House of Lords - 11 December

Criminal Defence Service (Very High Cost Cases) (Funding) Order 2013

Motion to Annul

8.52 pm

Moved by ***Lord Carlile of Berriew***

That a Humble Address be presented to Her Majesty praying that the order, laid before the House on 1 November, be annulled. (SI 2013/2804)

Relevant document: 18th Report from the Secondary Legislation Scrutiny Committee.

Lord Carlile of Berriew (LD): My Lords, in speaking to the two Motions standing in my name on the Order Paper, I should start by saying that I do so with sadness and regret. The fact that we are having this debate on annulment Motions at all is a symptom of the breakdown in trust between barristers in criminal practice and the Lord Chancellor's Department. I have

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been at the Bar for 43 years now, with 42 years in practice. Over that period there have been pinch points, there have been negotiations about costs, but they have always been resolved by constructive engagement. We are now in a situation in which, for the first time in my time at the Bar, barristers are intent on withdrawing their labour, and they are at loggerheads with a Government who a great many of them have supported over the years. That is a sad state of affairs.

I declare my interest at the outset. I am a barrister who has conducted several very high cost cases, the category on which I will focus. I was but am no longer involved in a still current case which is not affected by the changes. I am very grateful to my noble friend the Minister for meeting me, with two officials present, on 26 November. I thought the meeting was useful and possibly constructive for the future. I hope he shares that view.

What are VHCCs? They are called "very high cost cases" but that is somewhat pejorative. In truth, the letters could also stand for "very high complexity cases". They are few in number and among the most complex cases that come before any court, criminal or civil, in terms of the law that is involved and the facts that they engage. All, by definition, have to be expected to last more than 60 court days—they are massive cases. Substantial prison sentences may ensue for the people convicted, and usually those convicted in this class of case are not career criminals but people of previous good character.

A current case of which I am aware involves nine parties, including the prosecution; 20 counsel, including nine QCs; and between 5 million and 8 million pages of documents disclosed. One might ask, "What all those lawyers are doing, trying to read between 5 million and 8 million pages for the defence. Are they just making work for themselves?". No, not at all. "Disclosed" in this context means that the documents have been described by the prosecution as either materially undermining the prosecution case or materially assisting the defence case; there is a clear obligation on the defence to examine those documents as best as it can.

These cases are every bit as complex as some of the legendary civil cases involving Russian oligarchs and the like about which we read, and the huge commercial disputes that some of the distinguished noble and learned Lords now sitting in the Chamber were involved in in practice and as judges. They demand the same legal and analytical skills as the most difficult civil cases. There is an added element. All these cases are heard by juries; so the hugely complex material has to be translated, as it were—transposed—into a situation where it can be understood by a jury.

Some defendants are wealthy and would like to pay for their own defences, but they are not allowed to by the state. For the most part they cannot use their assets to pay for their defences because they have been seized by the state. They are the unwilling people who have been thrown on to legal aid and basically obliged to take it or defend themselves. We have had arguments in this House in the past about whether these assets should be unfrozen under careful scrutiny and management to allow them to be used to pay for their defences, but for a completely strange reason the Government are

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not prepared to allow this to happen. I suggest to your Lordships that that is a stubborn, unreasonable and unrealistic approach.

As I have said, these defendants are thrown unwillingly on to legal aid representation, like it or not, and the public pay. Theoretically, if they are convicted some of the costs can be recovered, but I would like to hear from my noble friend what proportion of the defence costs have been recovered in these cases. Defence costs are notoriously difficult to recover. There are a legion of anecdotes, mostly true, about how the families of those convicted can sit quietly on the assets that have been frozen and live, for example, in expensive family homes for years. Recovery is very unsuccessful.

There seems to be an implication that the Bar is being greedy, setting fees that are totally unrealistic, but I remind your Lordships and particularly my noble friend that these fees have never been set by the Bar or by any other advocate. They have always been set by the Government of the time, and, until now, after consultation, discussion and negotiation, which is a process founded on reason.

Unfortunately VHCCs have developed a substantial bureaucracy which is extremely frustrating to those of us who have had to conduct them. They involve case managers who are civil servants. I have occasionally suggested to these case managers that they are “valued members of the defence team”, a phrase that I have repeated on a few occasions in messages to them. Even that flattery has failed to secure a single attendance by a case manager at a conference in the case, or a single attendance at court when there was a critical incident occurring in a preparatory hearing or the trial. This is mere bureaucracy, which adds totally unnecessarily to the cost of these cases, the fees for which could be assessed by the very people who are sitting in the court—as used to be the case—the associates or court clerks, who saw what was going on and were able to see how much work each advocate had done in the case. The lazy got less than the assiduous.

9 pm

These two statutory instruments imposed, without consultation, cuts of at least 30% in the fees for these cases. It is an extraordinarily brutal way of approaching a perceived problem. The system is broke, actually. It is founded on payment per hour for preparation and per minute for documents. This is not by any means a satisfactory basis. Already much of the work on the old fees is unpaid. If we say that 30 seconds per page is allowed for reading what are sometimes extraordinarily difficult financial documents—and that does happen, commonly—much work is unpaid. In some cases, there is a vast proportion of unpaid work because of the massive detail that takes much longer to assimilate than the time that is allowed. In other cases, payment by the hour may create less rather than more efficiency of preparation.

The system is not ideal. It is worthy of root and branch reform. Improvements can be made, but they have to be made by co-operation and negotiation. Cutting fees by 30% at a stroke is a crude way of dealing with these problems. I say to my noble friend that it would

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be far better to suspend the operation of these instruments and renegotiate with a profession that is willing to help.

Some specific issues have arisen in relation to these instruments. The statutory instrument on VHCCs has been strongly criticised by the House of Lords Secondary Legislation Scrutiny Committee in its 18th report. Among other things, the committee suggested that,

> "the House may wish to press the Ministry of Justice to provide a more robust argument to support its assertions that the instruments will not have an impact on the administration of justice"—

by which it means an adverse impact—and the committee therefore drew these instruments,

> "to the special attention of the House on the ground that they may imperfectly achieve their policy objectives".

I agree.

Then we have the extraordinary point that the Ministry of Justice is committing wholesale state breach of contract, using statute to justify wholesale breach of contract—quite simply reneging on contracts it has entered into. On previous occasions when the Government of the time have cut legal aid fees, they have always reduced the fees paid to all future cases. Here, they have cut the fees in mid-case. People who have been committed to cases have seen a savage reduction in their fees—I repeat, without consultation. They will be paid 30% less. It does not set a good example of how professional organisations should behave and it is a shabby example of government behaviour.

In addition, legal aid advocate fees have been cut disproportionately in comparison with other publicly funded professions. We are used to hearing figures trotted out. Usually Ministers quote VHCC category 1 fees from the most serious cases, which in fact cover only 1% of VHCCs. Last year 59% of VHCC fees were paid at category 3, which pays £91 per hour for a QC and £61 for a led junior. In crude terms, that sounds like quite a reasonable amount of money, but let us not forget that every barrister has a chambers, staff, office costs and VAT; as self-employed individuals, they have no pension provision unless they pay for it, they have no sick pay and they do not get paid when they are on holiday. The reality of those hourly rates is that the barrister is lucky if, in truth, he or she is taking home more than about 30% of the gross fee to pay for family life.

They are not high fees when we remember that these cases are, as I said, the most complex and serious ones, requiring the most skilled and most experienced advocates—people who, if they were doing other work, would be earning several times that amount in the private market, which the Lord Chancellor has quite rightly been saying is one of the jewels in UK plc's crown. There is sheer hypocrisy, in my view, in saying that we want the jewel in the crown in those civil cases for which foreigners are paying but we do not want to have the same quality of representation in domestic cases, albeit for lower fees, but reasonable ones.

What has happened? The rates in the statutory instrument came into force on 2 December and they have already been proved to be below the market rates at which those with the necessary skills will work. To take a single case as an example, on 6 December at Southwark Crown Court, in a VHCC with five defendants, the advocates of three of them exercised their contractual

right to terminate their VHCC contract when the 30% cut came into force. One solicitor contacted 47 sets of barristers' chambers and 330 barristers with suitable experience. At the new rates, not one was prepared to do the cases. The result is going to be that either these cases are done by people who do not have any relevant experience and do not have the requisite skills, or people simply go without advocates.

What will happen in court? There are people in your Lordships' House who have immense experience—I hope that we shall hear from them—about what happens in court when a case is not done properly. It takes extra time. It takes more intellectual energy from the judge. It is very tiring. Above all, it raises the danger of serious miscarriages of justice. In complex cases lasting many months, as most of these do, the cost to the country of a

failure because of the case not being done properly because of not having appropriately skilled advocates, is immense. The figures that the Government have produced are simply misleading.

I have taken up enough time, and I look forward to hearing from others in this debate. However, I urge my noble friend to accept that he should go back to the drawing board. I urge the House to accept that this is an issue on which—unpopular as barristers sometimes are—they are probably right. At the very least, the introduction without any proper consultation, in breach of contract as I have described, is really not acceptable.

Baroness Deech (CB): My Lords, I speak in support of the noble Lord, Lord Carlile. The extent of the concern about this is evident in the noble and learned Lords and noble and legally aware Lords who are gathered here tonight. In fact, the cuts to legal aid and the way in which they are being implemented are set to take their place in the great pantheon of government failures, which were foreseen but went ahead anyway. The list includes home improvement packs, ID cards, the Millennium Dome, child support and so on. I predict with confidence that, in a few years' time, people will look back at the legal aid cuts and add them to that list. They amount to the suffocation of the criminal Bar and the weakening of the quality of the judiciary who would have been expected to emerge from it.

I have an interest to declare as the regulator of the Bar, but not as its representative, so I am reluctant to comment on the level of the cut—30%—to payments to the Bar, but the effects are clear to a regulator. They will damage the administration of justice, the rule of law and equality and diversity at the Bar. There will be too few advocates ready to take cases at those miserly rates, as we have seen. They are dropping them now, mid-case, and will refuse new instructions at those rates. We are talking about contracts entered into before 2 December where the case will be heard after 31 March, so advocates are being forced by the statutory instrument to take a 30% cut in their contracted rates mid-case.

The Ministry of Justice may be relying on the profession's sense of duty to continue the case at 30% less, but if the case is dropped, it will end up spending more because of the cost of getting another advocate to repeat months of work already undertaken. The Ministry of Justice is breaching contracts retrospectively and placing future VHCC cases in the statutory instrument category, not the former contract mode.

As a regulator, I say right now that the retrospection of the statutory instrument is the most offending feature. If the Government simply changed the date of effect, so that only new instructions offered in future were subject to the cuts—objectionable although they are—some of the worst effects on the administration of justice would be mitigated. Will the Minister tell the House why that should not be the case? Retrospectivity is contrary to the law of contract and the rule of law. For example, when income tax rates are cut, the Government do not expect the payer to take advantage of the new rates before the starting date. In fact, such cuts are normally given a starting date well in advance, to allow parties to plan their affairs accordingly.

The Government have tried to make the UK the world's pre-eminent destination for swiftly resolving international high-value legal disputes. That is increasing revenue. The UK legal sector output was £27 billion in the most recent figures, and is set to grow. It has exported £3.6 billion of services and is the largest, by a long way, in Europe. Some 14% of the world's largest law firms are headquartered in London. The Government should not trumpet the excellence of the UK—as indeed it is—as a global legal centre whose success and desirability depends on the utter reliability of adherence to the rule of law and the quality of its lawyers, and then cut at the routes of access to justice and the development of lawyers here. I can describe it only as double standards.

There cannot have been a proper impact assessment of the cuts in terms of lost business, delayed trials and the effect on equality and diversity at the Bar. The Bar is proud of its record in enabling the underprivileged and those from non-traditional backgrounds and ethnic minorities to enter the profession. Up to 19% of pupillages in recent years have gone to such young people. That cannot now be maintained. Young people cannot be expected to go into criminal or family law at those rates when they have higher than ever university

debts behind them and, of course, the cost of qualifying as a barrister. In the past, they were happy to take that on the chin because they knew that at the outset, they would get some legal aid work—low rates though they were, they were enough to survive on. Now, in all conscience, how can we encourage them to join the Bar?

9.15 pm

We are talking about saving £220 million per annum. Submissions to the Ministry of Justice on this topic allege that cuts have already been made and that there are other ways of making economic efficiencies without damaging the product itself. Most government cuts have a policy behind them which is often controversial but comprehensible. For example, cuts have been made in welfare so that it pays to work; unpopular charges for spare bedrooms have been applied to try to rationalise housing allocation. One may not agree with it, but there is a policy. In legal aid, there is no policy in cutting, save a crude cut. It is not alleged that these cuts will make the courts run better, free more funds for them, make professionals more efficient or increase consumer access. There is no rationale at all except a cut.

One must thus consider the relative morality and effectiveness of government expenditure in these times of austerity. Take, for instance, the recently reported

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loss of some £40 million on failed universal credit technology, or reports that much foreign aid goes into the wrong pockets and does not reach the victims of disaster. The Public Accounts Committee recently pointed out that the national programme for IT in the NHS has spent more than £3 billion with next to nothing to show for it, and that the benefits do not outweigh the costs which will, in the end, be at least £10 billion. The regional fire control project was scrapped after £500 million had been wasted. One could go on and on.

The Government need to consider what is good economy and what is bad. The savings of £220 million a year in legal aid will not materialise if courts and cases are disrupted. To maintain the rates, miserly though they already are, would be a good investment in the administration of justice and the rule of law. I am certain there are ways—noble Lords will, no doubt, think of others—whereby funds can be taken from projects that are not delivering, such as the ones I just mentioned, to keep going the administration of justice and the rule of law for which Britain has been famous for centuries.

Having put on record my concerns and those of others about the effects on our renowned legal system, the regulator's main difficulty would be eased if the Government made the changes wholly prospective, so that they applied only to instructions newly offered after 2 December. Then, at least, the strictures about breaches of contract and the rule of law will be minimised. I urge the Government to think again about the date of implementation. Will the Minister assure us that he will do so and tell the House how much it would cost to extend the date of activation so that the new fees apply only to instructions first offered after 2 December? I urge the ministry to consider the legal system and its international reputation with due care. Do not kill the goose that lays the golden eggs.

Lord Woolf (CB): My Lords, I must start by making a disclosure about my judicial career, my career at the Bar and the fact that, since I retired as a judge, I have been a non-resident member of a barristers' chamber. Of course, in accordance with the rules within this jurisdiction, a retired judge cannot go back to the Bar.

I congratulate the noble Lord, Lord Carlile, on bringing this Motion and on the way he presented it. I draw significance from the fact that the House has heard two speeches from people who, in very different ways, are able to talk about the issues before us, which have been rightly described as highly relevant to the administration of justice and the rule of law.

Having said that, I should make it clear that I also support what the noble Baroness, Lady Deech, has said from a different aspect, except that I would draw a different view from hers as to the benefits of merely postponing the date of implementation. I suggest that that would merely be sticking plaster on a very gangrenous wound.

Something much more is required of the Government if they are to recognise the responsibilities that they have to the rule of law, and to which I know that the Minister attaches great importance.

Equally, I understand why the Government felt that there was a need to take action to curb the costs of the cases with which we are concerned. However, in

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considering whether the action taken is appropriate, I suggest that we have to ask ourselves three questions. First, will the action proposed achieve its purpose—that being to save money? Secondly, is this action disproportionate in the way that it affects a particular section of the legal profession? Thirdly, does it create a serious risk of damaging severely the criminal justice system of this country? I suggest to the House that, judged by those questions, this proposal fails all three of the matters that I have referred to as requirements.

It is the third effect with which I am primarily concerned, although indirectly that involves consideration of the first and second questions that I have identified as well. We are considering here the most eminent practitioners in the field of criminal law in this country. The noble Lord, Lord Carlile, has painted a vivid picture of the sort of cases that we are involved in. It is vital for this country's justice system that those most difficult and demanding cases are properly tried. If they are not properly tried the whole of our criminal justice system will be under a dark shadow, which this Government will have created without proper consideration of the information available, to the extent to which consultation has taken place. I say that having been in practice at a time when the Bar would, to fulfil what it saw as its obligation to justice, take on cases up and down the country for the princely fee of two pounds four shillings and sixpence, irrespective of your seniority. Eminent counsel took those cases and took their share of responsibility for that. From what I know of the Bar standards today, I have no doubt that they would do it today if they had to.

However, you cannot expect people to go into a profession, rise to its top and be treated to the imposition of an arbitrary cut of the scale proposed here without damaging the reputation of that profession. These people are not only those on whom we rely to conduct the most difficult cases at present; they are also those we rely on to be our great criminal judges of the future. We also rely on them, by the way they conduct their practice, to ensure that the Bar gets in its recruitment programme among the brightest and the most able youngsters going through our universities today. Each of the Inns of Court has programmes whereby the senior members of the Bar—the sort of members of the Bar I am talking about—visit universities and talk to the students who want to know whether they should come to the Bar and, if they do, what sort of work they should do. They want to know whether they should take the risk of coming to the Bar in the present circumstances.

Certainly, when I was doing that, I was always able to say to them, "You will have a profession which demands a tremendous amount from you, but you will have the satisfaction of knowing that you are involved in a profession where the public at large respect what you do and which contributes to producing a quality of criminal justice that is admired around the globe". In those circumstances, they have continued to come to the Bar. Who, however, will be able to tell people to come to the Bar when they know that they will be dependent on a Government who apparently consider it appropriate to impose a cut retrospectively, as the noble Baroness, Lady Deech, indicated, on the profession? How can you do so, as a person who has the well-being

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of these youngsters who are thinking of coming to the profession at heart—I speak as the father of three sons who have come into the law—if you know that what we have heard about will be on the cards when it comes to their career?

There is very real reason for the Government to reconsider their approach in this matter. It is very important that they do so. If they do not, they will unintentionally cause serious harm to a profession that it will take years, if not generations, to undo. What is at present a profession that the brightest and most able want to enter, will be one that they will feel they cannot possibly enter because the risks of doing so are so great.

I have read, of course, the report of the statutory instruments committee. I note what it says about the Government thinking it will be possible to get people not out of the top drawer but from a lower drawer to do these cases. The Government may be right in saying that, but what will be the calibre and quality of those persons? I can say, on the basis of my judicial career, that, as the judiciary works in this country, it is dependent on the Bar. It is dependent on the Bar not only for recruits but for the help it gives to the judiciary to do justice. You do not save money just by fiddling with fees. If there is the need to create savings that the Government say there is, they should have taken action before to ensure that judges have the benefit of barristers who are paid not by the hour or by the day, but on a more sensible basis in respect of cases so that they have the same incentive as the justice has that cases should be disposed of expeditiously and not in the way that sometimes happens because of how our fees are structured. Reforms were possible. Cases require management, but it has to be possible for the management to take place economically.

9.30 pm

Lord Brown of Eaton-under-Heywood (Non-Afl): My Lords, I do not think I have any relevant disclosures to make. I have not had a private client for some 34 years since I followed the noble and learned Lord, Lord Woolf, as Treasury Counsel, and I shall never have another.

This very afternoon, in answer to a Question about our trade prospects with China, the Minister, the noble Lord, Lord Livingston, said:

"The UK legal sector is a great strength … the rule of law and support from professional services are very strong. I will certainly seek to champion the legal sector going forward".

I believe that I quote him accurately. I just wish that he would share his views and commitment with the Lord Chancellor.

For many years the criminal Bar has been the poor relation of the various specialist Bars. Over the past decade it has already suffered a series of cuts in public funding. Of course it does not earn for the Exchequer the riches that, for example, the commercial Bar earns when acting, very often on both sides of the litigation, in commercial disputes. However, I argue that the work undertaken by the criminal Bar is altogether more important than most commercial work. Most commercial cases result ultimately just in the adjustment of companies' balance sheets and book entries; they rarely affect the quality of people's lives. The outcome

of criminal cases, by contrast, is generally critical to real people; usually their very liberty is at stake. More than this, the strength of the rule of law, and indeed public respect for it, depends above all else on the proper administration of the criminal justice system.

Very high cost cases, the subject of the swingeing further cut in fees under consideration here, are generally the most demanding of all the cases in the criminal calendar, as the noble Lord, Lord Carlile, has explained, and usually, and appropriately, they are undertaken by the elite of the criminal Bar. There already exist few financial attractions for those contemplating practice, or indeed already practising, in crime at the Bar. If you impose these additional cuts, that elite will fall away.

The Attorney-General himself is said to have acknowledged at a recent Bar conference that he no longer expected people of excellence to come to the criminal Bar. Consider, if you will, the effect of that upon the future quality of those who practise at the very heart of the criminal justice system. Consider its impact on recruitment, as the noble and learned Lord, Lord Woolf, has made plain. Consider its impact on the rule of law, and consider its inevitable consequences in terms of the future judiciary. Where shall we find the next generation of criminal judges? What indeed about the present position, as described by Lord Carlile, with current cases going hopelessly awry because, understandably, Counsel are on occasion declining to continue with cases with their fees savagely and retrospectively cut.

Of course I recognise that the Ministry of Justice has many calls upon its budget and that we live in harsh economic times, but I just cannot accept that these difficulties justify cuts so inevitably and gravely damaging to the criminal Bar, to the administration of justice and to the very rule of law. If drastic economies in the legal aid budget are required, and if they must be found in relation to the kind of cases in question here, better far to my mind that the department revisit a measure long ago suggested but, regrettably, hitherto rejected: the ending of the automatic right to jury trial in complex and protracted fraud cases. Indeed, it is my own clear opinion that not merely would this save countless millions of pounds of legal aid funds, it would also make for better justice.

That, of course, must be for another day. In the mean time, let us surely strive to safeguard rather than destroy the quality of the existing criminal Bar. Let us annul, not merely postpone, this order and these regulations. I, too, support the Motion.

Lord Hope of Craighead (CB): My Lords, along with others, I am extremely grateful to the noble Lord, Lord Carlile, for tabling these Motions so that we can debate these important measures. I should make it clear that I have never practised at the English Bar and never sat in an English court. My experience has been of practice, both civil and criminal, north of the border. However, although I have never sat in an English court, I have sat in a United Kingdom court, have had some experience of dealing with criminal cases and think that I can speak with some authority in support of the points which have been made so effectively by the noble and learned Lords, Lord Woolf and Lord Brown of Eaton-under-Heywood.

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A cut of 30% on fees previously set by the Government surely must be regarded in the present financial climate as severe. I appreciate, of course, that the Minister and those for whom he speaks in this House have very little room for manoeuvre, given the cuts that already have to be made across the entire department. However, it would help if the Minister in his reply were able to put these two measures into their overall context. As I understand it, we are dealing here with cases that take a very long time and provide the advocate with the benefit of continuity of employment throughout a long period. As has been pointed out, these are complex cases which require unusual amounts of work outside the court room and are, in comparison with rates elsewhere in the system, better paid. I could therefore perhaps understand it if the strategy behind these measures was to reduce the cost of legal aid at this level, so as to keep any reduction at the lower levels, with which we are not concerned this evening, to an absolute minimum—or even to preserve the existing position at the lower levels. After all, it is at the bottom of the scale that there is real hardship. One hears not infrequently that the costs of travel and other overheads exceed the amounts payable as fees to the advocate. If there is any margin over that, it is often very small. I would be grateful if the Minster would say whether this is what the Government have in mind, and give us an assurance that there is no question of cuts of this dimension being made elsewhere across the system. That would be some reassurance to those who are deeply concerned about what the Government have in mind in the overall planning.

I will direct my remarks to the amendment set out in regulation 3(5) of the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013, as the provision which it seeks to insert affects the advocate's freedom of contract. The standard terms already provide for their amendment within the terms of the contract. There is a contractual power to do this, but it is not entirely unqualified; this is not the place to debate how extensive that power is. However, when it comes to altering the terms for payment, I suggest that it is a question of degree. The stage may be reached when the amendment proposed, purportedly within the contract, is so great that it cannot be altered without the advocate's agreement. In that situation, if agreement is not reached, the advocate would have a right to terminate the contract.

That leads me to consider what the effect would be if the amendment goes through. As I understand it, it would tie the advocate who agrees to this form of contract to the rates set out in Schedule 6. That being so, those rates can then be amended by a further order without the need for the advocate's agreement. There is no need to alter the contract: what one does is to look at the schedule and alter the schedule by a further order. Once the advocate is tied in to such a contract, he or she has no escape from it, however much the reduction in the rates may be. As there is every prospect, if one is realistic, that the cuts now proposed will not

be the last, the stage could be reached when the rates will become wholly uneconomic—indeed, some may say that this stage has already been reached. That amendment is a profoundly unattractive change in the

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existing arrangement. I do not understand why it is there and I suggest that the Government are taking a great risk by proceeding along these lines.

Members of the Bar, after all, are not civil servants. One of the strengths of the Bar, vital in our modern democratic society, is the independence of each one of its members from each other and from anyone else. That is an essential part of the system, which lies at the centre of maintaining the rule of law, which we all believe in. One of the characteristics of their independence is that advocates cannot be forced to accept terms to which they have not agreed or which they find unattractive. That leads directly to the consequences—to which the noble and learned Lord, Lord Woolf, drew our attention —which could be very far reaching and very damaging. Those already engaged in work of this kind might be well advised to withdraw from their contracts, lest they be sucked into an ever increasing pattern of cuts. There are many who might be attracted to this kind of work in other circumstances who would not wish to subject themselves to the reformed contract where they are subject to change without any further amendment of the contract itself.

I therefore have this further question for the Minister: what assurance can he give to those who may be willing to accept employment on these amended terms as to what the future holds for them? This is very relevant to the issue of recruitment. Schedule 6, as I have suggested, is open to further amendment. Are we to expect further cuts in these rates next year or is it proposed to do so within the life of this Parliament? If so, what further opportunity will there be—indeed what opportunity will there be at all—for consultation before any further amendments are proposed? What opportunity will there be for an advocate to withdraw if he decides that the rates that are then proposed are so completely unattractive that he is not prepared to carry on with that work? These are questions that all those engaged in this kind of work would wish to be answered and I hope very much that the Minister will be able to do so.

Lastly, on the point raised by the noble and learned Lord, Lord Brown, about jury trials, I come from Scotland where, as it happens, there is no right to a jury trial. It is up to the prosecutor to decide whether the offence should be tried by a judge alone in the sheriff court, with a sheriff and a jury, or in the High Court with a jury. The length of sentence is affected by that decision, but there is no reason why a case of very considerable complexity should not be tried before a single sheriff. The accused has no right to object to that. It raises the issue as to whether there is not considerable force in the point of the noble and learned Lord, Lord Brown, that we are reaching the stage where a jury trial in some of these cases may need to be reconsidered.

Lord Faulks (Con): My Lords, my noble friend Lord Carlile has summarised the arguments against the statutory instruments with his usual clarity and vigour, and I do not wish to weary the House with repetition. I would, however, like to add a few words and in doing so should declare an interest as a practising barrister. I am not a barrister who does criminal cases

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and I very rarely do cases where legal aid is involved. However, I have sat until recently as a recorder in the Crown Court and am thus familiar with our criminal justice system.

I entirely understand the desire on the part of the Government to reduce spending on legal aid. The LASPO Act was the Government's first move in reducing costs. There is no reason why lawyers should be in any way immune from austerity, nor should justice be recognised as some sort of special case, up to a point. Nevertheless, what troubled many noble Lords in scrutinising that Bill as it went through the House was the risk of real injustice not to lawyers but to those who encountered the system and would be at risk of being denied access to justice. The Minister reassured those of us who were anxious, particularly in relation to Part 1 of the LASPO Bill, as it then was, and made some important concessions. However, the impact of the Act is going to need careful watching to ensure that real injustices do not result.

9.45 pm

The Secretary of State has now proposed further cuts in the legal aid budget, focusing principally, but not exclusively, on criminal legal aid. Perhaps I may say how much I am looking forward to the response of the party opposite to these proposals. During the passage of the LASPO Bill, it was often said by the party opposite that, had it won the last election, it would have made significant cuts in the legal aid budget, but it was not apparent from the stance that it took to the proposals in the Bill where those cuts would in fact have occurred. On a number of occasions, the noble Lord, Lord Bach, whom I see in his place, indicated that the cuts would have come in criminal legal aid. I think that the House would regard it as important for the party opposite to be clear—if not on the detail then certainly in general terms—as to how those cuts, necessary as they were, would have fallen on criminal legal aid.

The previous Government were in the habit of publishing figures for the top earners, in both criminal and civil work, in receipt of funds from legal aid. This was no doubt seen to help in the softening-up process in relation to public opinion before any changes were made to legal aid funding. The figures were usually misleading. Unfortunately, this Government have followed suit in that respect.

In a sense, barristers are an easy target; the average member of the public has better things to do than drill down for the truth about their earnings and is happy, for the most part, to accept some of the stereotypical pictures of an overpaid man or woman in a wig quietly milking the legal aid system. However, I acquit the Secretary of State of describing barristers as “fat cats”. He has been at pains to emphasise that he is not set upon destroying the criminal Bar, and I entirely accept that that is not his intention.

Over the years, successive Governments have attempted to cut the fat off the criminal justice system and, as we have heard this evening, it is beyond argument that criminal barristers are, for the most part, very moderately paid. They are self-employed and have little muscle or obvious appeal in any negotiating process. There is no

doubt that the criminal Bar is a profession in crisis. However indifferent the public may be to the individual circumstances of barristers, there will, I apprehend, be far more concern if the system as a whole is degraded.

Very high cost cases are now likely to be ignored by the most competent barristers. There will thus be a position where the most complex cases will be conducted, if the defendants are represented at all, by barristers with considerably less experience and competence than is appropriate. When cases are subject to the control of an experienced judge assisted by experienced barristers, as we have heard from noble and learned Lords, the outcome is very often a significant saving in costs through the sensible use of admissions and a clarifying of issues. This results in a saving on the legal aid bill and, just as important, a streamlined and well conducted trial process. That is unlikely to remain the case.

It is not only barristers who are alarmed at the effect of these changes but, as we have heard, judges, who will have to preside over trials in the future. Our criminal justice system, for all the criticisms that it attracts from time to time, is still held in very high regard not only by the occupants of this country but by those in other countries. Its reputation, hard won as it is, is now at serious risk.

I have referred to the Secretary of State. He of course will also have close regard to his obligations as Lord Chancellor, requiring him to ensure access to justice. I fear that the fat has been so far removed from the carcass of criminal legal aid that these further cuts really threaten our justice system. There are changes and improvements that can no doubt be made in the disposal of very high cost cases, but I venture to doubt that a simple, crude reduction in fees is the way to go about making the necessary changes. Here, I entirely agree with what the noble Baroness, Lady Deech, said. The changes in welfare are based, as she rightly said, on a principle. It is difficult to discern what principle lies behind these changes.

I ask the Minister to consult the Secretary of State for Justice and Lord Chancellor and to think very carefully about whether the effect of these changes—short, medium and long-term—are really worth the apparent saving.

Lord Mayhew of Twysden (Con): My Lords, I acknowledge that I have something to declare, which is that many years ago I used to conduct criminal cases as a member of the Bar. I recognise very well what the noble and learned Lord, Lord Woolf, was saying about the fee of two pounds four shillings and sixpence. The difference between the scenario that he described and my own was that he described people of the highest eminence accepting two pounds four shillings and sixpence as it was their duty. I was at the bottom of the heap—the opposite—and was very glad indeed to have it.

The debate so far has been of the highest quality and I shall be very brief as I do not wish to diminish the impact that it undoubtedly had on my noble friend who is about to reply. The trick that the Government have to fulfil is that they have to make provision to reduce the deficit, and must do so in a way that avoids unintended consequences. I believe that it is a tragic

fact that the reduction of 30% that has been described this evening will have an unintended consequence. Fewer people will take the work and the consequence will play over to the task of reducing the deficit. It will increase the deficit for the reasons that high judicial authority has emphasised again tonight.

I want to add one additional circumstance that I can foresee. If you are doing a very long case which, as my noble friend Lord Carlile described, is one of high complexity, you become associated in the minds of instructing solicitors with that case—"Oh Mr Mayhew will not be available; he is tied up in this case which has gone on for months and with many more to come". When you finish that case, you will find typically that there is no work left and you will have a long gap in your practice before you are instructed again. That will bear on the decision of the advocate as to whether to accept the fee that is offered. That point has not been made tonight, but it is one that is similar in character and perhaps easily overlooked.

The Secondary Legislation Scrutiny Committee, in its 18th report, has drawn attention to what has been said about these measures by three professional bodies. It has called for a more robust defence, and I look forward very much to hearing from my noble friend that the Government believe they have a more robust defence to the many points of criticism of profound weight that have been put before your Lordships this evening.

Baroness Scotland of Asthal (Lab): My Lords, this has been an extraordinary but sad and rather sobering debate. I am grateful that, from the powerful opening by the noble Lord, Lord Carlile, until the noble and learned Lord, Lord Mayhew, sat down I have found no reason to disagree with one word that has been said, save that I shall make a few comments a little later to help clarify the views of these Benches for those who sit opposite. The reason I say "sad and sobering" is that we should be very clear that this is not a parti pris debate.

So far we have had the benefit of hearing from two former Lords of Appeal in Ordinary, one former Lord Chief Justice, the current regulator and now a very eminent member of the Bar and recorder. I declare my own interest as not only a member of the Bar, a recorder and deputy High Court judge, but someone who is in practice and who, although I have not taken legal aid criminal cases since leaving Government, certainly did in the past. The voices I have just spoken about are joined now by two former Attorneys-General of different complexions politically and, some would say, physically. This is something upon which those who are committed to justice and the rule of law and concerned about the quality of justice in our country have now spoken, and so far we have spoken with one voice.

It is very important to hear the echo of what has been said, because it is an echo of real alarm and concern. I was struck by the comments of the noble Baroness, Lady Deech, about the effect of retrospection, an issue I had intended to alight upon. I was struck by the description of the noble and learned Lord, Lord Woolf, when he talked about these provisions as "a gangrenous wound". It is a description with which, regrettably, I wholeheartedly agree.

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I was also grateful that mention was made of the Lord Chancellor's responsibility in terms of his oath. Members of this House will be familiar with it, but I shall repeat it so that the House and others may be reminded of what the oath of the Lord High Chancellor of Great Britain is. The oath that the current Lord Chancellor swore was this:

"I … do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God".

How does the Minister contend, on behalf of the Government, that that oath by the Lord High Chancellor of Great Britain is being discharged?

Let me help the House as to why I am concerned about whether the Lord Chancellor has taken that oath into account in bringing these orders forward. I know that when he gave evidence to the Select Committee he seemed to suggest that it was not possible to grant access to justice to all people at all times. That, if I may respectfully say so, is a fundamental misunderstanding of the Lord Chancellor's role. It is his duty to ensure that there are sufficient resources so that access to justice for all people at all times can be equally made available. Moreover, the wounds that the changes proposed in these orders will inflict may so damage the availability of good access to justice that the cost will be very difficult to bear. There are those who say that they know the cost of everything and the value of nothing. Let us be clear: the value of our justice system is very high indeed.

10 pm

We have already had significant cuts in costs. Noble Lords have talked about the 30% cut, but the House will be aware that in more serious cases such as those of murder, rape, historic sexual abuse, non-very high cost cases of fraud and kidnap, fees have been cut three times since October 2010. Some fees in murder cases have been cut by 59%, in rape cases by 70% and in non-VHCC fraud cases by up to 83%, so this 30% cut comes on top of the very significant cuts which have been made since 2010, when our Government were last in place.

Fairness and equality are right. We in this country believe that because of the changes we have made over the past 30 or 40 years, the diversity of the Bar and the diversity of the judiciary, which has started but which perhaps is not yet complete, has been of great benefit to our nation. Increasingly, our profession reflects the people it serves. I am therefore grateful to the noble Baroness, Lady Deech, for raising the issue of diversity. There was a time when in order to be a member of the Bar, you had to be a person of independent means because it was by no means assured that the money you would derive from your profession would be sufficient to keep you in a manner that was reasonable as opposed to even comfortable. That changed to allow a greater number of people to join our profession. I joined the Bar in 1977. I was a person without comfortable means, state educated, non-Oxbridge and with very little opportunity, some might have thought, of succeeding. Looking at the position we are now faced with, I must ask myself what a Patricia Scotland of today would

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think of her chances of surviving in this new regime. Will we have as diverse a profession in the future or not? I think that there is only one answer to that. If we want fairness and parity of treatment then, to a certain extent, we have to pay for it.

There is a moment when we have to decide what our values are, what justice means to us, and whether justice in our country is or is not for sale. I hope that our view is that justice is not for sale, that we understand its value and not just its cost, and that the Government will think very carefully indeed before they take the matter forward, for all the reasons given by noble Lords who have spoken already. The points have been validly made and I thank those who have spoken because, as I listened to them, I have been able to tick off

every single thing that I wanted to say, save and except for those which I know my noble friend Lord Bach intends to cover, and therefore I will not trouble the House. However, I ask the Minister to think very carefully, and I add my voice to each and every question he has been asked without repetition.

Lord Alton of Liverpool (CB): My Lords, perhaps a non-lawyer might be permitted to detain your Lordships' House for just a few moments. Although I am not a lawyer, I have a daughter who has this year qualified as a barrister and should declare that. I was particularly struck by what my noble friend Lady Deech said in her remarks earlier on, when she reminded us of the deleterious effect that the Government's policies may well have on this rising generation of young lawyers. Taken together with what the noble and learned Lord, Lord Woolf, said in his remarks about the high ideals that so many lawyers have when entering the legal profession, in pursuing this vocation, I think that the Government need to listen extremely carefully to the very distinguished contributions that have been made this evening and with such force.

I support the noble Lord, Lord Carlile, for two principal reasons. The first is that I think that the Government's policies will significantly impede the possibility of younger people from more disadvantaged backgrounds from entering the law—the point that the noble and learned Baroness, Lady Scotland, has just made. Secondly, having represented and been associated with inner-city areas of Liverpool since I was first elected to the city council there as a student some 40 years ago—at about the time when the noble Lord, Lord Carlile, began to practice at the Bar—I am acutely aware that social justice does not just require access to health, welfare and decent housing: it also requires access to law. That was a point that I made several times during the course of the LASPO legislation and return to again tonight.

Over the past few decades, much has been done to improve the diversity of those working at the criminal Bar. However, the further reduction of barristers' remuneration proposed by the Government has alarming social mobility implications. Criminal banisters have already sustained a disproportionate reduction in remuneration over the last decade. The noble and leaned Lord, Lord Mayhew, and others have rightly emphasised the dramatic effect that a devastating 30% reduction will have on those who are now working in the profession. In return, they are expected to work

long, unsociable hours and tackle difficult and, as we have heard, complicated issues of public importance.

These further swingeing cuts are simply unsustainable and the reality is that they will deter talented individuals from middle and low income backgrounds from entering or staying within the profession. Instead, the criminal Bar will once again become the preserve of the independently wealthy. Those without independent wealth to sustain them will turn to more financially rewarding areas of practice or to another profession altogether; we heard about the alluring effect of commercial law. They will do so not out of greed but simply out of a desire to receive an income comparable to the earnings of other equivalent professionals.

Yet instead of treating criminal barristers like other professionals, the Government have asked them to bear wholly disproportionate cuts to their incomes. As the Criminal Bar Association has pointed out in its correspondence with Members of your Lordships' House, no other public service professionals have been asked to shoulder cuts on the scale proposed by the Ministry of Justice. I think that the noble Lord, Lord Carlile, was quite right to say to us at the very outset that this is simply crude.

As a consequence of these measures, the criminal Bar will see an exodus of talent. The results will be far reaching and the consequences borne by society as a whole. That is my second point. People accused of serious crimes face the prospect of not having anyone of sufficient quality to represent them; and there will also be a lack of experience to prosecute the more serious cases in due course. As we have heard, it will also influence the make-up of the Bench as well as the years pass.

It is all too easy to forget the important part that criminal legal aid has played in ensuring a fair and just society because the criminal law is not something that impinges on the everyday life of most of us. Yet when liberty and the protection of the public are at stake, it is paramount that both the defendant and the state have quality of representation. If we accept the fundamental principle that all defendants are innocent until proven guilty, and may not have actually done what they are accused of, we should ask ourselves this simple question: "If I found myself in court accused of a serious crime and was trying to defend my innocence, who would I want defending me?". If the answer is a highly qualified, independent and dedicated advocate, it has to be understood by us all that the price of these measures is that we will forfeit that, and justice will be the loser. It is for those reasons that the arguments of the noble Lord, Lord Carlile, deserve our support tonight.

Lord Thomas of Gresford (LD): My Lords, it is a privilege to follow the noble Lord and the comments that were made in particular by the noble and learned Baroness, Lady Scotland. Referring back to my own beginnings, I was one of those who, having left university, was not in a position to go to the Bar as I had wished. I became a solicitor, and as a young articled clerk I instructed Lord Elwyn-Jones, leading Emlyn Hooson, in a number of cases. I was attracted by the lustre that surrounded the Bar at that time. Elwyn-Jones was a Nuremberg prosecutor, as was David Maxwell Fyfe,

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which my noble friend has recently had brought to his attention. Maxwell Fyfe really wrote the European Convention on Human Rights. It was the attraction of this profession that drew me, after serving as a solicitor for five years, to pay my 100 guineas to my pupil master and to enter on a different track as a barrister.

I played my part thereafter in civil cases, but more often in criminal cases, prosecuting, defending and later sitting on the Bench as a recorder. I was proud of the system in which I played such different roles. I was proud of the way in which justice could be achieved under the system that we had inherited over so many centuries. I am really sad today—a word that has been used by a number of people—that we seem to be coming to the end of that great tradition at the Bar. I know that my noble friend says no, but that is not how I see it. I agree with the noble Baroness, Lady Deech, who talked about the suffocation of the criminal Bar by these proposals. That is what I think it is.

I do not wish to repeat everything that has been said so well and ably, and with his usual eloquence, by my noble friend Lord Carlile. He has been an opponent on many occasions but I have also worked with him on a number of cases. We have worked together on some serious matters. I want to focus on the way in which entry to the Bar will be so curtailed by these provisions. When I go to see young people being called to the Bar at the various Inns of Court, particularly Gray's Inn, it saddens me to look at them and their parents, who are so proud of them for what they have achieved and how they have worked to get their degrees to become qualified. Finally, there they are in their fresh wigs and gowns, all ready to start on a career which has been so fulfilling in my own life—they are ready for it but there are no openings.

Today, if you wish to get a pupillage, you will struggle. Very properly, you receive a minimum level of payment, £12,000 a year, as a pupil in the common law field and criminal field. Last year, a commercial set advertised that it was prepared to pay £65,000 per year to a pupil. That, I think, illustrates the huge gap between the commercial Bar and the Bar with which I am familiar. I accept so much of what the noble and learned Lord, Lord Brown, said—that we deal with people's lives, and not just with money and contractual obligations and so on, as the commercial Bar does. We make a difference to people's lives in the profession that we follow. These young people who have come so far will not get the pupilages—and if they do, will they ever get the tenancies?

10.15 pm

I am now leaving the Bar for various reasons. One reason is that I do not want to be around to watch the struggle that will take place at the criminal Bar and family Bar as chambers disintegrate because there is not enough income as a result of the changes that we have seen over these past few years. I just do not want to watch it. I do not want to have to deal with the sort of disintegration that I foresee.

I appeal to my noble friend Lord McNally to think again about these measures that are being brought in today, to consult properly on them and to take the

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advice of people who know what they are talking about. When I see some statements from the Ministry of Justice it annoys me so much because it is clear that they do not know what happens at the coal face. They do not understand how the legal profession works. I ask him to think again and take back these measures.

Lord Bach (Lab): My Lords, I declare an interest, rather an old one, in having been a junior member of the Bar doing criminal law, pretty uniquely, for many years. I was calculating a few minutes ago that the last time that I practised was some 14 years ago. I am not a Queen's Counsel, although once or twice in this House I have been called that inadvertently—and much worse besides—and I have never sat. If anything, I speak as someone who was once a junior criminal barrister.

The House owes a huge debt to the noble Lord, Lord Carlile of Berriew, for tabling these two Motions. His speech and the speeches of noble Lords who have spoken have attacked these proposals with passion and in trenchant terms. I regret only that this important debate is being held effectively at dead of night, when the points made demand a greater audience at a better time of day, because the principles that they concern are of huge importance. All that I can say is thank goodness for *Hansard*.

My position on these regulations is fairly simple. Some cuts to criminal legal aid are justified; some cuts to VHCC costs are also justified. I had to make such cuts some years ago in criminal legal aid and VHCC rates. I do not resile from having to do that—any Government would have to do that at a time of economic difficulty. But frankly the percentage of cuts that is being proposed—the crude and absurd figure of 30%—seems to be much higher than any figure for which I was responsible and which can possibly be justified. I say "absurd", because quite a lot of the burden of this will not necessarily fall just on eminent Queen's Counsel who lead in these cases, but on junior barristers, either those being led or who sometimes in these cases are the sole advocates for a defendant. It will fall too on solicitors, which has not been mentioned: that is, solicitor advocates in court and solicitors who have to do the preparation for these very long cases. The damage that will be done to them has been described extremely eloquently already.

If my speech now becomes slightly less generous to the Ministry than others have been, I hope the House will forgive me, but one is left with a fairly strong impression that the Government really do not care very much any more whether there is a credible, high-quality legal profession practising criminal law, either now or, more importantly perhaps, in the future. We should not be surprised by what I call this recklessness. One must see it in context.

Anyone who has followed the Government's approach to legal aid from almost the day they came into office—a point made by the noble Lord, Lord Carlile—will know that almost immediately they removed the Legal Services Commission's grants for young trainee lawyers in social welfare law firms and advice centres. Anyone who has followed this approach will know that the Government do not care very much about the consequences of their actions, culminating in the tragedy—my word—that is Part 1 of the Legal Aid,

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Sentencing and Punishment of Offenders Act, which has already come close to destroying access to justice for hundreds and thousands of our fellow citizens.

To remove legal aid from social welfare law was tantamount to an attempt to kill it off. Was it ideological? It seems that way. Why would any Government have done something so ridiculous in financial terms and so monstrous in social terms, destroying a system of law that gave some access to justice, often in the form of fairly cheap legal advice, to poor people at the point in their lives when they needed it and in order that their lives could be put back on track? In exactly the same way that many noble Lords and noble and learned Lords have spoken tonight about how criminal law affects people's lives, we must not forget how those acts of legal

advice on housing or welfare benefits that have been given to people on legal aid also affected their lives in very important ways, often so that their lives could be put back on track.

It was a policy of supreme ignorance as well as utter recklessness. Now we see that Act in practice, this hard-nosed, ignorant approach to our law continues—all of it forecast in the debates that took many hours in your Lordships' House some time ago. Law centres have been allowed to close. The exceptional cases provisions of the Act are now so rarely allowed that they might as well not exist. The anecdotes and evidence as far as domestic violence is concerned are something that this House will really have to consider at some stage in the future—all the net results of this Government's approach to legal aid from the moment they were elected.

Here we are again. Anyone in legal circles, practising lawyers who thought that they could just keep quiet while the first stage of legal aid cuts was taking place, because all that was about was a few solicitors who did this kind of work or advice centres that advised in civil law, and that criminal law legal aid would be seriously touched, could not have been more mistaken. At least the Bar Council and the Law Society were very much part of the fight against the LASPO Bill and they should be commended for that. However, we are in this position now with this only the first of a number of orders that the House is likely to have to consider. The Government are not satisfied with the havoc—again, I chose my word carefully—they have already caused and are causing day by day and have turned their attention in a very real way to criminal legal aid and then potentially to destroying a great deal of the principles behind judicial review. All of which, no doubt, will come before us in due course.

These are all to be put into effect, at best, by statutory instrument. There is no primary legislation involved here, so the Government tell us. We have these big changes taking place with all the restrictions that statutory instrument legislation has for Parliament. All the while, this country's deserved and historic reputation for having a legal system that protected everyone in its own way and allowed everyone some access to justice is seriously threatened by a Government who—and I do not like having to say this—seem to have so little idea of what is actually important. Instead of treasuring our legal system they are in serious danger of demeaning it.

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Lord Beecham (Lab): My Lords, I rise from the lower ranks of the legal profession and many years ago was apt to brief members of the criminal Bar, few—with the exception of the late and much lamented Lord Taylor of Gosforth—of the eminence of many of those who have spoken tonight. I ought therefore to declare my interest which is, of course, registered. I also have, like the noble Lord, Lord Alton, a paternal interest because my daughter is a barrister. She also sits as a part-time deputy district judge but she is not at the criminal Bar.

In the earlier debate tonight, I raised the issue of how the Government go about or do not go about consulting on matters of great significance. We are in exactly the same position in relation to the present proposals. The noble Lord, Lord Faulks, on the other hand, perhaps to protect himself from his colleagues, threw the question at the Opposition regarding our stance. If he looked at the record he would have seen, as my noble friend Lord Bach's reply has indicated, that there were some cuts under the previous Government —indeed, my noble friend Lord Bach put through a 5% cut in fees. That is one-sixth of the present cut this Government is inflicting.

We made it very clear in discussions over the legal aid bill that there is a need to look at the cost of the whole system of justice, not to isolate a particular part like this and impose a massive swingeing cut on it. One can look, for example, at the Serious Fraud Office which unfortunately again is in the news, having again incurred a significant cost, perhaps because it is underresourced. In all events, there are other areas under the auspices of the Ministry of Justice that would repay attention and if we are looking for savings—and it is accepted that there have to be savings—then we ought to be looking not just at this end of the system but at the system as a whole to find sensible savings that would not impact on access to justice.

10.30 pm

In this case, we have proposals which have not been subject to consultation. They were not discussed with the Criminal Bar Association, the Bar Council, nor the Bar Standards Board. There is no impact analysis beyond

what passed for one—pretty flimsy as it was—in respect of the original *Transforming Legal Aid* White Paper, 18 months or two years ago.

To add insult to injury, as other noble Lords have pointed out, the Government have entered into the dangerous territory of, effectively, retrospectively changing people's contracts. That is, frankly, outrageous in any field. It is an appalling thing for a Government to do to the justice system, and I very much hope that they will look again at that. They have made a tentative move, because they tempered slightly the cuts in fees for transitional cases but, as others have pointed out, it still seems to be open to members of the Bar to decline to proceed with a reduced fee. As others have said, that seems likely to lead to increased costs.

The Minister must tell the House tonight how the Government will respond to the Bar Council's concerns as to whether any future changes will be made subject to proper consultation. One difference between this situation and that obtaining under the previous

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Government, to which the noble Lord, Lord Faulks, implicitly referred, was that those matters were discussed. They were negotiated. I dare say that it was felt that the Government had the stronger hand in the negotiation, but, nevertheless, there was consultation and a position was, however reluctantly, agreed. That is not the situation here. It has never been attempted in this case thus far. I hope that we may have some assurances from the Minister on that account.

The Secondary Legislation Scrutiny Committee has, as we have heard, made it very clear that it does not feel that the Government have made their case for those changes and that they should do so. Others have pointed out that it is wrong just to cite the figures, and the noble Lord, Lord Carlile, referred to the fee figures as being gross and not referring to the fact that there are substantial overheads. I think that he said that VAT was included; he may be mistaken in that respect. In any event, as far as savings are concerned, it should be noted that counsel will be paying tax. Counsels of the eminence of the noble Lord, Lord Carlile, will be paying tax at 40%—hopefully, a little higher, in due course. The net savings to the Exchequer, in the bald assertions of the documents, do not refer to the fact that a substantial loss of tax revenue would also occur, so the net savings to the Exchequer are not as large as the Government might claim.

As the Criminal Bar Association points out, an inquiry is going on at the moment commissioned by the Government—the Jeffrey inquiry into criminal advocacy. One might have thought that a sensible Government looking at that problem would have awaited the outcome of the commission's work; the Government have chosen not to do so. Will the Government look at fees again in the light of what the commission produces? It would have been better to have waited; if they are insisting on going ahead with the changes now, will they review the situation in the light of the Jeffrey inquiry's report? I assume that that will take some time. Will they also look at the impact of these changes not only on costs but on how cases are handled, the length of time that is taken and the problems that may arise by eminent, senior counsel refusing to undertake that work?

The longer-term effects on recruitment to the service, to both prosecution and defence counsel in complex cases and, later, into the judiciary, have been touched upon by other noble Lords. These effects will not become apparent immediately but there is a real concern about how those things might be affected.

The discussion tonight thus far has been—for understandable reasons, given the history of those participating in the debate—exclusively devoted to the impact of these proposals on the criminal Bar. That is a major issue, but there is another group affected by the regulations: expert witnesses. We had some debate, during the discussions on LASPO, about the cuts for expert witnesses of broadly 20%. This is differentially higher in London, because London expert witnesses are, in many cases, being paid significantly less than those in other parts of the country. They cover a wide range of professional services, many of which apply to both criminal and civil cases.

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I have spoken with somebody who is very active in representing experts who give evidence in the family courts, but the same people often also undertake criminal work. She told me that, in the last few days, she has spoken to two medical experts who will no longer undertake work in the criminal courts. She has spoken to a solicitor who is finding it extremely difficult to find expert witnesses to give evidence in the criminal court. He quite understands that and thinks it will be increasingly difficult to find experts. We must not forget that this is not just a matter for the Bar but for people who play a crucial part both in very complex cases and in more general ones, because the cut applies whatever level of case they are operating in. That can only impact on the way the system works.

As ever in this House, this debate has involved a huge amount of experience at the highest level of our justice system. However, it is not just this House that is indebted to the noble Lord, Lord Carlile, for raising these problems and initiating the debate. Everyone who has an interest in our system of justice is indebted to the noble Lord and other noble Lords who have spoken. That means everyone, because all of us have an interest in our system of justice and securing access to it.

I have referred before to the book *The Pursuit of Justice* by the noble and learned Lord, Lord Woolf. The pursuit of justice is what those of us who have participated in tonight's debate—and the Minister—are interested in. The pursuit of justice will be made more difficult if the Government press on relentlessly with the changes we are debating tonight. There is still time for them to think again before they inflict great damage on the system in which all of us have, hitherto, taken such pride.

The Minister of State, Ministry of Justice (Lord McNally) (LD): My Lords, like the noble Lord, Lord Bach, I have, on a number of occasions, been promoted above my abilities in terms of legal qualifications. I have been referred to this evening as "learned" and I was recently introduced, at a conference, as "Lord Justice McNally". My more mundane task this evening is to set out the Government's position on the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013 and the Criminal Defence Service (Very High Cost Cases) (Funding) Order 2013. Both these instruments were laid before the House on 1 November 2013.

Before I get into the detail of the two instruments, I want to set the legal aid transformation in context, as was requested by the noble and learned Lord, Lord Hope of Craighead. The need for reform of legal aid-funded services to ensure a cost-effective, sustainable legal aid system is recognised by all the major political parties and has been the subject of debate for a decade or more. It was the Labour Party that instituted the Carter review. It was the Labour Party that made cuts in legal aid prior to 2010 and promised further cuts in its 2010 manifesto. During the passage of LASPO, it said that it would not cut civil legal aid but would cut criminal legal aid. Now, it does not like the legal aid cuts. I still wait to hear whether the Labour Party would restore the legal aid cuts if it were to come into office in 18 months' time.

The fact is that changes in technology and its increasingly fundamental role in the functioning of the criminal justice system demand the kind of changes to working practice and business models seen throughout the public and private sectors in recent years. The introduction of alternative business structures and an increasingly well informed customer base are examples of changes that present their own challenges, and which the legal professions must meet. Those changes are accompanied by the fact that the number of businesses providing criminal legal aid services now exceeds demand for such services. To put it bluntly, there are too many lawyers seeking the work available. New entrants to the market, new technologies, new working methods and oversupply in relation to demand are all factors that force change in any industry, sector or profession. I urge the Bar to recognise that the change is necessary to deliver efficient and effective legal services in new and innovative ways.

For our part, the Government recognise that the services the profession delivers are a vital component of our legal system and, where necessary, ensure access to justice and equality before the law. That is why, looking more widely, the Lord Chancellor has asked Sir Bill Jeffrey to review the provision of independent criminal advocacy in the courts of England and Wales, as just referred to. That review is intended to consider the experience, skills and future structures that might best support the continuing provision of quality, independent advocacy services. However, alongside the need to ensure access to justice and a healthy,

sustainable legal sector, the profession must also recognise that the Government are obliged to seek the best possible value for money from the legal aid budget.

I turn now to the instruments that are the subject of this debate. They apply a reduction of 30% to the legal aid fees paid to litigators and advocates in what are known as very high cost criminal cases, although I will accept the description of them by the noble Lord, Lord Carlile, as being very high complexity cases as well. This will save £19 million per annum in a steady state. The noble Lord, Lord Carlile, will be familiar with these cases; as he told us, he has undertaken this sort of work in the past. For the benefit of others, I should explain briefly that VHCCs are the longest and most expensive Crown Court trials funded by legal aid. Under the current system, they are those cases which are expected to last more than 60 days at trial; the overwhelming majority of them relate to fraud offences of one type or another.

These cases are managed by the Legal Aid Agency under contracts with service providers, with work being agreed in three-month stages in advance as the case progresses. Typically, these cases are complex and run for a number of years; the amount of preparation involved can be enormous. Although the debate today has concentrated on fees in VHCCs, I should also mention, for completeness, that the remuneration regulations also make two other changes to the criminal legal aid scheme. As the noble Lord, Lord Beecham, indicated, they reduce fees paid to most expert witnesses involved in legally aided criminal cases by 20%. They also amend the category of work in which a provider of legal aid services can claim a fee. This is a consequence

of the changes in the scope of criminal legal aid for prison law, which is being implemented through separate secondary legislation.

10.45 pm

Noble Lords will know that this Government have given priority to repairing the public finances. Every part of government has had to face the brutal reality that we are not as well off as we thought we were and we cannot borrow our way out of trouble. The Ministry of Justice will see its budget reduce by nearly one-third between 2010 and 2016. No area of our spending has been immune from scrutiny in these circumstances. Our legal aid system is a major part of the department's budget, and it is therefore appropriate that we make savings there, too. Sometimes, when I hear some of the heartbreaking stories about the legal profession, I think of the 20,000 people that I have had to see go from the Ministry of Justice in the past three years as part of that programme as well.

The policy implemented by these instruments was the subject of public consultation for eight weeks. *Transforming Legal Aid: Delivering a More Credible and Efficient System* set out a package of reforms intended to ensure a sustainable, efficient and credible legal aid system. Around 16,000 responses were received from representative bodies, practitioner and other organisations, individual members of the judiciary—

Lord Carlile of Berriew: My Lords—

Lord McNally: It is very late and noble Lords have all had a very good time.

Lord Carlile of Berriew: It is very late, but this is an important debate, as has been made clear. I have one question to ask. If my noble friend thought it right that there should be an extensive consultation on the generality of legal aid, why was there no consultation on VHCC cases?

Lord McNally: This is the first time that VHCC cases have been cut by this Government. I do not think that they were cut by the previous Government. Were they? I stand corrected.

There was a consultation and this has not come out of the blue. I have been talking to the Bar for three and a half years about these cuts.

I hope we do not get an interruption from my noble friend Lord Phillips. He came in very late.

Lord Phillips of Sudbury (LD): I was not going to.

Lord McNally: Okay, I am sorry—not guilty.

Lord Phillips of Sudbury: Does the Minister want me to?

Lord McNally: No. These matters have been discussed over a long period. We received 16,000 responses from representative bodies, practitioners and other

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organisations, individual members of the judiciary, Members of the House of Commons and the House of Lords, individual solicitors and barristers, and members of the public. The majority of responses did not support the Government's original proposals for reform, although there was some support for particular measures. Some, including the Law Society, specifically acknowledged that VHCCs were an area where the Government might be able to make savings.

As we said in responding to consultation, the Legal Aid Agency analysis of fraud VHCCs shows that the average value of a contract is £1 million and such contracts run for three or four years on average. Even with a 30% reduction in fees VHCCs will remain high-value, long-duration cases that, because of the way these cases are managed with regular phased payments, bring certainty of income for providers for the extended period in which they are instructed in these matters. That is why the Government believe that a reduction in fees is sustainable in this area.

We believe it is right that our reductions should affect advocates who receive higher levels of legal aid fee income, rather than those who are on much lower fee income. In 2012-13, more than half of those with fee income of more than £200,000 worked on VHCCs, compared with just 20% of those with fee income of between £100,000 and £200,000. Just 4% of barristers who earned below £100,000 worked on a VHCC in 2012-13.

Concerns have been raised about the impact of this fee cut on existing contracts. It is precisely because these cases run over a number of years that we must ensure that the ongoing fees represent value for money. We are therefore reducing rates in existing contracts where cases are at a relatively early stage and where the ongoing costs are likely to be significant. I cannot give any assurances about changing the position that we have taken on this because we are under responsibilities to make these cuts.

We have taken a fair and balanced approach to applying the new rates to existing contracts. The new rates do not apply to contracts where cases were at trial on 2 December or those that, before 2 December, were set to come to trial on or before 31 March 2014. These include cases that had a date set at any point in the past for trial on or before 31 March 2014 but that date has been vacated and a new date fixed, even if that trial date is after 31 March 2014; where the trial has taken place but there remain outstanding proceedings, such as confiscation proceedings; and where the original trial has concluded but a retrial will take place, even if the retrial is after 31 March 2014.

A number of points have been raised but I am conscious of both my time limit and the House's. I have referred to the fact that VHCCs represent a tiny number of total cases; fewer than 1% of the total Crown Court trials over the past year were VHCCs. I understand the points that the noble Lord, Lord Carlile, was making about the returning of cases, but we will just have to see how this works out. I do not want to bandy figures about.

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I hope that the Bar itself thinks very carefully about how we navigate through these matters. I believe that when a very distinguished profession talks about going on strike, it crosses a Rubicon that is very difficult to re-cross.

As for the idea of funding legal aid from restrained assets, it may be that one or more parties might put that as a suggestion in their manifesto; maybe we will see that, although I remember the debates in this House about removing jury trial from High Court cases. We have had lots of suggestions but none with the immediacy with which we can address the issue.

I accept the point that was made about the present system being bureaucratic and the hourly rate-based system not being ideal. I cannot remember which noble Lord it was—was it the noble and learned Lord, Lord Woolf?—but one of them got very close to suggesting one case, one fee, which was one of the first things rejected by the Bar when we were having those negotiations that apparently have never taken place. The fact is that we have explored alternatives, and I have no doubt that ideas will continue to be floated.

I have said to my own party and I say to all three parties that, after what has been a very painful period, we should look at how we handle legal aid. As we have said so often, although to listen to some speeches you would not believe it, since 2010 to when this exercise is finished, which is some three or four years away, legal aid will have been cut from just over £2 billion to £1.5 billion. That leaves us with a legal aid expenditure about which I will not bandy words as to whether it is the most generous in the world, but it is an extremely generous allocation of money by the taxpayer. It is incumbent on all parties to see how we can look at that kind of sum and get a better and more efficient outcome from it. That requires a willingness to contemplate change and flexibility from all parts of the legal profession. I would hope that we can look at it in that way.

I hear what my noble and leaned friend Lord Mayhew said about the sacrifices that the high-cost barristers make in losing other business and being out of the loop. However, even with a 30% reduction in fees, VHCCs will remain of high volume and long duration, with regular payments that bring certainty of income to providers. We believe that it will continue to attract lawyers once they come to see the points that are on offer.

There is no sign of a lack of young people entering the profession. We all wish the daughter of the noble Lord, Lord Alton, well in it; she certainly knows where to come for advice.

We are looking at the review under Sir Bill Jeffrey. We cannot accept all the existing contracts but we have, as my noble friend Lord Carlile knows, tried to widen that as far as possible. We had to bring in a cut-off point somewhere. Noble Lords will have heard in many other professions where they have had responsibility the suggestion, “Why don’t you put it off?”, or, “Why don’t you have a review or do it some other way?”. I wish that both the Treasury and the Government worked differently than they do. The noble Baroness, Lady Deech, has the idea that you can, as it were, go across the meadow picking flowers

from here and there to finance things. The fact is that my department, as part of an overall spending review in response to a very real economic crisis, has had to take across the board cuts of 23% in 2010, a further 10% after a further review in 2012, and a further 1% in this review. We cannot go plundering other parts of Whitehall to make up the difference. We have to make hard, tough decisions about our expenditure at this moment, and try to make them in the fairest and broadest way that we can. Somebody asked whether we were also targeting other earners. The figures that I have, and I will confirm this, are that the cuts that we have consulted on were of about 7% on average. Of course we have targeted the higher earners.

Noble Lords made a number of points and I have tried to explain the context. We have had a very frank debate. I will close by saying to the noble and learned Baroness, Lady Scotland, that my right honourable friend the Lord Chancellor is well aware of his responsibilities and those of his office. I am sure that he will read the report of this debate in *Hansard* very carefully. I hope that in the mean time the noble Lord, Lord Carlile, will withdraw his Motion.

11 pm

Lord Carlile of Berriew: My Lords, it is now 11 pm so I shall be very brief but I do want to reply to the debate. Twelve out of the 13 Members of your Lordships' House who have spoken in this debate have spoken consistently with the same thread, criticising the Government for the introduction of these statutory instruments. As I listened to those contributions, I reminded myself of what a privilege it is to be a Member of your Lordships' House. There were magnificent speeches, many of them from the Cross Benches, three from noble and learned Lords who have held very senior positions in the judiciary, and two from noble and learned Members of this House who have been Attorney-General on opposite sides, with very different types of practice in their experience.

I believe that your Lordships have provided my noble friend the Minster with the finest debating tutorial he could ever have had and that the Lord Chancellor could ever have had in how wrong the Government's decision to introduce these statutory instruments has been.

Lord McNally: My noble friend interrupted me and I shall interrupt him just once. It only for this reflection: yes, we have had a good debate and I do not doubt the eminence of those who contributed to it, but I have said it before: the legal profession must not exist in a bubble and congratulate or commiserate with itself. I sometimes wish that this House was full to the gunwales so that we could have a proper debate on these matters and see whether this unanimity of view about the sufferings of the legal profession was quite so evenly spread as a debate like this might sometimes indicate.

Lord Carlile of Berriew: My noble friend is a much liked, popular and witty Member of this House and I will not rise to the uncharacteristic and unjustified provocation of that intervention. I was about to say that I hope that the Lord Chancellor himself will read

every word of this debate and will take note of what I think I described earlier as the finest debating tutorial one could have. If my noble friend is saying that all that has happened in this House in the past couple of hours has been a demonstration of self-interest by lawyers, one or two non-lawyers, judges and others who are acting in concert to defy the Government then, in my view, that demeans what has been a magnificent debate. I thank all those who have taken part for giving me the privilege that I described earlier.

I have some sympathy for my noble friend the Minister who sought to respond to the debate. He read out a familiar litany, but it was a litany without a message save the message of mistake. He allowed himself to stray into the suggestion that there had been consultation about the VHCC changes. He sought to elide into the VHCC changes consultation that had taken place on completely different legal issues. It is important to emphasise at the end of this debate that there was no—zero, zilch—consultation on these VHCC changes, and that is fundamental to the complaint that the Bar makes about the high-handed way in which this unilateral breach of contract has occurred.

My noble friend said that the Government were "under responsibilities to make these cuts"—those were his very words; I noted them as he said them. However, with great respect to my noble friend, that phrase is meaningless. The Government have the responsibility to get it right, not just to make cuts for the sake of making them. He said in relation to what is going to happen to these VHCC cases, in which there are now no advocates, that "we will just have to see how this works out". That took my breath away. It is an acceptance that there are now cases with no advocates, that there is no plan B for these cases and that the promises that the Government made to everyone that it would all be all right on the day have simply been shown to be wrong. I would never accuse my noble friend of being incoherent but the brief that he had was full of incoherence, and we saw it displayed this evening.

At this late hour, I do not propose to divide the House but I believe that I do not need to do so. This debate has been well worth having because of its overwhelming effect of showing that the Government are wrong in what

they have done with these cases and that the explanation which my noble friend sought to give just did not hold water at all. With the permission of the House, I beg leave to withdraw the Motion.

Motion withdrawn.
