are at a loss to know quite what the Government really want to do.

After all, let us not forget that the LASPO Act includes equivalent provision for legal aid funding in immigration cases concerning anyone granted indefinite leave to remain as the partner of an individual settled in the United Kingdom whose relationship then permanently breaks down because they are the victim of domestic violence.

During the passage of the Act, the then Minister, Mr Jonathan Djanogly, emphasised the importance of this provision stating:

"There is a real risk that, without legal aid, people will stay trapped in abusive relationships out of fear of jeopardising their immigration status".—[*Official Report*, Commons, Legal Aid, Sentencing and Punishment of Offenders Bill Committee, 19/7/11; col. 245.]

Since 2002, over 2,000 women have been granted indefinite leave to remain in the United Kingdom following the breakdown of a relationship with a violent partner. While this accounts for a comparatively small fraction of legal aid expenditure, it reflects the significant human cost that would be incurred were such recourse not available.

To be fair, the Government have demonstrated a strong commitment to tackling the horrors of human trafficking. They have also shown a clear determination to prevent and reduce domestic violence. On 24 April this year, Helen Grant, the Minister for Women, Equalities and Victims, told the Salvation Army trafficking conference that trafficking is.

> "something that no civilised country should tolerate. It creates victims who are often some of the most vulnerable members of society".

In the human trafficking strategy published by Theresa May the Home Secretary in 2011, the Government outlined the UK's positive record in tackling trafficking and committed to a series of measures building upon this, including better care for victims.

The Home Office website setting out the Government's policy on ending violence against women and girls states:

"We all must do much more to prevent violence against women and girls happening at all".

It specifically highlights that,

**11 July 2013 : Column 466**

> "fewer than one in four people who suffer abuse at the hands of their partner—and only around one in 10 women who experience serious sexual assault—report it to the police".

My Lords, those of us who are concerned about the victims of trafficking and the women victims of domestic violence in the circumstances that I have described have heard warm words from Ministers and read many encouraging statements, but I conclude by saying to the Minister that depriving victims of legal aid for immigration cases risks undermining steps to address domestic violence against vulnerable women and significantly exacerbating the problem of underreporting of these cases. I hope that he and the Government will think again about these proposals.

**3.28 pm**

**Lord Low of Dalston:** My Lords, I join other noble Lords in thanking the noble Baroness, Lady Deech, and congratulating her on securing this important debate, which could not be more timely. I declare an interest up front. As noble Lords may know, I have for the past nine months or so been chairing a commission established by the Legal Action Group with funding from the Baring Foundation, the Barrow Cadbury Trust, LankellyChase Foundation and the Trust for London on the future of advice and legal support on social welfare law in England and Wales. We are on course to have a draft report for consultation in September and produce our final report by the end of the year. I have been keeping a fairly low profile so as not to compromise the independence of our report, but I have been prevailed upon to break cover for just six minutes today.

Let me say straight away that I understand the Minister's problem. On my first day at university, we received a lecture from Lord Denning who said that the difference between a judge and an academic was that whereas judges had to find a solution for every difficulty, academics took pleasure in finding a difficulty for every solution. In this, I see Ministers as more akin to judges than academics. We shall certainly be trying to come up with solutions rather than difficulties. We do not think it is possible or even desirable simply to put things back as they were and I hope we will be able to come up with some suggestions for creating a more orderly landscape of advice services which will be helpful to Ministers in getting the most out of reduced resources.

The recent proposals are mostly about criminal legal aid, of course, and that is not our concern. But there are also some proposals affecting civil legal aid which have been less remarked on, although they have not been ignored today, perhaps because they save a comparatively small amount of money—£6 million, I think. They may nevertheless have some untoward consequences and I want to say a word about two of them in a

personal capacity, in the hope that the Government might be willing to reconsider them, particularly when they make such a trifling saving. They also concern me because of their potential to impact on children with special educational needs trying to secure the special educational provision they require.

**11 July 2013 : Column 467**

Often the only thing that makes a local authority do what they know they ought to do is the threat of judicial review. According to MoJ figures, about half the cases in which legal aid is currently granted to bring judicial review do not lead to a JR. My information is that the actual figure may actually be considerably higher than that. That is not because the claims are unmeritorious but because in many of them a local authority caves in when they know a JR is coming. If, as under the new proposals, lawyers do not get paid for the work they do before the permission stage, many fewer JR claims would be brought, as has been said, and local authorities would be let off the hook. Either that or, if lawyers get paid only for cases which are issued and permission is granted, and not for cases that settle, there will be a perverse incentive to commence cases which would currently settle and more, not fewer, JRs will be brought and the projected saving will soon disappear.

Secondly, stopping the funding of borderline cases will have a dramatic effect for tiny savings on disability and SEN cases. Many such cases are currently classified as borderline in terms of their legal aid merits, either because they are factually complicated or are test cases, raising new issues of law. Some very important test cases of strategic significance are borderline and will not now be able to be brought. Indeed, test cases are almost by their very nature borderline.

In passing, the residence test will impact very harshly on children challenging special educational provision who happen to be the children of persons who have not been resident for 12 months. In effect, they will be being punished for their parents' immigration status.

Also in passing, I am advised that recent reforms to the costs regime in civil litigation have had a deleterious impact on disabled litigants trying to bring cases under the Equality Act. No longer having the benefit of cost-shifting rules or the ability to recover insurance premiums, it is much more difficult for them to bring proceedings under a conditional fee agreement. They are thus unintended casualties of the Jackson reforms. I wonder if the Minister would be prepared to meet me to see if we can find a way through this.

Finally, young legal aid lawyers have written to me to express concern about the impact of these latest proposals on junior lawyers. Some, such as the cuts to civil advocacy fees, will have a direct impact. Others, like price-competitive tendering, will have an indirect impact as firms cut corners in order to stay afloat. This will impact on the future of the profession. If junior lawyers are not paid, supervised and trained to an adequate level, we will lose our next generation of legal aid lawyers.

As the judiciary said in response to the consultation, there is a,

> "real risk that the firms obtaining contracts will employ those who will take the lowest salary in order to maximise the firm's profits".

This can lead only to a race to the bottom. It will also impact on social mobility and diversity in the profession, which will become increasingly closed off to those from less affluent backgrounds. These are not fat cats talking but young lawyers with a real sense of public

**11 July 2013 : Column 468**

service, which I find runs strongly within the profession, who want to be able to provide a quality service to vulnerable clients.

**3.35 pm**

**Lord Clinton-Davis:** My Lords, I apologise at the outset for my late arrival, but I will not go further into that.

When I was a young solicitor, many moons ago, legal aid was viable from the point of view of both lawyers and clients. It represented an important part of our social services, and that situation endured for many years. Today all branches of legal aid have been drastically reduced and more is threatened, but will there be a substantial reduction in expenditure, as the Government predict?

With regard to criminal legal aid, while a large amount is spent on exceptional, long and complex cases, it is idle to assume that the remainder of people on trial—the largest proportion by far—will not suffer increasingly. So will all this result in savings? Is it not possible that, in consequence, trials will take even longer? Will unrepresented defendants not take much longer to make their points, or fail to distinguish between the good, the partially good and the virtually unarguable?

One of the most odious ideas concerning legal aid, coming from a department where senior Ministers are "lawyer-free", is that a criminal defendant will have to be represented by a lawyer selected by the Government. In my view, this offends a basic tenet of the criminal law. However well qualified the lawyer—and that may be open to doubt—a defendant may believe that they have been foisted upon him or her, for somewhat dubious reasons. This proposal may never come to fruition, of course, and indeed I hope not, but it remains a possibility and a threat.

The Government certainly face some difficult problems in the sphere of criminal legal aid but the wrong solutions should not be sought, and not everything can be solved by assailing lawyers' fees. Legal aid in both the civil and criminal sectors still represents a vital part of our social services, yet the Government resist that concept. It is puerile to conceive that little or no damage will follow the severe and often ill thought-out cuts that the Government have set their heart on.

The Government should say to the legal profession, "We want to work closely with you but it's not a one-way street. We both want to make our legal aid system work more efficiently and cheaply, and we are prepared to listen to your views as well". Are the Government prepared to take that course? Are they ready to abandon political and unworkable nostrums in return for sensible debate? I fear not. However, I still say to the Government: think again, and think wisely.

**3.39 pm**

**Lord Hope of Craighead:** My Lords, I thank the noble Baroness, Lady Deech, for initiating this very important debate. It is with some regret that, so recently having returned to the House after the lifting of the

**11 July 2013 : Column 469**

disqualification that attached to me as a Justice of the Supreme Court, I find myself speaking for the first time on such an occasion as this. It is a sad occasion because one cannot help feeling that the need for this debate ought not to have arisen at all. I find it hard to believe that a Government which truly understood and respected the rule of law, which had taken the trouble to appreciate what that phrase really means and assess the consequences of what they had in mind, would have even contemplated introducing some of the proposals that have attracted so much criticism this afternoon.

Let me emphasise at the outset that I have no personal interest of any kind in the outcome of these proposals.

I left legal practice long ago and have now reached the age when I am no longer allowed to sit as a judge. I can claim, however, to be an informed observer. My experience as an appellate judge during the past 24 years has been very wide. Judicial review has been a significant part of my work, as has dealing with cases supported by legal aid. I am also well aware of the pressure on public funds and of the need to make savings, and to continue to make savings year after year wherever possible. I had to face up to that problem time and time again when I was the Senior Presiding Judge in Edinburgh and, more recently, as the Minister will know, as the Deputy President of the Supreme Court. I have done my best to promote efficiency and the saving of costs wherever possible. I have supported the Government and will continue to support them in their search for further savings, including in the administration of legal aid. Of course there is no bottomless pit.

The Government are right to seek to target their limited resources on those cases which really do justify legal aid and on those people who need it, but that requires the exercise of judgment based on sound research and open-minded consultation. There is one cardinal principle which until now has always been respected. It is set out in Section 1 of the Constitutional Reform Act 2005, to which the noble and learned Lord, Lord Irvine of Lairg, referred: the constitutional principle of the rule of law and the Lord Chancellor's role in relation to that principle. It is worth recalling that the clause was not in the Bill as originally drafted. It did not appear until Third Reading in this House following a recommendation by the Select Committee on the Bill. Perhaps it was thought to be so obvious that it was not necessary to state it at all, but that was not the view of the Select Committee, which thought that it should be there and could not be dismissed as unimportant. It is indeed fundamental to the continued existence of our democracy, but the important point I would emphasise is that the rule of law exists for the benefit of everyone and it is for everyone to respect it. There can be no exceptions at whatever level of government. What this means is that all persons and every public authority must regard themselves as bound by, and entitled to the benefit of, laws that are openly and publicly administered in our courts.

Time is very short and I have only a few points that I can make, particularly in relation to judicial review and the tests—the permission test, the borderline test and the residence test. I would invite the Minister to

**11 July 2013 : Column 470**

have regard to a paper circulated on 25 June by Dr Nick Armstrong of Matrix Chambers in which he analyses the costings of these various proposals. For example, with prison law he draws attention to the fact that of the overall savings in the proposals that the Government have in mind, which are assessed to be £6 million, £4 million of those are said to come from prison law. Dr Armstrong, however, has indicated—his work has been seen and approved by the Parole Board—that the additional costs that result from these savings may come to as much as £10 million as a result of the continued detention of people who have no access to prison law. That is quite apart from the constitutional implications.

The truth, if one has regard to the consequences of these proposals and burrows underneath what is being proposed, is that the efficient functioning of the rule of law will no longer be there for everyone. As so often one finds on further examination, it is the weakest, the most vulnerable and, let us face it, the most unpopular who are at risk of being unprotected. For them, the rights that are at issue here are the most basic rights of all, and the savings are at risk of being overtaken many times over by increased costs.

On the permission test, to which the noble Lord, Lord Marks, referred, why not fund the early stages of seeking permission before it is sought? At present, 60% of cases are resolved at that stage, especially social welfare cases, so it seems odd that the work done by the firms that provide these services should not be paid for so that they can meet the costs of running their businesses.

Time is too short for me to go further. However, I respectfully ask the Minister to do two things. First, I ask

him for an assurance that the Government's mind is still open on all these issues and that they will look at the costings in the paper to which I have referred. Could he say how it is proposed to bring these proposals into force, given that they raise fundamental constitutional issues? I endorse what has been said by the noble Baronesses, Lady Deech and Lady Kennedy, that detailed parliamentary scrutiny, line by line, is required. This is a matter that requires primary legislation. I hope that we will not have to face up to a succession of regret Motions on delegated legislation, which would be wholly unsatisfactory.

**3.46 pm**

**Baroness Hamwee:** My Lords, it is entirely sensible that anyone who feels in need of legal assistance will seek it and will seek the best—the Government themselves do that. Many Members of this House have said to me, "You're a lawyer; you must understand such and such", which is not always true, but I say that both to declare an interest as a non-practising solicitor and to remind myself that we in this House are a very advantaged group.

What is "best" is different in different circumstances. I want to deal with one type of best. First, I will mention something that I heard earlier this week about refugees applying for family reunification, which is a right, who are unable to tackle the complicated application without legal help or who borrow from

**11 July 2013 : Column 471**

loan sharks in order to get that help. That is an example of the "underclass" to which Treasury counsel have referred.

The authors of the many and substantial briefings that we have received will be disappointed that it is not possible to include all their material. However, we have read it—I put that on the record—and, more important, so will the Government, along with the 16,000 responses to the consultation. I welcome the fact that there will be a re-consultation, which must itself give time to be real.

We used to be concerned about Tesco law; it may now be Stobart law. Although the supermarkets have established small outlets, they are small versions of the same; the specialist stores have disappeared. I want to mention the specialist firms, which have a national reach—not that they get paid for travelling. Niche providers need to be national to generate sufficient volume to be sustainable; I know that the Secretary of State is concerned about that. Many such firms have chosen to remain small so that each solicitor has the ultimate responsibility for the client and sees a case through. Being specialised gives you the ability to deal efficiently with complicated issues, to recognise core issues and to gain the client's confidence—and it is important to have their confidence in order to give difficult advice such as whether to plead guilty. A single solicitor who supervises a number of unqualified or less qualified paralegals will not inspire that confidence. I know all this from my own experience of struggling occasionally with unusual cases.

The Justice Secretary at the Select Committee said last week that,

> "the most important judge of quality is the qualification".

That is by no means the whole of it. The CPS has also commented on this:

"There are some types of case … that require a specialist service if they are to be dealt with efficiently and fairly".

Of course, there are specialists in a number of areas; children and juveniles have been mentioned. Among

these are many that involve the state very directly: human rights, civil liberties, terrorism, the police, trafficked people, asylum-seeking children where there is a dispute as to age, challenges to the UKBA and a raft of immigration issues.

Almost all miscarriage of justice cases have involved small firms. The proposals extend, too, to the experts who often complement lawyers in complex cases involving vulnerable individuals—the interface between law, psychiatry and psychology, as has been said. We must be careful that, in reducing fees, we do not have the obvious effect on the market in relation to the experts available.

I have mentioned cases to which the state is party; I do not mean just routine crime cases. I am particularly concerned, like other noble Lords, about the combined impact of tendering and the proposals for judicial review—the state restricting challenge of the state or in other cases a sort of double denial of access to public services. Lawyers bringing weak cases no longer being reimbursed makes me wonder whether we have learnt anything from conditional fees, but there is no time for that today. Nor is there time to say anything more on the residence test than, number one, babies

**11 July 2013 : Column 472**

and, number two, it depends on whether you see tax as what you pay for the sort of society you want or as a price paid on an individual basis to gain entry to the club.

I would like to say more about whether the public disquiet that we are told about is general or whether it is about those obviously hugely wealthy individuals mentioned by my noble friend who manage somehow to qualify. I would like to say more about conflicts of interests and the market. I appreciate that both clients and lawyers must be disincentivised from thinking that there is a sort of TARDIS of a piggy-bank available for legal aid, but few think that. Most lawyers I know want to do their best for the clients, even if they become fat along the way, although I point out that my noble friend the Minister does not use that term. They want their clients not to be subject to luck-of-the-draw representation and justice and they want to train their successors and to secure the legal service for the next generation.

**3.51 pm**

**Lord Scott of Foscote:** My Lords, I join all noble Lords in thanking the noble Baroness, Lady Deech, for arranging this debate. I also thank noble Lords who have already spoken, because they have said virtually everything that could possibly be said. I support what they have said and have heard nothing with which I have disagreed.

The subplot to this debate about legal aid and proposed cuts is the rule of law and access to justice. Everyone in this Chamber would accept the importance of the rule of law in a civilised country. It depends on many features, one of which, of course, is access to justice for people who need to go to the courts. If they need to claim something they believe to be due to them, the courts are there for them—self-help is frowned on and criminalised in many cases. If they are defendants, the courts are there for them to reject the claims that they believe to be unjustified.

The rule of law requires that there be access to justice, but it has to be a reality and not just a constitutional theory. It used to be said that the Ritz was open to everyone, but of course it was not, as not everyone could afford to pay its charges. The courts theoretically at least are open to everyone, but to get in front of the courts now, whether as a claimant or as a defendant, you have to pay a fairly substantial sum up front.

I cannot remember how long ago it was—I think that it was when the noble and learned Lord, Lord Mackay

of Clashfern, was Lord Chancellor—that the then Government introduced the notion that the civil justice system had to be self-financing, with substantial charges for commencing or defending an action or putting in a reply; practically any step you took in the action was subject to a fee. It was a relatively expensive matter to embark on litigation or to defend it. However, in those days, although the civil justice system had to be self-financing, it was not proposed that the fees paid by litigants should cover the cost of legal aid assistance. That was left alone. It is being introduced now as a feature. The Government need to save money to cut down on public expense, and the legal aid bill,

**11 July 2013 : Column 473**

whether for criminal or civil legal aid, is looked at as one of the means of reducing government expenditure to balance the books. The object is one with which one cannot possibly quarrel, but the Government have to bear in mind what this process may do to the justice system.

I want to concentrate my remarks on the civil justice system, because, as all my colleagues will know, I know precious little, or nothing, about the criminal justice system. In the civil justice system, individuals need to have access and, if they cannot have access to it to defend themselves or prosecute their claims, their respect for the justice system will be affected. Respect for the rule of law is a cultural advantage, which this country shares with many others, but there are many countries in the world where the rules and regulations that appear to provide for the rule of law lack reality, because the laws in question do not command respect.

In this country, individuals, of course, disapprove of some laws that they may be required to obey, but, broadly speaking, one of the features of living in this country is that the population and the public as a whole respect the rule of law. That respect is cultural, however; it is not to be found in every country and it is not necessarily immutable. Let us think of what may happen if there is a substantial number of people whose access to the courts to prosecute claims that they think they are owed, or to defend themselves against claims that they think are unjustified, is made impractical or impossible because of the difficulties of financing the entry into litigation or paying for lawyers to argue their case. Some may try to argue the case themselves, with all the difficulties that they must know that will involve because they are not lawyers—or at least in general circumstances they are not lawyers, and the law is not always something that appears simple to non-lawyers; sometimes it does not appear simple to lawyers, either.

Respect for the rule of law, which is so important, is capable of being forfeited and lost if excessive cuts are made affecting potential litigants. I wish that the Government would bear that in mind in considering how far to take the inroads into the legal aid bill for the purpose of cutting government expenditure. I hope that it will not happen to a point that the rule of law loses the respect that at present it commands. It cannot be taken for granted by the Government that that will not happen and I hope that they keep that in mind.

**3.57 pm**

**Lord Bach:** My Lords, not for the first time the House owes a debt of gratitude to the noble Baroness, Lady Deech. By securing this important debate, she has not only obliged the Government to defend their past conduct and current proposals in Parliament, something that I suspect they are not overkeen on doing, but she has attracted a stellar cast of speakers, and not just great lawyers and judges. I pay special tribute to the noble and learned Lord, Lord Hope, whom it is great to see back in his place in this House again. There are others here who are not lawyers who recognise just how important these matters are to our whole way of life and our status as a civilised country.

**11 July 2013 : Column 474**

The debate takes place in the middle of a lovely summer afternoon, and many who are outside will be more interested in getting some sunshine or finding out how the Ashes are going. But we would be foolish to underrate how many out there are listening one way or another to what we are saying and, in particular, to what the Minister will say in due course. There is a lot at stake here.

The Government's latest proposals, following on frighteningly fast from the implementation of part 1 of LASPO, have been the subject of sustained and deadly attack during this debate. For example, my noble and learned friend Lord Irvine effectively pulled apart the proposals for judicial review, particularly the residence test, revealing it as a tawdry ideological assault on the rule of law and the Lord Chancellor's duty to uphold it.

The Lord Chancellor himself let it slip, in his session at the House of Commons Justice Committee last week, that it was not cost savings that underlay these proposals, it was "ideological": that word was used. Does the Minister agree? Is it part of his ideology too that if there was a case in the future like, for example, the Baba Mousa one, it should be outside the scope of legal aid? Or does the Minister still stick to the line that it is the costs that justify these proposals, though the Dr Armstrong paper referred to earlier demolishes the costs argument pretty conclusively as far as JR is concerned?

Is it the philosophy that the right to legal aid—and thus the ability to make a claim against a state—should be based on the status of the claimant? Is our system, with its grand tradition of protecting the rights of all, to become so diminished that it will not allow justice, where it is necessary, for all those who need it? As far as I am concerned, these proposals are much more dog-whistle politics than they are thought-out legal proposals. The Government sometimes give the impression that they are careless about the importance of ensuring access to justice. They would, perhaps, like us to forget what has already been done in the name of cost-savings or ideology or both.

We are three months into LASPO and the Government intend to have post-legislative scrutiny within three to five years of Royal Assent. What will they find? If the first three months are anything to do with it—and they should have been the easiest months—there will be practically nothing left apart from, perhaps, a few providers dotted around the country with vast deserts of no social welfare law provision at all: a sort of wasteland. Let us look briefly at the evidence. Birmingham Law Centre has closed down and advice is not being given on 2,000 cases of social welfare law each year. Will the Government consider saving Birmingham Law Centre in the same way as the Government of whom I was proud to be a member saved South West London Law Centre when it was in difficulties?

The Mary Ward Centre, which has given 100 years of service to the poor in London, is now turning away 15 people each week. It has no contracts in benefit cases because that is out of scope. It has four debt cases where there were 400 this time last year. What are poor Londoners going to do when the Mary Ward Centre cannot look after them? The Government cannot

**11 July 2013 : Column 475**

hide their eyes from this. Social welfare law helped hundreds of thousands of people who were given quality advice on legal issues that affected their everyday lives, for less than one tenth of the whole cost of legal aid. Lawyers did not get rich on it, but poor people got some access to justice.

George Orwell wrote:

"Whether the British ruling class is wicked or merely stupid is one of the most difficult questions of our time".

Perhaps only an old Etonian could have put it in those terms. Of course Ministers are not wicked—indeed, in my experience, they are pretty nice people who mean well. But Part 1 of LASPO, taking away the possibility

of many of our poorest citizens getting some access to justice, is pretty close to the second word that he used.

Ministers should think again before it is too late. I do not hesitate to use the quotation which was used many times in the LASPO argument. It is from the late Lord Bingham who said that,

> "the denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law".

That is what this debate has been arguing.

**4.04 pm**

**Baroness Howe of Idlicote:** My Lords, like other noble Lords, I have significant concerns about all these proposals. However, I shall focus my comments on the impact that they will have on children and young people.

This generation of children and young people is a particularly important one upon which we will all need to depend. Regrettably, they are facing unprecedented challenges in achieving their potential and negotiating a smooth path to a happy and successful adulthood. The phenomena of high youth unemployment, rising youth homelessness and widespread adolescent mental health difficulties are well documented. They help to highlight why it is incumbent upon our lawmakers to ensure that children and young people are able to receive all support to which they are legally entitled and to consider what impact new policies and laws will have on young people.

I understand that the Government have yet to publish any kind of age impact assessment relating to these proposals. This is highly regrettable and I hope that the Minister will be able to reassure the House that the Government intend to publish such an assessment. If they do not, there is surely a danger that they will be in breach of their commitments and undertakings, including those under the United Nations Convention on the Rights of the Child, to protect children, and that the changes will be open to legal challenge.

In the mean time, we should all listen carefully to expert voices, such as that of the Children's Commissioner, who has expressed her concern that the legal aid proposals that we are debating today will have a disproportionate and profoundly negative impact on children and young people by curtailing their access to justice. I am indebted to JustRights for its detailed assessment, which makes it clear that children and young people's very safety and well-being would be jeopardised if the proposals were to be implemented. In other words, the changes would have major implications for child protection as well as for access to justice.

**11 July 2013 : Column 476**

I shall give two examples. I shall not go into trafficking in detail because it has already been dealt with by the noble Lord, Lord Touhig. However, the Court of Appeal has recognised the importance of treating people who have been trafficked as victims. The proposals would take away a crucial route to protection for trafficked children and young people who are extremely vulnerable to sexual exploitation, abuse and violence. Extraordinarily, even British-born babies aged less than 12 months will be excluded by the residence test. Also, the removal of prison law from scope will deny children and young people in detention access to legal aid. These young people are in another exceptionally vulnerable group, often with learning difficulties or mental health problems. Many will have endured troubled childhoods and spent time in care. It is simply inhumane to deny them a crucial route to challenging and preventing bullying and abuse in prison or obtaining support to aid their resettlement on release.

Meanwhile, limiting the circumstances in which judicial review can be brought will have a devastating impact on young people. For example, where a local authority has not, as corporate parent, provided the correct package of support to a young person in care or a care leaver, or has housed a young person in unsuitable accommodation, the circumstances under which its decisions can be challenged will become very limited. The power imbalance inherent in the relationship between the individual and the state, and between a child or a young person and the state in particular, necessitates mechanisms for challenging decisions and unfair treatment by state authorities that, if left unchallenged, can often have devastating consequences for the young person well into their adult lives.

We are all aware of the Government's need to find savings but this cannot come at the expense of weakening our systems for protecting vulnerable young people and exposing them to abuse, homelessness and destitution. Common sense tells us that these proposals would cost the public Exchequer far more in the long term than the Government hope to save. This is confirmed by rigorous research for Youth Access, which shows that a young person with a legal advice problem typically costs local public services as much as £13,000 before they manage to obtain advice. Much of this cost falls on councils, social services, housing departments and on the NHS. Huge savings could be made by ensuring earlier advice.

The noble and learned Baroness, Lady Scotland, and the noble Lord, Lord Bach, reminded the House that its support for protecting access to legal aid for children and young persons was abundantly clear during the passage of the LASPO Act. Indeed, I remember it all very deeply myself. Therefore, I hope that the Minister will tell us how the Government intend to ensure that children and young people will be able to continue to receive age-appropriate legal advice and representation if they push ahead with these ill conceived proposals.

**4.10 pm**

**Lord Beecham:** My Lords, in our many debates about legal aid, the Minister has constantly justified government policy by referring to the need to cut public expenditure. While making every allowance for

**11 July 2013 : Column 477**

the need to make savings, some of us have all along suspected an ulterior motive. Those suspicions were explicitly confirmed, as we were reminded by the noble and learned Lord, Lord Irvine, by the Lord Chancellor in his recent evidence to the Justice Select Committee when he affirmed that the proposal to reduce funding for legal aid to prisoners was ideological, rather than driven by financial considerations. Given the minimal amount that the proposals were supposed to save, that is not surprising. When one takes into account that the savings engendered by denying access to legal aid to prisoners seeking redress is very likely to be outweighed more than fourfold by the costs—for example, of delayed release or of Parole Board hearings, matters referred to by the noble Lord, Lord Carlile, and the noble and learned Lord, Lord Hope—the economic case falls away completely.

This is not the only area in which the Lord Chancellor's ideological proclivities are shaping policy. The residence test for legal assistance, like its proposed equivalent in the health service, is, as my noble friend Lord Bach has pointed out, another blast on the Tory political dog whistle, which is likely to cost more than it saves, apart from its malign consequences for a particularly vulnerable group of people, including children, immigration detainees or even Gurkhas. Are these people to be treated, in Kipling's words, as,

> "lesser breeds without the Law",

but in this case at our behest, not theirs?

In the crucially important area of judicial review, the savings are estimated at all of £1 million for each of the two proposed restrictions: where legal aid is withheld until permission is granted to proceed with a judicial review, as mentioned by the noble and learned Lord, Lord Brown, and where the case is borderline, even where there may be a public-interest element. Here, the Government's use of figures would do credit to one of those bankers manipulating LIBOR. They rely on the fact that over half of legal aid applications for judicial review are ended prior to permission being granted. However, as the respected Bingham Centre for the Rule of Law points out, a much higher percentage of cases are abandoned or lost at the subsequent stages by claimants who do not have legal aid. Moreover, as the noble Lord, Lord Low, pointed out, many cases are withdrawn because a defendant body, perhaps a local authority in a planning matter, recognises its mistake and corrects it before the case proceeds.

Again and again, eminent judges, including the president of the Supreme Court, the Master of the Rolls and the noble and learned Lord, Lord Woolf, have stressed the importance of judicial review as a means of holding the Executive and public bodies to account and as a cornerstone of our judicial system, much as our courts uphold the human rights legislation which we should be proud to have caused to be secured in the European convention, but which Tory Ministers seem constantly to denigrate. Even the Attorney-General has expressed his concerns about the impact of these proposals on judicial review. Can the Minister really be comfortable in this tainted company? Is he really a willing accomplice to the political offence of obtaining parliamentary votes by false pretences? I think more

**11 July 2013 : Column 478**

of him than that. Indeed, there are false pretences on the strategic scale, not just in relation to the particular issues that have been canvassed today.

The cost of legal aid is falling, not rising, even before taking into account the fact that the cost includes VAT, which of course goes to the Treasury—assuming that HMRC collects it, which it is not always capable of doing, as we have heard recently. From a peak of £2.237 billion in 2009-10, the bill has fallen to £1.917 billion; that is a significant reduction. In cash terms, it now stands at marginally above the cost of legal aid in 2007-08. If one takes into account VAT and the impact of inflation on those figures, it is clear that the cost is not out of control; indeed, in real terms, it is falling and has fallen substantially.

Moreover, as the National Audit Office pointed out, the overall cost of our justice system, including legal aid, is not at all out of line with that of other European jurisdictions, at 0.33% of government expenditure. That is equal to the average. However, as the noble Baroness, Lady Deech, pointed out—I join others in congratulating her on securing this debate—you cannot really compare different legal aid systems when they apply to different judicial systems. In any event, overall, the expenditure on the courts and the justice system is not greater here than elsewhere. In any case, the Government are yet to explain how they will achieve their £220 million saving when their estimates disclose that the figure for 2016-17 is only £118 million.

We are now in the middle of a consultation on the proposed changes to criminal legal aid, which remain highly contentious, despite the fact that a defendant may now choose his lawyer rather than have one appointed, as in the Moscow magistrates' court of old, by the state. How that will work in the world of the proposed tendering process, not to mention the ludicrous proposition of the fees for guilty and not guilty pleas being the same, is wholly unclear. The noble Baroness, Lady Deech, referred to that clear anomaly. Will any changes to the criminal legal aid scheme be subject to parliamentary scrutiny and, if so, in what form?

Contrary to the impression that Mr Grayling likes to convey—I do not accuse the Minister of this; he is not guilty on this particular charge—concern about the effects of the existing and future costs to legal aid is not confined to lawyers or expert witnesses, who will also be badly affected. Last week, the Judicial Executive

Board, which includes the Lord Chief Justice, the Master of the Rolls and the heads of the main divisions of the High Court, joined the chorus of criticism and concern, while rightly acknowledging the need for savings to be made.

A wide range of voluntary organisations, from Citizens Advice, Mind and Shelter to the 26 children's charities who signed a letter published in today's *Daily Telegraph*—and even several Conservative MPs in a House of Commons debate—have expressed their profound worries about what has happened and what portends. They do so because the cuts already made are having dire consequences. Law centres, CABs and other third sector advice agencies are trapped between soaring demand and reduced resources.

**11 July 2013 : Column 479**

The Newcastle Law Centre, which I played a small part in creating and supporting, is now down to one lawyer and can undertake legal aid only for immigration cases, and even those cases are financed by the council's Newcastle Fund for voluntary sector projects. Since 29 April, it has had to turn away 80 cases out of 138 which would previously have qualified as being in scope. The cases were mainly on family, welfare and immigration matters. That matches a 59% reduction in cases lost after the cuts at the Islington Law Centre. Newcastle Citizens Advice Bureau has lost qualified professionals and in three months has had a 40% increase in welfare cases, with 157 people who are now out of scope for tribunal representation having to be given unlimited advice on self-help, 83 of them seeking to challenge Atos assessments. As we have heard, fees for interpreters and doctors' letters can no longer be funded. The CAB in Gateshead lost £500,000 of funding. The Newcastle bureau has to rely on Big Lottery funding for projects, which now have to be bid for every six months—and on a different basis each time.

For hundreds of thousands of people and their dependents, there is a no entry sign where once there was access to justice. As we have heard, that applies to judicial review, to family cases including domestic violence, to prisoners, to immigration, to trafficking, to debt and welfare cases and to children and young people. I hope that the Government will listen to the debate today, which has been virtually exclusively critical of what they are doing and think again about the impact—perhaps not foreseen—that they are having on the lives of too many of our fellow citizens and other residents of this country.

**4.20 pm**

**The Minister of State, Ministry of Justice (Lord McNally):**My Lords, it is important that I put on the record the Government's point of view in this important debate, so I will not be able to follow the usual courtesy of a detailed response to the many individual points and questions raised. However, I will treat the *Hansard* of this debate as an input into the consultation under way, and I will see whether I can cover some of the specific points raised in an omnibus letter that we will circulate to noble Lords.

First, I, too, congratulate the noble Baroness, Lady Deech, on securing a debate on this important subject. It has attracted a speakers list of great experience and expertise, and the debate as a whole has been a major contribution to what I emphasise is a consultation still in progress. This debate and the consultation that has initiated it take place against a background of two inescapable realities. The first was stated by the noble Baroness, Lady Deech, herself when she spoke in the debate on the gracious Speech on 9 May. She was also quoted today by the noble and learned Lord, Lord Hope. She said:

"It is self-evident that there cannot be a bottomless fund for legal aid".—[*Official Report*, 9/3/13; col. 101.]

The second reality was made clear by the noble Lord, Lord Carter, in his review of the procurement of legal aid conducted in 2006. He said:

"A healthy legal services market should be driven by best value competition based on quality, capacity and price. All three of these factors should lead to the restructuring of the supply market".

**11 July 2013 : Column 480**

Of his own proposals, he said:

"The emphasis of the proposals has been upon providing incentives for firms to structure their businesses in such a way that legal aid services can be procured more effectively, and that the service is delivered more efficiently".

It is therefore no surprise that previous Governments wrestled with this issue.

The establishment of the Legal Services Commission in 1999 reformed the part of the system which funds legal aid services but not the part which delivers them. Costs continued to increase, giving rise to several series of fee cuts. The case for reform was certainly enough to persuade the Opposition to include a commitment to find greater savings from the legal aid scheme in their 2010 manifesto. Their consultation document, *Restructuring the Delivery of Criminal Defence Services*, published earlier that year—this was quoted by the noble Lord, Lord Faulks—said:

"Currently the criminal defence service is highly fragmented, with a large number of small suppliers and relatively few large suppliers".

The need for reform of legal aid-funded services in order to deliver a cost-effective, sustainable legal aid scheme is well established, but it is not the only driver for reform of the legal professions. Changes in technology and its increasingly fundamental role in the functioning of the criminal justice system demand the kinds of changes to working practices and business models seen throughout the public and private sectors. The introduction of alternative business structures, Jackson reforms and an increasingly well informed customer base are all examples of changes which present their own challenges that the legal professions must meet. Those changes are accompanied by the brutal fact that the number of businesses providing criminal legal aid services now vastly outstrips demand for such services.

The realities have been gathering force and relevance for decades, so it is absurd for the professions to claim that they have been bounced by a short and ill-considered consultation. When I first came into this office in 2010, the Bar Council was starting to consider ways to restructure the way that it delivers its services. It was looking at what it called procure co-type organisations. I had a very interesting discussion with the then chair of the Bar Council about its vision for the future of the Bar. I understand that work to explore such arrangements ceased at the request of senior members of the Bar due to concerns that it would aid the Government in introducing competitive tendering. We want the Law Society and the Bar Council to engage with changes which are in many cases inevitable.

The Government recognise that the services the professions deliver are a vital component of our legal system and ensure access to justice and equality before the law. We recognise that the independent judiciary—perhaps the most critical element of our justice system—could not survive without drawing from the pool of talent that the professions create.

However, alongside the need to ensure access to justice and a healthy, sustainable legal sector, the professions must also recognise that the Government are entitled to seek the best possible value for money from the legal aid budget. The coalition's programme for government made a commitment to review the

**11 July 2013 : Column 481**

legal aid scheme with the aim of finding savings, culminating in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This will have removed around £320 million from the legal aid budget by 2014-15—largely, as has been explained, from the civil legal aid budget—as well as strengthening accountability and introducing a more rigorous approach to financial management by creating the Legal Aid Agency.

However, the current financial climate means that it is necessary to look again at everything that the Ministry of Justice is doing, including in relation to legal aid, in order to make further savings, particularly in respect of criminal legal aid. This was the focus of the consultation, which has recently concluded, and the aim is to further reduce the legal aid spend by around £220 million by 2018-19.

The consultation, published in April, included a proposal to move to a model of price competitive tendering in the criminal legal aid market. Conscious of the professions' objections to the principle of "one case, one fee", we proposed to exclude criminal advocacy from the competition model, instead proposing to restructure the Crown Court advocacy scheme. Being mindful of the great disparity in the level of fee income received by advocates for Crown Court work, our proposals would rebalance fee income so that those at the top end took the greatest reduction and the lower earners the least. Indeed, some lower earners may see a small increase in their fee income.

Alongside this, we sought to further increase efficiency by proposing a sensible reduction in the use of multiple counsel. To ensure public confidence in the level of expenditure on the longest and most expensive cases, as well as delivering the necessary savings for the legal aid scheme, we propose to reduce the rates paid for criminal very high-cost cases by 30%. We have also included some small but important reforms to civil legal aid and expert fees to ensure that these, too, are fair and proportionate, and consistent with those paid for similar work elsewhere.

Our proposals also seek to address a number of issues where the savings may be small but we believe that the impact on public confidence in the legal aid scheme is significant. We propose to reduce the scope of prison law cases funded through legal aid, directing less serious matters to the internal prisoner complaints process. The prisoner complaints system was updated in 2012 and has recently been audited with a review of the adequacy, effectiveness and reliability of controls over prisoner complaints, with no significant concerns identified. Criminal legal aid will remain for a significant number of cases where liberty is at stake, such as parole hearings, or where there is a risk of extra days being added, such as in disciplinary cases.

By proposing a Crown Court eligibility threshold, we are ensuring that those who have the means to pay for their own defence do so. By setting it at twice the average household disposable income, we have ensured that it is fair.

In introducing a residence test, we seek to ensure that civil legal aid expenditure is targeted at those who have a strong connection to the UK. As with other public services, legal aid is paid for by UK taxpayers

**11 July 2013 : Column 482**

and we do not believe that it should be provided to those who have never set foot in this country or whose connection is tenuous.

We have already proposed an exception for asylum seekers in recognition of their particular vulnerability—

**Lord Carlile of Berriew:** My Lords—

**Lord McNally:** No, I am not giving way. I am sorry. I have five minutes left. It is a time-limited debate and the noble Lord has had his time.

**Lord Carlile of Berriew:** Will the noble Lord answer the debate?

**Lord McNally:** I am answering the debate.

We have already proposed an exception for asylum seekers, in recognition of their particular vulnerability, and made clear that persons who did not meet the test would be entitled to apply for exceptional funding. We have heard the concerns raised during the consultation and in today's debate in respect of the impact of the test on other groups of people or types of cases. We will reflect carefully on these points before making any further decisions.

We recognise the importance of judicial review as an important tool of redress which balances the power of the state. We continue to believe that it is important to make legal aid available for most judicial review cases. Under this proposal, legal aid for the earlier stages of a case would not be affected. Payment would continue as now for work to investigate the strength of a claim or to engage in correspondence as required by the pre-action protocol. This is important as many cases will settle or conclude at this point without issuing an application, avoiding further costs to the legal aid scheme, the courts and public authorities. However, we are concerned that legal aid is sometimes treated as a resource to further pursue weak cases that have little effect other than to waste taxpayers' money. We do not think it is fair for taxpayers to pay the bills for weak cases that have little effect other than to incur costs for public authorities and the legal aid scheme. We set out our initial assessment of the impact of the proposals along with the consultation paper and invited consultees to comment on the extent and range of those impacts and set out any concerns that they had in this regard. We are now carefully considering all responses and the issues that they raised.

Much of what has been said about our proposals on price competition has quite simply been false. The debate has been dogged by a baffling conflation of the Government's intention to manage the criminal legal aid scheme, through around a quarter of the current number of contracts, with a mythical intention to see only around a quarter of the present number of firms. Some of the rhetoric has risked misleading the public that legal aid would no longer be available. However, the professions have made clear their views on the importance of client choice both for the benefit of clients themselves and for the health of the market more generally. As the Justice Secretary told the Justice Select Committee last week, we have listened and will put forward revised proposals in the autumn. We have also listened on the proposed residence

**11 July 2013 : Column 483**

test and will consider the issues raised as well as the comments made across the proposals from nearly16,000 responses.

This House has much collective wisdom and experience about the issues that we have been discussing today. I want to make it clear that this is a real consultation and we are listening. The decision that Ministers have to take will be in the context of the economic realities from which the legal aid fund cannot escape. There will be cuts that will mean some tough choices. However, when the cuts have been made we will still be left with one of the most generous legal aid schemes in the world. I would make the point that although I have never compared it with continental legal aid schemes, I have compared it with common law legal aid schemes in Australia, Canada, New Zealand and elsewhere—and noble Lords will find that it is one of the most generous in the world. I am proud of that fact. I want us to have a generous legal aid scheme. Access to justice is important. I want us to work on ways and ideas, some of which have been thrown up by the consultation, which will give long-term sustainability to legal aid.

However, long-term sustainability means the legal professions facing up to some hard facts. There continues to be oversupply in both parts of the profession, with too many lawyers chasing a limited amount of publicly

funded work. Lawyers themselves have to address the further issues of quality and consolidation which will remain long after this present argument has been settled. Alternative business structures, the Jackson reforms, no-win no-fee, damage-based agreements and conditional fee agreements, will all impact on the organisation and structure of the profession. There are wider issues, such as a lack of social mobility and diversity which cannot be solved simply by tweaking the legal aid scheme.

In some ways, I have been disappointed at the way in which those who have responsibilities in these areas have refused to engage with these fundamental issues. I agree with my noble friend Lord Marks that we have to seek a new settlement in this matter. There is still time to do so. Our legal system, our respect for the rule of law and the eminence and integrity of our judiciary are precious gifts passed down from one generation to another. We all have a duty to protect what is best while managing the change that is inevitable. That is the task before us now, and I again call on all those who care about the system of justice to join us in that task.

**4.35 pm**

**Baroness Deech:** My Lords, I have the impression that there is no time left save for me to thank all noble Lords and all noble and learned Lords who have joined in from different perspectives. They have been almost unanimous in encouraging the Government: first; to make sure that there is primary legislation; secondly, to undertake a real impact assessment; and thirdly, to take a holistic view of the costs of the legal system in order to make cuts where they are most needed.

I thank the noble Lord, Lord McNally, for listening. I remind him that the Bar could certainly move faster were there not so much red tape and duplication in the

**11 July 2013 : Column 484**

Legal Services Act 2007, but I am sure that it will do its best. I look forward to further proposals from the Government to rescue this most important pillar of our democratic society.

*Motion agreed.*

# Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2013

Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 20132nd Report from the Joint Committee on Statutory Instruments,5th Report from the Secondary Legislation Scrutiny Committee

## *Motion to Approve*

**4.36 pm**

*Moved by* ***Baroness Hanham***

That the draft regulations laid before the House on 20 May be approved.

*Relevant documents: 2nd Report from the Joint Committee on Statutory Instruments, 5th Report from the Secondary Legislation Scrutiny Committee.*

**The Parliamentary Under-Secretary of State, Department for Communities and Local Government (Baroness Hanham):** My Lords, the regulations laid before this House on 20 May 2013 introduce new and amending regulations to support recent planning reforms—reforms that will give applicants the confidence to submit planning applications for development, that will give businesses the confidence to invest to support growth, and that will give greater certainty for communities.

The proposed changes to the fees regulations emanate from a variety of changes in both primary and secondary legislation as well as from policy, which I will attempt to outline to noble Lords. The draft regulations were approved in the other place on 26 June 2013 and, if approved by this House, would come into force on 1 October 2013.

The Growth and Infrastructure Act 2013 introduced measures to enable quicker and better decisions where there are clear failures in local planning authority performance. We are all aware that delays in getting a decision on a planning application can mean frustration, unnecessary expense and the loss of investment and jobs. Where a planning authority has been designated, planning applicants will have the option of submitting applications for major development directly to the Planning Inspectorate on behalf of the Secretary of State.

I should emphasise that this reform does not remove any powers from underperforming authorities; it merely gives applicants the choice of applying to the inspectorate where this is clearly justified. We have been working closely with the Local Government Association to ensure that any authorities that are designated will receive the support they need in order to improve.

The Secondary Legislation Scrutiny Committee has questioned why we are bringing forward changes to the fees regulations to implement this measure ahead of the order setting out how applications will be handled where they are submitted to the Secretary of State. We have made very clear in our response to the consultation on this measure, published on 4 June,

**11 July 2013 : Column 485**

how such applications will be handled, including the very small number of tasks that designated authorities will still be required to do.

We have been equally clear that we would like to make any initial designations by the end of October this year so that any cases of sustained poor performance are tackled as soon as possible. To meet that schedule we have prioritised the regulations that are before the House today, but there should be no doubt about our intentions for how the rest of the process will work. The response that we issued on 4 June makes that clear.

Regulation 3 allows the planning application fee to be paid to the Secretary of State rather than to the local planning authority. This will enable the Planning Inspectorate to cover the cost of determining the planning application in place of the local planning authority. It is important that a fee is paid to cover the cost to the planning inspector of determining the application, especially as applicants can expect to benefit from the increased development value that planning permission brings, otherwise the benefit derived would be at a cost to taxpayers. The fee will be exactly the same as would have been paid to the local planning authority. It is simply going to a different place, where the applicant chooses this alternative route. There will be no difference for the applicant.

Local authorities will not benefit from the fee as they will not be dealing with the application, which is something we discussed at length when the Growth and Infrastructure Act was in Committee. Local authorities will be required to undertake some work in connection with the application, but this will involve only keeping the planning register updated and notifying neighbours of the planning application. The

designated authority will also be required to send any planning site history to the Planning Inspectorate. This work is minimal and will not be burdensome on local authority resources, particularly as it will impact only on the small number of authorities who are designated.

Pre-application discussions on planning proposals can help to iron out issues at an early stage and avoid time being wasted on ill-conceived applications. Local planning authorities are able to charge for such advice under Section 93 of the Local Government Act 2003. We want to make sure that pre-application advice is available to applicants who choose to apply to the Planning Inspectorate. Regulation 2 makes provision for the inspectorate to make a charge for such advice, strictly on a cost-recovery basis, as is the case for local planning authorities.

The planning guarantee was put in place in *The Plan for Growth* to promote timely decisions on planning applications. This provides certainty by setting a one-year limit on the time that any planning application should spend with decision-makers so that, in practice, there is no more than 26 weeks to decide an application and no more than 26 weeks to decide any appeal that may follow a decision on the application. We are strengthening this by underpinning the guarantee with a refund of the application fee where a planning authority fails to determine the application within 26 weeks from the date that a valid application is made, as set out in Regulation 5.

**11 July 2013 : Column 486**

The statutory period for determination is 13 weeks for major applications and eight weeks for other applications. This means that the time allowed under the planning guarantee is twice as long as the statutory period for major applications and more than three times that for other types. We believe that it is manifestly unreasonable if no decision has been issued within that period and that, therefore, the applicant should have the fee reimbursed. We want to ensure that the system speeds up decisions and operates fairly. There are some limited exemptions from the guarantee to allow a common-sense approach; for instance, where the applicant and the planning authority have agreed that a longer period than 26 weeks is genuinely needed to deal with a particularly complex proposal. This means that local authorities will need to ensure that they are efficient and effective in dealing with planning applications. The fees for planning applications were raised by 15% in November 2012. This will provide an additional £32 million per annum to local authorities to fund planning services.

Furthermore, we will be working closely with the Planning Advisory Service to provide support to those authorities that are designated and those which are close to designation to help them to understand how their planning service can operate more efficiently.

The Enterprise and Regulatory Reform Act 2013 introduced changes to bring about the Government's aim to streamline the heritage protection system. Specifically, we have introduced the provision to abolish the need for conservation area consent to demolish an unlisted building in a conservation area, but instead that it should require planning permission. This means that, where development is also being proposed, only a single consent will be required. The provisions simply replicate the existing level of protection but in a streamlined way.

**4.45 pm**

Fees are not currently payable for conservation area consent, and Regulation 4 maintains this principle by excluding fees for applications to demolish unlisted buildings in a conservation area.

We have brought about a number of changes to allow flexibilities in the planning system and have introduced

new permitted development rights for change of use to enable better use of existing buildings, cut bureaucracy and encourage growth. We have also put in place a light-touch prior approval process for some changes to ensure that they can be carried out without an unacceptable impact on the local area. Local authorities will be able to consider the impact of specific issues such as flooding or traffic. Regulation 6 introduces an £80 fee for such prior approval applications. Where a planning application for associated changes is made at the same time as a prior approval application, this £80 fee will not apply.

Finally, there are two minor amendments to the regulations. First, Regulation 7 amends the fee for applications to extend the time limits for implementing outline planning permissions that have been partially commenced. This is to ensure that the current lower fee for time extension applications is payable rather than the full outline application fee. The amendment

**11 July 2013 : Column 487**

corrects an inconsistency between the fee to extend unimplemented planning permissions and the fee to extend partly implemented outline planning permissions. Secondly, Regulation 7 amends the 2012 regulations to correct a typographical error by inserting "0.1" between "additional" and "hectare" in Schedule 1, Part 2, Category 3(1)(b).

It is vital that applicants looking to provide homes and jobs have confidence that their planning application will be handled as quickly as possible. These measures are an important part of the package that we are putting forward to ensure that decisions are made swiftly and reliably. I commend the regulations to the House.

**Lord McKenzie of Luton:** My Lords, I thank the Minister for a very clear explanation of these regulations, which concern changes to the charging of fees for planning applications and certain other planning events.

Our objection to the regulations is not so much about changing the scope of charging as the underlying policies that drive this necessity. These are, as we have heard, certain provisions in the Growth and Infrastructure Act 2013 and the Enterprise and Regulatory Reform Act 2013, the first in particular enabling applications for major developments for designated authorities to bypass the local planning authority and go directly to the Secretary of State. We opposed this during the passage of the primary legislation and continue to do so. It is the ultimate denial of localism, which for planning has been embedded in the system for more than half a century.

However, if applications are to be routed to the Secretary of State—in practice, the Planning Inspectorate—then it is obviously right that there should be a commensurate fee structure, otherwise the incentive would be for major applications always to be made to the Secretary of State. I understand, and I think that the Minister confirmed it, that fees applicable to England were last uprated with effect from November 2012; it is understood that the fees set out in these regulations would apply initially.

As we have heard, the regulations cover other fee issues, and I shall come on to those, but I have some questions for the Minister. What volume of applications is it anticipated will be received and be subject to this charging regime? During the passage of the primary legislation we had various estimates of "vanishingly few" LPAs being designated, although that was revised up to around 20 by the time we finished our deliberations. The criteria for designation were published in June in time for an October start to designation. While I accept that the final data for the initial designation will not be available until September 2013, the department must have some increasingly firm indications of the likely number of planning authorities to be designated. Can we know what that number is?

Where a local planning authority has been designated and major applications are made to the Secretary of

State, directions can nevertheless be given to the local planning authority requiring it to undertake certain tasks in relation to the application. We consider it unfair that the authority should receive no part of the fee. Moreover, this is not the only circumstance where the regulations require the local planning authority to undertake activity for no fee. The changed arrangements

**11 July 2013 : Column 488**

whereby in future the demolition of unlisted buildings in conservation areas will have to be dealt with by local planning authorities also come without the right to a fee.

These regulations cover circumstances where the Secretary of State, via the Planning Inspectorate, is able to charge a fee for pre-application advice where the application is made to the Secretary of State. That developers should pay for such advice is entirely reasonable, although we would maintain that much of this work will in fact be done by the local planning authority, which will get no part of the fee. Notwithstanding that an application goes to the Secretary of State, will the Minister encourage local planning authorities to engage in the pre-application process, and how should they be remunerated if they do so? The regulations set down that charging should proceed by applying an hourly rate to the time spent by the planning inspector or planning officer. This hourly rate is to be set by the Secretary of State from time to time and must be set by reference to the average cost of providing the services of the individual. It is understood that this reflects the charging position for local planning authorities. Can the Minister remind us of what systems are in place to put this into effect? What is understood by "average cost"? Which overheads are built into the calculation? Is any differentiation made for the different levels of experience of the staff, other than planning inspector or planning officer, or indeed for the overheads of different regional locations? As for fees payable under the general permitted development order, the regulations require a fee of £80 where prior approval for change of use is required. Approval might be required from the local planning authority or the Secretary of State. Does the fee go to the person required to give approval and what is the basis for the £80 figure?

Our overall concern about these regulations is that they erode the opportunity for local planning authorities to generate fee income and therefore to sustain their planning capacity, and this at a time when there has been considerable change in the planning system, where local authority budgets have been squeezed to breaking point with further cuts to come, and when the blame for poor economic performance is all too often laid at the door of the planning system. I conclude by asking the Minister this: what assessment has been made of the capacity of local planning authorities to cope in the current environment?

**Baroness Hanham:** My Lords, I thank the noble Lord for his response to these regulations which, if I interpret it correctly, is: "We don't like them but see what you're trying to do". I take that to be the spirit in which the noble Lord delivered his response. He asked me a couple of questions, some of which I may be able to answer directly and some of which I may not.

The first was about the increase in planning fees. As I said in my opening remarks, they were increased by 15% across the board in November 2012, so local authorities have had quite an uplift in those fees very recently.

The next question was: what volume of applications do we expect to go to the directorate? We discussed this during the Growth and Infrastructure Bill proceedings.

**11 July 2013 : Column 489**

We will know more about that when we see how many local authorities are to be designated in September. Once we see the data about which local authorities and how many are likely to be designated, it will be easier

to judge that. As I said before, however, we do not expect this to be a huge number. In fact, we very much hope that there will not be a huge number, because that would mean that we were having to designate more local authorities than we wanted.

On the pre-application fee, if the developer is going to go to the inspectorate, it is very unlikely that they will want the local authority to, or indeed that the local authority would, hold any pre-application discussions. The intention is that the planning inspectorate will do any pre-application discussions and then charge a commensurate fee for them. In fact, perhaps I should rephrase that: the applicant can decide where to go, but we expect that they will probably go to the inspector if they are going to go there in the first place.

The noble Lord also asked me when information will be available about which authorities risk a designation. I think that I have answered that: September. The list will be published so they will know then. Indeed, many of them know now what the situation is because they are kept pretty well up to date with what is being put forward.

The noble Lord asked me about the £80 fee. I am now struggling a bit because I cannot remember what that was for. Would the noble Lord mind rephrasing his question?

**Lord McKenzie of Luton:** It was to do with the general permitted development order and the regulations. There are regulations that require prior approval from either the Secretary of State or the local planning authority. My question was: to whom does the £80 go? Is it the person who actually has to give that approval, be it the Secretary of State or the local planning authority?

**Baroness Hanham:** Yes, we would expect that to be more or less the local planning authority in most cases.

I hope that I have covered the questions. I am grateful to the noble Lord for the way in which he has addressed the regulations. So long as he is happy that I have more or less covered what he had to say, I beg to move that these regulations be agreed to.

*Motion agreed.*

---

Next Section
Back to Table of Contents
Home Page

**Footer links**

- A-Z index
- Glossary
- Contact us
- Freedom of Information
- Jobs
- Using this website
- Copyright