# PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

## Public Bill Committee

# JUDICIAL REVIEW AND COURTS BILL

*Second Sitting*

*Tuesday 2 November 2021*

*(Afternoon)*

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**Saturday 6 November 2021**

**The Committee consisted of the following Members:**

*Chairs:* † Sir Mark Hendrick, Andrew Rosindell

† Barker, Paula *(Liverpool, Wavertree)* (Lab)
† Cartlidge, James *(Parliamentary Under-Secretary of State for Justice)*
† Crawley, Angela *(Lanark and Hamilton East)* (SNP)
† Cunningham, Alex *(Stockton North)* (Lab)
† Daby, Janet *(Lewisham East)* (Lab)
† Fletcher, Nick *(Don Valley)* (Con)
† Hayes, Sir John *(South Holland and The Deepings)* (Con)
† Higginbotham, Antony *(Burnley)* (Con)
† Hunt, Tom *(Ipswich)* (Con)
† Johnson, Dr Caroline *(Sleaford and North Hykeham)* (Con)
† Longhi, Marco *(Dudley North)* (Con)
McLaughlin, Anne *(Glasgow North East)* (SNP)
† Mann, Scott *(Lord Commissioner of Her Majesty's Treasury)*
† Marson, Julie *(Hertford and Stortford)* (Con)
† Moore, Damien *(Southport)* (Con)
† Slaughter, Andy *(Hammersmith)* (Lab)
† Twist, Liz *(Blaydon)* (Lab)

Huw Yardley, Seb Newman, *Committee Clerks*

**† attended the Committee**

**Witnesses**

Richard Leiper QC

André Rebello OBE, Senior Coroner, Liverpool and Wirral area

Sara Lomri, Deputy Legal Director, Public Law Project

Ellie Cumbo, Head of Public Law, The Law Society

Louise Whitfield, Head of Legal Casework, Liberty

Louise Finer, Head of Policy, Inquest

Stephanie Needleman, Acting Legal Director, Justice

Steve Valdez-Symonds, Programme Director for Refugee and Migrant Rights, Amnesty International UK

Dr Joe Tomlinson, Senior Lecturer in Public Law, University of York

Aidan O'Neill QC

Michael Clancy OBE, Director of Law Reform, The Law Society of Scotland

# Public Bill Committee

*Tuesday 2 November 2021*

*(Afternoon)*

[Sir Mark Hendrick *in the Chair*]

## Judicial Review and Courts Bill

2 pm

*The Committee deliberated in private.*

**Examination of Witnesses**

*André Rebello OBE and Richard Leiper QC, gave evidence.*

2.5 pm

**Q35 The Chair:** I remind Members that this session is being broadcast. We will now hear oral evidence from André Rebello OBE, senior coroner for Liverpool and Wirral and honorary secretary of the Coroners' Society of England and Wales, and from Richard Leiper QC. We have until 2.45 pm for this session. I welcome the witnesses. Would they like to introduce themselves, starting with Richard?

***Richard Leiper:*** My name is Richard Leiper QC. I am a specialist in employment law and related civil matters. I am also chair of the advisory council of the litigant in person support strategy. In that capacity, I was part of a shadow online rules committee that was chaired by Mr Justice Langstaff.

***André Rebello:*** I am André Rebello. I am the senior coroner in Liverpool and the Wirral and the honorary secretary of the Coroners' Society of England and Wales, the judicial association for coroners. I have been a coroner for over 28 years, and I welcome, with some caveats, all the provisions relating to coroners in the Bill.

**Q36 Andy Slaughter** (Hammersmith) (Lab): I have one or two quick questions on coroners. Some people have commented that the provisions in the Bill are fairly modest, particularly in light of the recent Justice Committee report, which was debated last week and which suggested that progress could have been made in quite a number of other areas. Probably the suggestion that received most attention concerned legal aid, specifically in relation to bereaved families at inquests where state parties are represented. Those are seen to involve an inequality of arms. Is that something that you have experienced, and do you think that there is merit in that suggestion?

***André Rebello:*** A coroner's jurisdiction is inquisitorial. It is an inquiry; it is not litigation. In the vast majority of inquests in which the state is represented—apart from some very high-profile inquests—those representing the state are actually representing, in effect, a body corporate, to provide a voice to an organisation. They often facilitate the proceedings, assist the court and, more often than not, assist bereaved families to understand the issues before the court.

**Q37 Andy Slaughter:** May I press you on that? It sounds to me that your answer is that legal aid for bereaved families in such inquests may not be necessary, even if it was desirable. However, these are often complex matters and, although I am sure that legal counsel will do its best to assist the coroner's court, they also have their clients' interests to look after. Whose job is it—is it your job as a coroner?—to help those who have no legal experience and who are in difficult and perhaps emotional situations, as relatives of the deceased, to understand proceedings and to represent their best interests?

***André Rebello:*** As you will recall from the Justice Committee hearings with the chief coroner, the deputy chief coroner and myself, more than 95% of inquests are heard by coroners sitting alone. The coroner has an enabling role, and it is the coroner who carries out an inquiry. Only the coroner can call evidence, and you will also recall that the coroner's court is the only court where no one actually brings a case to prove. We are led by the evidence, and the coroner's role is to level the playing field.

**Q38 Andy Slaughter:** Except that in some cases there will be pro bono representation, or there may be privately paid representation. Is this a level playing field? I am talking about the minority of cases where there is representation.

***André Rebello:*** Where there is representation, you should recall that from section 41, where the properly interested persons are identified, they have rights with regard to disclosure of advance information, but thereafter their duty is to assist the court in finding the true facts as to who the deceased was, when and where they died, and by what means and in what circumstances they came by death in certain cases. That is all done without determining criminal liability by a named person or any question of civil liability. This is an inquest, not litigation.

**Q39 Andy Slaughter:** Are there any other recommendations of the Select Committee which are not in the Bill at present which you would like to see in the Bill? There were quite a number to do with appeals, oversight, the national service, the inspectorate and complaints—matters of that kind. Was there anything in there that caught your eye?

***André Rebello:*** Lots of things caught my eye, however, I am a judge and not the Executive. It must be for the Executive to make policy. However, I will reiterate the issue of the national shortage of pathologists desperately needs addressing. The fees have not been increased for over 20 years and that is something which must affect the number of pathologists available to facilitate coronial investigation.

**Q40 Andy Slaughter:** And you will have seen the Government's response to that?

***André Rebello:*** I have seen the Government's response to that. However, being at the coalface and knowing the lack of pathologists across the country, something needs to be done.

**The Chair:** Richard, do you wish to respond to this question?

***Richard Leiper:*** No thank you.

**Q41 Antony Higginbotham** (Burnley) (Con): Mr Leiper, these questions are probably for you. One of the things that the Bill does is introduce an online procedure rule committee. I believe you sat on a shadow version of

such a committee. Can you give us your insight into what kind of efficiencies this might bring and where you think the early focus of that committee should be in its first couple of months after inception?

***Richard Leiper:*** One of the things that people need to appreciate about the conception here is how broadly it could be applied. It is intended or, at least, it empowers there to be rules which cross employment tribunals, first-tier tribunals, all civil proceedings and all family proceedings, and it would need to be dealt with on a very narrow incremental basis.

I see two particular issues. First, there is not an existing infrastructure for an online process. Essentially, this rule committee would be laying rules which could be seen to tread on the toes of the existing rule committees for civil procedure, for family law, for employment tribunals and it would set down rules which somehow put in place the process which, for example, would tread on the toes of an employment tribunal—so, how a claim was initiated.

The online rule committee would be setting a rule which provided a wholly new way of a process being initiated. That would need the buy-in and support of the tribunal process, because there is not, as yet, the underlying infrastructure. That is in contrast, for example, to the civil procedure rule committee, where the entire infrastructure of the civil court process is there, and the judges know where they fit in and what they are supposed to be doing. Here, this has judges being told that there is a new process which has an online procedure, and they will not have a clue how that is supposed to operate.

If you start broadening it, it becomes cross-jurisdictional. For example, someone who wants to bring a claim against their employer that involves a breach of contract claim and an unfair dismissal claim, but one of which would normally go to a civil court and one to an employment tribunal. How can that be pulled together? Who would be the judge that dealt with it, and how would the procedure move forward? These are enormously difficult questions, which brings me to a second point.

The current composition of the committee is a total of 6 people. That is in contrast to the civil procedure rule committee, which has 18 members. The family procedure rule committee has 18 members. To me, given the potential breadth of the rule that could be set by this committee, having one senior judge, a couple of other judges, one practitioner, one layperson and one computer person is simply not enough. That is partly because the scope for the procedures would be trespassing on areas which it is likely that no member of the committee would have any knowledge of.

For example, I have no knowledge at all about family court proceedings—how they begin, how they proceed, or what the interests of the various parties would be. Yet, if there is just one practitioner, who could be a barrister, a solicitor or a legal executive—each of whom have different perspectives on how the system operates, how it impacts on clients, other parties and so forth—there will not be the wealth of knowledge, even with consultation with people who do know, to enable effective online rules. The composition of the committee is my single greatest concern.

**Q42 Antony Higginbotham:** Can I just follow up? I understand what you are saying about treading on toes, but it is not also the case that we must ensure our ways of working evolve as technology evolves. To your point, that is why it is important, as the committee establishes itself, that it does so in a careful and considered way—not to step on toes, but to take the best of new ways of working and carry the profession with it.

***Richard Leiper:*** I could not agree with that more. I think it is exactly the right concept to have. It will help litigants. There is provision so that those who do not have the means of doing things online would have the alternative of doing so through more traditional mechanisms, but I completely agree with the process because it should simplify the system to enable people to access justice more freely.

I could not agree more with the underlying concept. It is more a matter of ensuring that the infrastructure is in place to carry that through, so that it can become effective. That has two parts. First, it means having a properly composed committee with the expertise that can be brought to it and, secondly, having the infrastructure behind it so that it is not just a rule committee setting what needs to happen on high, but it gets the buy-in of everyone who will implement it and of how it will operate.

**Q43 Alex Cunningham** (Stockton North) (Lab): Mr Leiper, you talked about the size of the committee being inadequate at six members. What is your opinion about how we build that particular committee? Are you suggesting 16 members like other committees or do you think there is a middle ground? Who should the committee comprise?

***Richard Leiper:*** I am not one for large committees, which can be counterproductive, but we are talking about an enormous amount of work that will need to be undertaken across a wide range of practice areas. I suggest that the composition was akin to that of the civil procedure rule committee and of family law, so having more judges and more practitioners. The committee has only one person who can bring the knowledge of the lay-advice sector, whereas I think both the civil procedure rule committee and the family procedure rule committee each have two lay members. It needs a wider composition akin to those of the existing rule committees—which seem to operate perfectly successfully—where people are able to bring together the knowledge and direction of what they want to achieve through the online rule committee, but also bring particular practice or individual knowledge to the development of those rules.

**Q44 Alex Cunningham:** You said that a tremendous amount of work needs to be done, but that you accept that this is a good idea generally. What safeguards do you think we will need to put in place in the short term to ensure that justice is not adversely impacted as this is developed?

***Richard Leiper:*** I guess that the biggest risk is of technological failure of some kind, because this is wholly dependent on having the underlying technology operating successfully. If there is a failure, then it could lead to disaster. It is about ensuring that there is the funding and knowledge behind it to be able to support a process that would need to be implemented in a small area at first—I would think—ensuring that it was successful, and then gradually broadening it so that one could have confidence in its effectiveness. It is about having the comfort that there is going to be the technological and financial support behind it to ensure that it works.

**Q45 Alex Cunningham:** Thank you. I have one final question. What do you think about the powers provided to the Lord Chancellor by the OPR provisions in the Bill, in clauses 19 to 26? Do they cause a democratic deficit?

***Richard Leiper:*** I suppose there are two answers to that. One is yes. The other, which is my personal view, is that it seems to reflect the processes that are already in place into the existing procedure rule committee. This appears to have been the accepted approach since about 2005, and it seems to be replicating that. It does seem to give a substantial power to the Lord Chancellor in this regard, which I personally find surprising. However, it seems to be the way that things have operated for some time.

**Alex Cunningham:** That is very helpful, thank you.

**Q46 Dr Caroline Johnson** (Sleaford and North Hykeham) (Con): I wanted to ask a question about online procedures, particularly the coronial inquest where you have said that 95% are carried out by a coroner sitting alone. For the 5% that require witnesses, how does being able to hold inquests online make the system more efficient?

***André Rebello:*** Perhaps I misspoke. When a coroner sits alone, the coroner still hears evidence, and witnesses still come to court. It is just that there is no representation for any of the interested persons; the coroner hears evidence and makes finding and determinations. There is a real issue, though, with remote hearings in that, although many people have found advantages with them, the coronavirus easements did not apply to coroners' courts. Coroners' courts have only been able to work through remote hearings by using rule 17 to receive video evidence.

The provisions in this Bill are to bring coroners' courts in line with other courts. However, there is a real issue in regard to the Equality Act 2010; not everyone can participate in the rule of law and in open justice through remote hearings. Any judge presiding has to be very careful to make sure that everyone can participate. I suspect there are more disadvantages in remote hearings than in having everyone in court, where you can fully appreciate how people are following the proceedings. In the 95% of cases where there is no representation, the coroner still hears evidence. It is not as if the coroner is just reading statements; evidence is still heard.

**Q47 Dr Johnson:** Do you think there are enough safeguards to be sure that people are able to participate, and alternatives if they are not?

***André Rebello:*** With regard to remote hearings or with regard to—

**Q48 Dr Johnson:** You said that some people cannot participate in remote hearings.

***André Rebello:*** No. Basically, with remote hearings, there are all kinds of AV infrastructure challenges with regard to recording what has been said, and people with hearing difficulties being able to follow Zoom or Microsoft Teams. Technically it is quite difficult. It is also difficult for a coroner to evaluate evidence, because they do not have the people in front of them to judge.

Further, there is a danger with remote hearings that we will lose courts. If people can have all hearings remotely, there is a danger that we may not have a court infrastructure in future, for when justice needs to be seen to be done. The correct procedure in my view is that most things should be dealt with in court, and remote hearings should be used where necessary, but that should not become the norm.

**Q49 Dr Johnson:** Can you give an example of where it might have been necessary? I have given evidence to coroners' courts, in my capacity as a doctor. I remember one specific case where the doctor who had been involved with the child at the time of death was overseas and refused to return for the court. As someone cannot be extradited for the purpose of a coroner's court, their evidence was not heard. Would allowing online processes enable that individual's evidence to be heard? Does it apply to evidence being given virtually from overseas?

***André Rebello:*** Under the Coroners and Justice Act 2009, the coroner can receive evidence by video, under rule 17 of the inquest rules. I have certainly received evidence from Australia and, I think, South Africa, with doctor witnesses who had moved overseas and then given evidence. I see no reason why coroners should not receive evidence from overseas. However, if people can attend, it is important, because it is a lot easier to give an explanation about the means someone comes by the cause of death, if everyone is in the courtroom, and everyone can follow the proceedings.

If Parliament brings in remote hearings for coroners and brings them in line with the Courts and Tribunals Service courts, the Chief Coroner will have to issue some very firm guidance on how and when it is used, because I do not believe it should become the norm.

**Q50 Angela Crawley** (Lanark and Hamilton East) (SNP): Much has been said about the importance of having people present when looking into such an important matter, which I understand, but there is an accessibility issue. One thing we have learned throughout the pandemic is that many people have had the advantage of accessibility and the ability to attend. Would it not be a real advantage, in some instances, to have a hybrid performance, so you could retain the formal court setting, with people both present and remote, if required?

***André Rebello:*** Absolutely; if someone needs to attend court and they cannot attend other than remotely, that is fine. At the moment, the legislation relating to coroners allows witness evidence to be given remotely only under rule 17 of the coroner's inquest rules. The easements that would be provided by the Judicial Review and Courts Bill would enable coroners' courts to be far more flexible, with people appearing remotely, and also broadcasting. At the moment, under section 41 of the Criminal Justice Act 1925, it is unlawful for a coroner's court—or any court—to broadcast. The purpose of remote hearings is for participation.

**Q51 Marco Longhi** (Dudley North) (Con): I have a question for Mr Rebello. What is your view on coroners having the power to hold inquests without a hearing, particularly in non-contentious cases?

***André Rebello:*** I have no problem with that proposal, that being another tool in the bag, as and where it is necessary, that is needed. My own preference is to go into court and record the hearing that I would have had, so that people can apply for a copy of what has been received and they can actually hear what has occurred.

Certainly, it takes a lot longer to write down a considered decision than to go into court, go through the evidence orally and speak to it. Something that could take me five to 10 minutes in court, could take me an hour and a half to write down the issues, the law being applied, the rulings, the findings, determinations and conclusion, and then all the reasons which you would need for a considered judgment. That would be far, far more time consuming and may well take up far more coroners' time. I appreciate not all coroners have access to courts all the time, and they cannot just go into court, so this is a very useful proposal, which I am sure will be used as and when needed.

**Q52 Tom Hunt** (Ipswich) (Con): We understand that the Chief Coroner will be providing guidance to coroners on the proposed five measures in the Bill. Do you think that that will ensure consistency of practice across coroner areas, given that coroners are independent judicial office holders and that judicial decisions are for them to make?

***André Rebello:*** Absolutely. We should bear in mind that coroners are judges like any other judge, and every judge is an independent judicial office holder. No other judge, other than a properly constituted appellate court, can tell another judge how to decide something or do something. However, it is important to have guidance to ensure consistency not only between coroners, but internally for each coroner. What you have to bear in mind is that every coroner determines the facts of the case on the very facts that are before the coroner. No two cases are actually the same. If the Chief Coroner is minded to issue guidance, that can only help to make these things work.

When you look at the provisions, the ability to merge coroner areas is something that has been long needed, because at the moment you can only merge unitary authorities, not parts of those authorities and that has delayed the coroner reform project. It is sensible that the disapplication of reportable deaths under covid continues because we are not out of the pandemic. On remote hearings, we should be brought in line with the Courts and Tribunals Service, with some guidance to ensure consistency, so that that facility is used where necessary, but not overused, because the rule of law and open justice is very important and people should be able to attend to see justice being done.

As we have just discussed, written inquests, without going into court, will have their need when coroners are struggling to get a court. The ability to discontinue cases when we have not ordered a post-mortem is long over needed. Occasionally, we will have a GP abroad who knows the cause of death and there is no one else qualified to give a cause of death. The only way the coroner could open up the facility to discontinue that case would be to order an unnecessary post-mortem. The proposal will enable coroners to open an investigation and when the GP returns, to discontinue and have the death registered.

That does raise another issue that the Bill does not cover, and I am sure that Members will be aware that the sunset clause in the Coronavirus Act 2020 expires in March next year. The law used to be that a doctor had to treat a patient in his or her last illness and, relying on regulation 41 of the births and deaths regulations, had to have seen the patient within 14 days of death, or seen the body after death. The Coronavirus Act gave an easement, enabling 28 days to be used, whereby any doctor had seen the patient and any other doctor could see the body after the death. It looks as if that part of the Coronavirus Act will expire before Parliament has a chance to bring into force the medical examiner and death registration provisions. There will be a big lacuna in the work coroners are carrying out. If doctors are not seeing patients face to face and cannot issue death certificates, far more cases will be unnecessarily reported to the coroner. If there is any way to continue that coronavirus easement on death certification, it would be greatly appreciated, particularly by the bereaved.

**Q53 Janet Daby** (Lewisham East) (Lab): According to Transform Justice:

"Online pleas compromise open justice principles by removing the opportunity for the plea hearing to be witnessed/observed."

It sounds like you may agree, Mr Rebello. To what extent do you think online pleas are compatible with the principles of open justice?

***André Rebello:*** I am not sure that is a matter for a coroner, because I deal with inquisitorial proceedings in which there are no pleas.

***Richard Leiper:*** This might relate to the Crown court part of the Bill, which I do not think either of us deals with. Online pleas would be an aspect of the criminal process.

**Janet Daby:** Okay, I will leave that for session 6.

**The Chair:** Three questioners wish to be called a second time. I will call them in the order in which they indicated.

**Q54 Alex Cunningham:** I suspect Mr Leiper might not be able to help me on criminal procedure reforms, but will he indicate that is the case?

***Richard Leiper:*** I should not. I sit as a recorder in the Crown court, but I would not hold myself up as having the necessary expertise.

**Q55 Alex Cunningham:** That is fine. I have a general question. Clause 4 extends the pleading by post scheme to children—in other words, defendants who have attained the age of 16, rather than the usual 18. Do you think that is appropriate?

***Richard Leiper:*** Again, that is an issue for the Crown court section of your discussion, rather than the civil side of things.

**Alex Cunningham:** Okay.

**Q56 Dr Johnson:** On death certificates, you spoke about treating the last illness or seeing a patient in the last 14 days or after death. I appreciate that at the moment you can see them in the last 28 days or after death, and you seem to be implying that makes a large difference. With increasing face-to-face appointments and the opportunity to see the person after death, why do you believe the change will make a material difference to the number of cases referred to the coroner? I appreciate that the coroner gets involved if you cannot issue a death certificate, but how many cases are there in which the doctor is unable to see the patient after death or in which the 14-day window—between 14 and 28 days before death—is crucial? It seems to me that there would not be many such cases.

***André Rebello:*** Actually, there are many. With the easements in the Coronavirus Act, we are just about keeping our heads above water in the coroner service. Under the Coronavirus Act, any doctor could have treated the patient—it does not have to be the doctor who certifies the death, provided that the other doctor sees the body after death—and we have been able to get medical examiners and other doctors to issue death certificates. These are all deaths from natural causes, which should not ordinarily be reported to the coroner. Hopefully, the statutory medical examiner service will alleviate quite a lot of the deaths that come the coroner's way, which cause a lot of concern for bereaved families. Unfortunately, a lot of deaths are reported to the coroner unnecessarily. At the moment—gosh—probably 20% or 30% of deaths being reported now do not need to be reported. Doctors could issue, but for whatever reason, the deaths are being reported—I suspect that doctors are busy trying to get back to normal and see patients.

I have concerns about the coronavirus easements lapsing before we bring in the new death certification and medical examiner provisions. I raise this on the record to flag that I can see a storm brewing in, probably, April of next year.

**Andy Slaughter:** Mr Leiper, am I okay to ask you about employment tribunals?

***Richard Leiper:*** You can.

**Q57 Andy Slaughter:** Our notes say that I can, so I will have a try. Do you welcome the provisions in clauses 32 to 36? Do you see any problems with them, or are they mainly administrative?

***Richard Leiper:*** I do not see any particular issues with them, but they do seem primarily administrative in that they are reflecting changes. There are issues about the composition of the tribunal, which I suspect some people may have concerns about. There has been quite a substantial shift in tribunals being presided over by a judge alone rather than being supported by members, for example, but in my experience, that has not been unsuccessful. The provisions seek to further that, as I understand them.

**Q58 Andy Slaughter:** It looks like it moves responsibility from the Department for Business, Energy and Industrial Strategy to the Ministry of Justice, making adjustments to the procedural rules so that they are equal between the different types of tribunals, and changes the membership, like you say. Is that your reading of it?

***Richard Leiper:*** Yes. On where it fits, I do not know why, historically, it has not fallen within the Ministry of Justice; it has always been slightly out on a limb in that it has not.

**Q59 Andy Slaughter:** I guess it is because they were industrial tribunals to begin with, so they were in the industry Department. We have discussed coroners, but could we take this opportunity to put in the Bill anything relating to employment tribunals? I am thinking in particular of the backlog at the moment, which is pretty heavy. Could any measures be introduced to address that?

***Richard Leiper:*** As I understand it, they are desperately trying to recruit more judges, which is an underlying problem. Another problem that I do not think the Bill would address is the financial support and infrastructure for employment tribunals. Individual employment tribunal centres are essentially fractured in the IT that they have, as I understand it, and that has caused significant problems, particularly at the beginning of the pandemic, when remote hearings were almost impossible because the tribunal just lacked the software and infrastructure to be able to do them. There has been a chronic underfunding of the tribunals system for a very long time, and if the backlog is going to be dealt with, the system desperately needs that support.

**Q60 Andy Slaughter:** There was a reduction in resources because of the Unison case, which has now been reversed. Is that also causing problems?

***Richard Leiper:*** Yes—well, not problems, but it has meant that more people have been able to bring their claims. I do not see that as a problem, but it has created more cases that need to be dealt with, yes.

**The Chair:** I thank both our witnesses for being present today and giving evidence, which I am sure the Committee has found very useful indeed. We will now move on to the next panel of witnesses.

**Examination of Witnesses**

*Sara Lomri, Ellie Cumbo and Louise Whitfield gave evidence.*

2.45 pm

**The Chair:** We are now going to hear evidence from Sara Lomri, deputy legal director at the Public Law Project; from Ellie Cumbo, who is head of public law at the Law Society; and from Louise Whitfield, who is head of casework at Liberty. We have until 3.30 pm for this panel, and we will try to make sure that the questions are fairly sharp. If the answers can be equally sharp, we will get more questions in and I am sure it will be much more fruitful. I can see two of the three witnesses on screen, and the third witness is present in person. First of all, can each of you briefly introduce yourself, and then we will open it up to questions?

***Sara Lomri:*** Hello, I am Sara Lomri. I am the deputy legal director at the Public Law Project.

***Ellie Cumbo:*** Good afternoon, my name is Ellie Cumbo, and I am the Law Society's head of public law.

***Louise Whitfield:*** I am head of legal casework at Liberty. I will be talking on behalf of Liberty, but I have been a judicial review specialist for 20 years, so I may refer to my experience in practice previously.

**Q61 Andy Slaughter:** This question is to any of the witnesses. Do you think the changes to judicial review that are included in the Bill are justified?

***Sara Lomri:*** I am happy to go first, and thanks for the question. Ultimately, the short answer is no, they are not justified. IRAL, which you were talking about this morning—Lord Faulks's review—asked for lots of evidence. They were asked to review administrative law in a really short timeframe, and they were not able to go into the kind of level of research detail that we would have liked them to, but they nevertheless did a valiant job. They gathered evidence from right across the public law world. Although some of their recommendations are slightly mirrored in the Bill, the Bill in fact goes so

much further, and we really cannot see the evidence base for the proposals put forward in the Bill. The Government say that the proposals will, for example, give judges more flexibility, save time and money and promote the rule of law. We think exactly the opposite. I am happy to go into that in more detail now, or to let my colleagues answer and come back in.

**Q62 Andy Slaughter:** I am happy either way. Rather than assertions, however, I think we are looking for some factual basis for why you say this is wrong. We heard some evidence this morning that perhaps suggests there is a political motivation, or at least that judges are being drawn into politics in this way. Is that how you read it, and do you see these provisions addressing that problem?

***Sara Lomri:*** Absolutely not; in fact, quite the contrary. We think that clause 1 will draw judges further into potentially political ground where they will be asked to look at the impact of implementation of the order, and they may be drawn into further satellite litigation around what order is available.

I think it is fair to say, and I do not think this came out in any of the evidence given this morning, that JR is a remedy of last resort. As a solicitor, I represent individuals who bring judicial review. The cases are about hospitals and care homes closing, policies discriminating against service personnel and disabled children being denied proper care. It absolutely is a last resort. It is really hard to access legal aid for judicial review, which is heavily restricted.

It is a very low-volume jurisdiction. Around 4,000 applications are issued a year and, of those that get permission, only a third or so proceed to trial: that is fewer than 1,000 cases a year. Of course, a few of those cases will feel very political to the Government, but that really is the absolute minority of judicial review cases—which, in any event, is a low-volume jurisdiction. I will leave that point there.

***Ellie Cumbo:*** It is not for the Law Society to speculate on the motives—we are interested in the effect. I want to draw particular attention to the proposal to create prospective-only quashing orders, which appears in clause 1. It is important to understand that that is a drastic new suggestion that did not arise in the report by the independent review of administrative law. Its effect would be to remove a remedy from a person who successfully challenges a decision and proves that it is unlawful. Is it not the most basic requirement of a justice system that, if someone brings and wins a case, they are entitled to an effective remedy? The proposal really is very difficult to justify, and is a radical departure from the expectations that I suggest all of us—including all of your constituents—have of an effective justice system.

The point that we are most concerned about, which also appears in clause 1, relates to the statutory presumption. It is less drastic, in the sense that presumptions do, of course, exist in the law. However, it is difficult to understand the justification for creating a new set of remedies and then creating a presumption that those are the default remedies, in the absence—because there can be none—of any evidence as to their effect as a remedy. We are concerned that there is simply no justification for the Government's own rationale for those particular provisions in clause 1.

***Louise Whitfield:*** I would like to add that I think there is no justification, because there is no evidence the proposals will improve public-body decision making. One of the main benefits of judicial review is that it holds public bodies accountable—not just central Government, but all sorts of public bodies that make decisions affecting people's day-to-day lives. If it improves public body decision making, we would expect to see reforms that were going to help that.

In actual fact, Liberty thinks that the reforms will hinder the ability of public bodies to make good decisions because they will be tempted to gamble more. The proposals create a risk of incentivising the public bodies because they will not have to put right the wrongs that are found by the court. It will buy them a couple of years while the case is fought out, and they will know that there is a good chance of getting a prospective-only remedy or some suspended quashing order, even if it is found that the policy or decision was unlawful. That is the other piece of the jigsaw: it lacks any justification for saying that the proposals will improve the quality of public body decision making.

**Q63 Andy Slaughter:** Thank you very much. Turning to clause 2 for a minute, I would like to clear up one point with Sara from PLP. We have heard about the success rate of Cart reviews, which was corrected from 0.22% to, I think, about 3%. Public Law Project puts it higher than that—perhaps as high as 6%. Could you shed any more light on what the difference is?

***Sara Lomri:*** That is right. We say that the best evidence puts it at around 5.7%. We are particularly concerned that, in response to IRAL, the Government agreed that there should be judicial supervision of the decisions of the upper tribunal, particularly in relation to refusals of permission to appeal, citing the significant cost as a reason to abolish Cart JRs.

In actual fact, the total cost save is around £364,000 to £400,000 a year. The data relied on by IRAL was incorrect—it has agreed that it was incorrect—and, in fact, it looks more like 5.7% to 6% of Cart JRs are successful. In fact, there is not a significant cost. It is £364,000 per year which, given the constitutional principle at stake, is not a significant cost.

**Q64 Andy Slaughter:** More generally—this is for any of the witnesses—in relation to Cart, you have seen the reference from the Government's statement that it is expected the legal text that removes the Cart judgment will serve as a framework that can be replicated in other legislation. We discussed that part this morning; This might form the basis of oustering other cases. What is your response to that?

***Ellie Cumbo:*** I would just say again this is a really drastic suggestion. Remember, it is for Parliament, not Government, to decide when to oust the jurisdiction of the courts and remember that the effect of it is to prevent a remedy when a decision has been found to be unlawful. The importance of that should not be underestimated. Parliament is supreme and has that right, but it must be considered on a case-by-case basis, as long as the circumstances are appropriate. We would welcome an indication from Government as to when they would consider it appropriate to ask Parliament to pass future ouster clauses.

***Sara Lomri:*** I would tie it back to an article by David Davis on 25 October, in which he talks about the Government's plans to restrict the use of judicial review in this Bill as an obvious attempt to avoid accountability. He refers to previous attempts by previous Governments, so obviously it is not just this Government, but David Cameron's Government and before that Tony Blair's Government attempting the same thing in a different guise. PLP would say that consideration of ouster clauses is constitutionally really problematic. We understand that it comes up from time to time, but it is not in this Government's best interest to do that. It will really impact the way in which decisions by this Government and future Governments can be held to account.

***Louise Whitfield:*** I echo those points. Liberty's concern is that this is the death of judicial review by a thousand cuts. It would chip away at the fundamental right of citizens to challenge Government and other public-body decision making. If we start down the road of ouster clauses, the question is when will it stop and what else will be subject to ouster clauses until we are left with virtually no judicial review at all?

**Q65 Andy Slaughter:** Thank you. I have one more question—I do not want to monopolise the time. You have already said something about prospective-only quashing orders. If you want to saying anything more about how that might prevent somebody from obtaining an effective remedy, please do. I would specifically like your comments on suspended quashing orders and whether you see any merit or demerit in introducing them as proposed in the Bill.

***Ellie Cumbo:*** I am happy to say on behalf of the Law Society that we support the creation of suspended quashing orders. That enhances remedial flexibility and how can that be anything but a good thing? As I have already indicated, our concern is with the presumption that those then become the default remedy, when they do not already exist and there is no evidence base as to the extent to which they are an effective remedy.

**Q66 Andy Slaughter:** What do the other witnesses think about that?

***Sara Lomri:*** PLP would add that the judges already have those powers. There are cases where suspended orders have been made, but the judges have used them very sparingly. I heard earlier today your witnesses talking about increasing discretion and flexibility for judges. Absolutely, clause 1 does not do that. As the Lord Chancellor said in *The Daily Telegraph* on 17 October, it is about trying to mandate judges and that is really problematic for the reasons that we have already set out.

**Q67 Andy Slaughter:** Just to be clear for Liberty and PLP, are you welcoming the provisions in the Bill on suspended quashing orders, or do you think they are not necessary or could they be dealt with by the judiciary itself evolving those powers?

***Sara Lomri:*** We think that they are dealt with by the judiciary itself. It does have that power, and it is not needed in the Bill.

***Louise Whitfield:*** Liberty's position is the same: the judiciary has the power. We do not see that there is a difficulty in legislating to clarify that it does have the power, but it is the presumption that becomes problematic.

One of the points that is missing from this debate and discussion is that this will actually add a very considerable layer of further complexity and cost and take up more court time, in a way that will make judicial review less accessible and less clear. There are already hearings just about remedies. If you add on top of that a whole layer of arguments about six different factors as to whether you should get an immediate quashing order or a suspended quashing order, I think, based on my experience, you are going to have a lot of very lengthy legal submissions in writing and further hearings; you will have to list the hearing before the same judges who heard the original trial. It is going to increase costs, and it is going to make the litigation more risky for claimants. It is going to be off-putting because of the difficulty in advising people about their chances of getting the order to which we say that they should be entitled if it has been held that something is unlawful.

**Andy Slaughter:** Thank you very much.

**Q68 Sir John Hayes** (South Holland and The Deepings) (Con): I do not know whether any of the witnesses are familiar with the recent comments of the Attorney General on these matters, which seem to contradict some of their evidence. She said that, in the last decade or so, there has been

> "an increased appetite for political litigation, and, more worryingly, an appetite for putting judges in an invidious position, by asking them to decide essentially political matters on applications for judicial review."

That also reflects the view of Lord Sumption who, the witnesses will be aware, has commented:

> "Allowing judges to circumvent parliamentary legislation, or review the merits of policy decisions for which Ministers are answerable to Parliament … confers vast discretionary powers on a body of people who are not constitutionally accountable for what they do."

He added that

> "if we keep asking judges to answer inherently political questions, we are ignoring the single most important decision maker in our system: the British people."

There is clearly a problem. We have heard that from other witnesses this morning. The problem needs to be solved. I have some sympathy with the view that the Bill does not go far enough and that we could do more. However, the idea that we should do nothing seems to me to ignore the facts.

***Ellie Cumbo:*** If I may say so, I have not heard facts. I have heard assertion; I have heard the opinions of two people, neither of whom have been recent practitioners. On behalf of the Law Society, I do not think that we would agree that we have seen evidence that there has been an increased politicisation of the courts. In any case, it is not up to the judges to decide what cases come before them. This question is largely about the remedies available in judicial review; that is what the Bill seeks to focus on. Our view is that judicial discretion is what enables a proportionate remedy that correctly responds to the facts of the individual case to be made.

**Q69 Sir John Hayes:** But you do accept that judicial review should not be a means for perpetuating political debate, that it should be entirely separate from any consideration of policy, where Ministers are held accountable for that policy and it has been made in a proper way.

***Ellie Cumbo:*** Certainly, but, as I say, I have seen no evidence to suggest that that is what is happening.

**Sir John Hayes:** I will give you some evidence in a second, but others may want to comment first.

***Ellie Cumbo:*** I was actually going to make a slightly different point that actually enhances the ability of the Bill to protect judges from any assertion that they are in fact dabbling in matters of policy, which is that the provision we were just talking about earlier—to create suspended quashing orders—is not entirely clear on the face of the Bill. What it actually says it may do is allow for conditionality in suspended quashing orders: in other words, you would introduce a quashing order that would take effect only in the event that certain conditions laid down by the courts are or are not met. That is, arguably, inviting judges to pass a view on what an acceptable policy solution in those circumstances would be. We would welcome some clarification on that point of the Bill in order to ensure that it is very clear that judges are not being invited to pass policy.

**Q70 Sir John Hayes:** Forgive me for saying so, but I am asking questions, not commenting. I agree that there is an argument both for increasing the scope of the Bill and for dealing with some of the issues of process identified in the independent review of administrative law. I agree that the Bill could be tightened and improved, but that is true of all legislation.

To give an example, I understand that a character called Jolyon Maugham—I am inclined to say, wearing my inverted snobbery on my sleeve, that there were not many Jolyons on the council estate that I grew up in—is going to take to judicial review the appointment of the new chair of the Charity Commission, at least according to reports. That is despite the fact that in parliamentary answers it has been made clear that that appointment has been an open and fair competition in line with the Cabinet Office's governance code on public appointments, as regulated by the Commissioner for Public Appointments. Even where the process has been entirely fair and reasonable, the judicial review is being used as a way of asserting—one might go as far as to say campaigning—for political ends.

***Ellie Cumbo:*** I do not want to continue to speak if my colleagues would like to join in. I will just say that I am not familiar with the merits of that case and cannot comment on it. I would return to the point that the Bill is primarily looking at the remedies that should be available in the event that a decision in that case was found to be unlawful. Our view, as stated already, is that remedies should be effective whatever the impugned decision is.

**The Chair:** Sara or Louise, do you want to join in?

***Sara Lomri:*** Yes, I would love to. The assertion around the increased number of political cases and litigation remains just that; Lord Faulks and the IRAL looked at this and there was no such finding. At PLP, we advocate for and promote evidence-based approaches to policy. We know that there are around 4,000 applications for judicial review every year and around 1,000 get to trial. We know that in the majority of cases defendants win, not claimants.

In terms of the cases that you, Mr Hayes, and the Attorney General are talking about, there are probably a handful over a couple of years. It is understandable why those cases may take up a lot of oxygen, and of course we cannot talk for Jolyon Maugham and what that case is about.

I am a solicitor and I represent individual, marginalised, disadvantaged people who have no option but to use judicial review to hold the state to account. By passing this Bill you are going to make it harder for those people: the vast majority of users of judicial review on a day to day basis. You are going to make it hugely more difficult for them to get access to justice.

**The Chair:** Louise, do you want to add anything?

***Louise Whitfield:*** I have nothing to add to what my colleagues have already said.

**Q71 Angela Crawley:** Thank you for that, Sara. We have heard much this morning about how most of the judicial review cases are subject to immigration decisions, and that those are particularly privileged in terms of judicial oversight compared with other matters of jurisdiction. Do you think that that is a fair assessment? Can you indicate for the benefit of everyone here the other instances where judicial review is used as a remedy of last resort? I will start with the Public Law Project.

***Sara Lomri:*** I do not have the stats in front of me to compare the number of JRs in the immigration jurisdiction and at the upper tribunal as opposed to the High Court, but I can quickly try and find those.

The judicial reviews that we are involved with are around how decisions of the state impact poor and marginalised individuals. There are issues around welfare benefits, special educational needs, discrimination against all kinds of individuals, and particularly disability discrimination and difficulties around getting access to public services. That is the mainstay of our work. I am not sure that anybody who uses the immigration justice system feels that they are getting any kind of special treatment.

We say that Cart JR—if that is what was behind the question—remains a really important procedural safeguard for the most vulnerable, marginalised and disadvantaged individuals, to make sure that unlawful and erroneous decisions do not go unchecked.

**Q72 Angela Crawley:** Thank you for that, Sara. I am conscious that Louise and Ellie might want to come in on that, but I will just ask a supplementary question specifically on the responsibility of Governments. Successive Governments have all had differences of opinion on policy, but it is not the responsibility of any Executive to ensure that their Government is held to account for their decisions. The Bill may limit future Governments and bind them by the same principle. Do you feel that is a fair point?

***Sara Lomri:*** I would just say yes, I absolutely agree with that.

***Louise Whitfield:*** I have not practised immigration law either—like Sara, I cannot comment on the figures—but a lot of the judicial reviews that I have been involved in over the last 20 to 25 years have been the kind of low-level day-to-day decisions that affect people. A lot of the debate has focused on the high-profile cases.

People hear about judicial reviews that go to trial over completely random issues, such as where Richard III should be buried and that kind of thing. In actual fact, judicial review is really important, if not essential, for day-to-day stuff such as whether you are entitled to a

blue badge and whether rail replacement buses should be wheelchair accessible, and for loads of issues such as whether you should be supported to live independently in your home when you are old and disabled and struggling on your own, or whether you should have access to particular drugs or healthcare.

The reason why those cases do not get much publicity, but are really important, is that they settle pre-issue. They settle pre-issue because we have the opportunity, within an effective pre-action protocol, to say to a public body, "We think this decision is wrong; please put it right."

If you go down the road of these reforms and make remedies harder to get, and there is more opportunity for public bodies to put off the day of giving in—or to know that even if what they have done is found to be unlawful, they will not have to address the wrongs that people have suffered previously—that will just make it harder for individuals to use judicial review effectively. That can only be a bad thing.

***Ellie Cumbo:*** I understood the question to be about Cart and this idea that immigration cases are privileged—I think that is what you said. It is important, in the interests of strict accuracy, to say that Cart judicial reviews are available outside of immigration. Mr Cart himself was challenging a decision of the child support and social security tribunal. He was seeking to vary his child support. While I am on this, it is also worth saying that he ultimately lost; he was unsuccessful in securing a judicial review of his own. He merely won the principle that judicial review should be available in certain circumstances.

**Angela Crawley:** Thank you.

**Q73 Tom Hunt:** This is to Sara. In principle, do you agree that the Government have a duty to ensure that precious and limited judicial resources are directed as effectively and efficiently as possible?

***Sara Lomri:*** Yes, of course.

**Q74 Tom Hunt:** But with such scarce resources and pressure, and such a low success rate in the cases that do get JR, how could that be seen as an efficient and effective use of precious resources?

***Sara Lomri:*** In relation to Cart JRs, we are talking about a constitutional principle. Public Law Project and others are saying that that price tag of £350,000 to £400,000 is worth it and a good use of resources.

When we talk about Cart JRs, we talk about the case of G, who had been seriously mistreated in Nigeria and trafficked to the UK. The Government agreed at the first-tier tribunal that she was a victim of trafficking, but the tribunal came to a bunch of erroneous decisions, including that the evidence that supported her being a victim of trafficking was not substantiated, and came to the wrong decision. She brought a Cart JR, which was successful. As a result, she and her child were not returned to Nigeria, where they invariably would have been killed. That is the price tag.

We say that that is such an important procedural constitutional principle that the tribunal's decisions should be reviewed from time to time by the High Court—by a judge who is more senior, has more time to consider the evidence, and who is sometimes better placed to make those decisions. Yes, we think that is an efficient, much better use of scarce resources.

**Q75 Tom Hunt:** But you accept that the vast bulk—well over 90%—of that £350,000 of scarce resources is spent on cases that are going to be unsuccessful.

***Sara Lomri:*** It is the same amount that DCMS spent on its art collection in 2019-20. When we are talking about constitutional principles, I do not think we can say that is too much money.

**Tom Hunt:** Thank you.

***Ellie Cumbo:*** Could I come in briefly on that point? We entirely agree that judicial resource is precious. As one of your earlier witnesses said, more of it would make an enormous difference to the issues we are dealing with, such as the backlog in courts at the moment. However, there are other interests that it must be balanced against, including that once again, in these cases, we would be talking about an unlawful decision by the upper tribunal. I think it is a reasonable expectation that unlawful decisions should be able to be challenged.

I would make a second point about resource. If we take the Public Law Project's figure of around 5.7%—so around the 6%—that is not incomparable to the number of rape reports that lead to a conviction: nobody would argue that that is a waste of resource.

**Q76 Tom Hunt:** My understanding is that the 5.7% figure is heavily contested. In fact, I have seen figures of under 1%.

***Ellie Cumbo:*** I believe Sara can speak to the extent to which that is a contested figure. It seems clear on paper, at least to me.

**The Chair:** Is that the end of the answers?

***Ellie Cumbo:*** Yes, from me.

**Q77 Andy Slaughter:** I would just like to clarify some points that came up this morning about this issue. It has been said several times that with Cart reviews, there is an extra bite of the cherry—an additional step to challenge, which is not there in other types of case. Is that right in your view, and is it justified? It is also said that, because the upper tribunal has equivalent status to the High Court, it is inappropriate perhaps for the High Court to review those decisions. What is your view of those points?

***Sara Lomri:*** Just in response to Tom Hunt's point, originally, yes, IRAL made a claim that Cart cases had a very low success rate. In order to answer that question, we have to get into the weeds of how cases are brought and how they are reported. IRAL said that there were 12 cases that had been successful, which points to a success rate of 0.22%.

In fact, there is significant difficulty because Cart cases are not reported. Also, because of the way they are brought—through a different stream, and they do not go to hearing—it is hard to get to the data. Through the work that we did with practitioners and people we know who have been involved in Cart JRs, we came up with a figure of more like 5.7%.

The Government's revised figure—following our successful challenge to that, which went via the Office for National Statistics, and they agreed with us—is something in the range of 3%. Other researchers have had a look at it, and they have said between 5% and 10%. Our own data indicates 5.7%, which is why we give that figure—and we think it is hugely more reliable than the Government's 3%.

**The Chair:** I am conscious of the time, and we have three more questions to come. Paula Barker.

**Q78 Paula Barker** (Liverpool, Wavertree) (Lab): Thank you, Chair. I want to concentrate on clauses 18 to 31, which deal with the online procedure rules committee, and I will put this question to Sara first, if I may. I would be interested to understand which types of proceedings you believe should be subject to online procedure rules.

***Sara Lomri:*** Ellie, I am not trying to drop you in it, but could you answer that first? I feel like you have more to say about online than we have.

***Ellie Cumbo:*** The Law Society would probably not get into the detail of deciding which cases it would be appropriate for. What we do have is quite a comprehensive set of views on the types of proceedings in which online proceedings are appropriate—rather than the types of cases, if you see what I mean. It is going to depend not just on what the case involves, but on the nature of the parties. If it is helpful, I would be very happy to provide that to you after today. I am probably not in a position to itemise it right now.

The only thing I would say that I think would serve as a general Law Society position on this part of the Bill is that we have a particular concern about unrepresented litigants or, in criminal proceedings, defendants taking part in online proceedings. There is a real danger of the formality not being clear to them in the absence of expert advice, and these can be life-changing decisions, so we would have real concerns about the fact that, as drafted, the Bill does not seem to make any distinction between represented and unrepresented parties.

**Q79 Paula Barker:** Thank you. That is really helpful. Louise, did you wish to add anything?

***Louise Whitfield:*** No. Liberty is not doing any work on part 2 of the Bill, so I will leave it to colleagues to answer this.

**Q80 Paula Barker:** Thank you. I believe this next question is actually for Sara. What impact will the measures in clauses 18 to 31 have on practical access to justice?

***Sara Lomri:*** Public Law Project, like others, remain very concerned about digital exclusion and the blurring between digital assistance and independent legal advice, which we say remains extremely important. Further than that, I know that you will hear from other witnesses later on, including Justice, and we would support what they say on online courts. Later on today, you also have Dr Joe Tomlinson, our ex-research director, who will also be able to flag some headlines in terms of PLP's response to the online issue.

**Q81 Paula Barker:** I will be putting the same questions to Justice in the next session. Do you think there are any potential safeguards that the Government could introduce to ensure that access to justice is not adversely impacted?

***Sara Lomri:*** In terms of the headline answer to that question, we would say preserving and promoting legal aid, and ensuring that independent legal advice remains a viable option for those using online justice systems.

**Q82 Paula Barker:** What about the powers provided to the Lord Chancellor by the OPR provisions in the Bill, specifically looking at clauses 19 to 26? Do you believe that they cause a democratic deficit?

***Sara Lomri:*** I am sorry, but I am not able to answer that question.

**The Chair:** Paula, I am conscious of the time.

**Paula Barker:** That is fine. Thank you, Chair.

**The Chair:** I think the Minister wants to come in briefly now. I will then move to Liz Twist, and then to Caroline.

**Q83 The Parliamentary Under-Secretary of State for Justice (James Cartlidge):** Going back to Cart JR, and this point on privilege; I would not personally use the word privilege, but we can surely accept that there are many areas of law in this country that do not have what we are calling three bites at the cherry. Therefore, seeing as the panel have given very passionate arguments, particularly the Public Law Project, as to why we should retain Cart JR, is it your view that in those areas of law that do not have three bites of the cherry in the same way, that they should also get that? Or do you think this should be an exception in these cases, which are primarily—95% of them—immigration cases?

**The Chair:** Could Members please indicate who they want to direct the question to.

**James Cartlidge:** I said the Public Law Project.

***Sara Lomri:*** We do not accept that it is about bites of the cherry. It is about fair systems. For example, in the case of G, the Government accepted that she was a victim of trafficking and the first-tier tribunal came to an erroneous decision. The High Court then corrected that erroneous decision. If the Cart JR had not been available to G, a victim of trafficking from Nigeria who was on the verge of being returned with her child back to her traffickers, that erroneous, unlawful decision would have held. It is not about bites of the cherry; it is about correcting unlawful decisions, and erroneous errors of law.

**Q84 James Cartlidge:** The Public Law Project is not just about immigration, as I understand it. Correct me if I am wrong, but that was the impression I got when I met your representatives at the legal aid meeting. Whether you like the phrase three bites of the cherry or not—I think it sums it up very well—my question is whether that right should apply in other areas of the law in this country that do not have it.

***Sara Lomri:*** Why it does not summarise it very well is because it is trying to paint a picture of our client group, who are the most marginalised and disadvantaged people in society, as having some kind of privilege that most people do not have. This is just not the case. This is about correcting unlawful decisions; most people do not have to go through this. Most people—thankfully, because we live in a good and democratic society—do not have to hold Governments to account,. However, when they do, we hope that those systems are fair and work properly.

**Q85 Liz Twist** (Blaydon) (Lab): I have a question for Ms Cumbo and the Law Society, about the abolition of local justice areas. I wonder what impact you think the abolition will have on the criminal justice system in England and Wales?

***Ellie Cumbo:*** We do have a concern about that provision, in clause 42, I believe. We believe that the abolition of local justice areas obviously risks forcing parties to a case to travel much greater distances, at great cost to themselves and to the courts in the event of delays and cases having to be taken off as a result. There is also a point of principle around justice being seen to be done at that local level where it feels like it relates to the community from which all parties are drawn. What we would ask is for a consultation with local stakeholders before those provisions go ahead.

**Q86 Liz Twist:** Talking of local stakeholders, do you think that the proposals might have an adverse impact on the independence of the magistracy?

***Ellie Cumbo:*** I do not think we have considered that question in detail. Possibly the Magistrates Association would be best placed to comment, and we would usually defer to them. If you would like us to provide an answer at a later date, I am very happy to do that.

**Q87 Dr Johnson:** I want to clarify with Sara; you have talked about the importance of Government accountability, and the importance of judicial review to children with special educational needs and people who may be discriminated against because of a disability. I do not think there is anyone in the Committee who would disagree with you on the importance of those things. However, in practice, the decisions that are governed by the Cart reviews are not decisions of Government; they are decisions of an upper-tribunal court.

***Sara Lomri:*** Absolutely. When I was talking about—

**Dr Johnson:** The legislation that I am talking about would not actually affect whether or not a child with special educational needs, or a disabled person, was able to bring a judicial review of the Government's decisions on their behalf. It does not really apply to this Bill—or have I misunderstood?

***Sara Lomri:*** I think you have. I was painting a picture of the kinds of clients that I represent when using judicial review. Clause 1—

**Dr Johnson:** But does it affect the abolition of the Cart reviews?

***Sara Lomri:*** Clause 1 is about the presumption of prospective-only orders, which absolutely would impact on that client group.

**The Chair:** Order. I am afraid that we have come to the end of the time allotted for this panel. I thank the three witnesses for their evidence.

**Examination of Witnesses**

*Louise Finer, Stephanie Needleman and Steve Valdez-Symonds gave evidence.*

3.31 pm

**The Chair:** Welcome to the new witnesses. It is good to see all three of you physically present. We will have none of the technical difficulties that we had earlier, although it is important that people attend, whether virtually or in person. Could you please introduce yourselves before we begin the questions?

***Steve Valdez-Symonds:*** My name is Steve Valdez-Symonds, I am the refugee and migrant rights programme director at Amnesty International UK. For the purposes of these proceedings, it is probably relevant that I have experience of practice in the immigration field, including many years of representation before the immigration tribunals of various iterations, and training and supporting practitioners in understanding the law and procedures, and many years' experience of parliamentary advocacy, including representing those practitioners in that.

***Stephanie Needleman:*** I am Stephanie Needleman, I am the acting legal director at Justice. Justice is an all-party law reform and human rights organisation that works to strengthen the justice system in the UK. Our vision is for fair, accessible and efficient legal processes that protect individuals' rights and uphold the rule of law.

***Louise Finer:*** My name is Louise Finer, I am head of policy at Inquest.

**The Chair:** Your sound is very low indeed. Could you move a bit closer to the microphone?

***Louise Finer:*** I was trying to socially distance, but it is more important that you can hear me. We are an organisation that supports families through the inquest system. I bring that experience to this Committee.

**The Chair:** Thank you.

**Q88 Alex Cunningham:** I have a question for Stephanie. Does the Bill contain sufficient safeguards to ensure that online pleas are entered only if the defendant has legal advice. If not, what safeguards do you think might be put in place?

***Stephanie Needleman:*** There are two provisions in the Bill that we are concerned about in terms of safeguards. There is the new allocation procedure for online pleas, for adults in clause 6 and for children in clause 8. While the Government have said that this will be accessible only through the common platform, which as I understand can currently only be used by legal professionals, there is nothing in the Bill that would guarantee that a defendant would only be able to enter an indicator plea or trial venue with access to legal advice. We would like to see something in the Bill that guarantees that.

We oppose the use of the procedure by children. We do not think that even with a safeguard of access to legal advice that it is an appropriate procedure for use by children. The criminal justice system considers children to be inherently vulnerable, and there is a whole process in place in the youth criminal justice system that recognises their rights and works to guarantee them, and this system would allow that whole system to be bypassed.

**Q89 Alex Cunningham:** Do those concerns you have about children extend to clause 4, where we talk about the defendant who

"has attained the age of 16"

rather than the usual age of 18? Could that be covered?

***Stephanie Needleman:*** Clause 4 is not something that we have looked at in particular detail. As I understand it, the automatic online conviction process in the Bill is only available to 18-year-olds. The single justice procedure

that it builds on is also only available to 18-year-olds, and the section 12 procedure in clause 4 is available to 16-year-olds, and that does appear to be an inconsistency that is unjustifiable.

**Q90 Alex Cunningham:** Apart from the inconsistency, what is your concern?

***Stephanie Needleman:*** The same concerns as we have with using the new online allocation procedure for children. There is a whole system set up to protect vulnerable children within the criminal justice system, and those safeguards are being bypassed.

**Q91 Alex Cunningham:** That is helpful; thank you. Do you have any concerns about clause 9, which gives the court powers to proceed if the accused is absent from an allocation hearing?

***Stephanie Needleman:*** That is not a clause we have looked at in particular detail, unfortunately.

**Q92 Alex Cunningham:** Can I ask you about something else, then? Do you anticipate that the automatic online conviction as the standard statutory penalty will have an impact on disproportionality in the criminal justice system?

***Stephanie Needleman:*** Yes, we are very concerned about the disproportionate impact of the AOCSSP—a catchy acronym. That builds on the single justice procedure, and there are clear issues with that that have not been addressed by the Government. There has been some research by Appeal, which shows that the vast majority of those being prosecuted under the single justice procedure are women for non-payment of television licences.

We are concerned about the impact on ethnic minorities. Racial disparities permeate the criminal justice system, and we are concerned that a disproportionate number of ethnic minority individuals will also be unduly criminalised through the automatic online conviction process, as well as those with mental health conditions or neurodivergent conditions who may have particular difficulties understanding the process or the implications of going through the process, pleading guilty and receiving a conviction.

As it stands, there is nothing within the process that would screen for any vulnerabilities, and there has also been no assessment by the Government, as far as we can see, of the equalities impact of the Bill. Back in 2017, these measures were originally floated in the Prisons and Courts Bill, and there was an equalities statement which recognised the potential adverse impact on people with protected characteristics. There has not been an update to that equalities statement as far as I have seen. As it stands and given the issues with the single justice procedure that it builds on, we think that the procedure should not be in the Bill. However, it definitely should not proceed without a review of the current evidence available in terms of what impacts it might have on those groups with protected characteristics and vulnerabilities.

**Q93 Alex Cunningham:** That is helpful as well. Some people in the sector have expressed concern that there are insufficient safeguards built into the Bill for all manner of things, but an awful lot around how people understand what their options are. For example, if you look at the expansion of the written procedure for allocation proceedings in clause 6(4), do you think it provides sufficient information for the accused to understand what is happening and how to effectively engage in that process?

***Stephanie Needleman:*** Absolutely. That is also a concern of ours in terms of people understanding what the process involves and, importantly, what the outcome of that process is going to be. Obviously, with the automatic online conviction, that outcome is a criminal conviction. We are worried that the process encourages people to go through it and plead guilty without properly understanding what impacts that can have later in life. I know it is currently only for summary and non-imprisonable offences, but those can still have serious implications—a criminal record, increased insurance costs, loss of employment and educational opportunities. This is not just for trivial offences that will not have an impact on people's lives. Similarly, with the online plea, understanding the implications of where a case is heard—and the seriousness of going to the Crown Court and having the greater sentencing powers available there—is incredibly important. There should be provisions built in to ensure that defendants understand those. Having legal representation in the context of the allocation procedure goes some way to dealing with that.

**Alex Cunningham:** You have anticipated the rest of my questions. I do not know if either of your colleagues wish to comment. No.

**Q94 Sir John Hayes:** I want to turn to the issue of proportionality. Witnesses may be aware of the recent judgment that says that

"challenges to legislation on the grounds of discrimination are becoming increasingly common in the UK, usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign."

They are assisted in that, are they not, by the principle of proportionality, which confers on courts a broad discretionary power that risks undue interference of the courts in the sphere of political choices. That is very bad, is it not, both for a democratic society and for the role and reputation of courts, because the separation of powers—well, I do not need to lecture witnesses on the separation of powers. They know what it means. We have a problem that needs to be solved by legislative means. The Bill is a welcome start in that respect, is it not?

**The Chair:** Who is the question directed at?

**Sir John Hayes:** I am happy for any or all to take it.

***Steve Valdez-Symonds:*** I am happy to respond to that on behalf of Amnesty. With respect, I think that is to misunderstand the role of the courts. The courts manage—indeed, you make a reference to the Supreme Court giving clear direction about its view to all the other courts below it as to how to manage the matters that are brought before it, including matters that raise the issue of proportionality. Proportionality, where it applies, is a question of law on which courts need to rule. That is why we have a judicial system, not for Parliament to try to predetermine how courts should exercise that role and perform their judicial function, in ensuring that

administrative bodies act proportionately, according to the law and according to its interpretation as clearly set down now by the Supreme Court.

**Q95 Sir John Hayes:** To be clear, I was reading out a recent judgment from a court.

***Steve Valdez-Symonds:*** The Supreme Court.

**Sir John Hayes:** I was reading out a court judgment, so there are a number of distinguished judges who share the view I articulated, as you know, that proportionality has become a problem and the Supreme Court has interfered in matters of high politics. That is the argument that has been made by the Attorney General, Lord Sumption and others. That is not my view; it is the view of those who want to see the courts doing what they traditionally did. It is a long-established and time-honoured principle that courts do not become involved in matters of high politics and the argument I am making—or reflecting—is that that is now a problem. We saw it in the Miller case and there is no guarantee that the Supreme Court would not act as it did in the Miller case again. We need to do more to clarify and make certain the respective roles of those who are chosen by the people and who are accountable to them, and those who are not.

***Steve Valdez-Symonds:*** If I may, I will make two responses to that. First, with respect, you started reading from the Supreme Court's judgment on the question that you were concerned about, I understood from you, in support of what the Supreme Court had ruled and the direction it has given therefore to all the courts below it as to how judicial proceedings on the matter in question should be performed in future. It seems to me that the matter is addressed by the Supreme Court in black and white in front of you.

As for the wider question, the issue is clear that the Government set out—commissioned—a review of judicial review. It had eminent evidence from many public bodies, including many Government Departments, about whether there were concerns. Its overriding finding on judicial review generally was that there was no problem. Again, for reasons that have also been given earlier, I do not see that there is any need for this interference, frankly, with the way in which courts perform their constitutional function.

**Q96 Sir John Hayes:** Since we are having this helpful exchange, the change has been the Supreme Court entertaining the idea of proportionality as a general ground for judicial review. That has altered over time. You could argue, as you seem to do, that that is perfectly acceptable and agreeable, but my case is that it is not what judicial review has been about or is supposed to be about.

A good argument for a process of judicial review is that the grounds on which it is exercised have altered. As you know, the Attorney General has made clear her concerns about this, as have a number of senior lawyers, former Supreme Court judges and others. The argument I am making is by no means an unusual or untested one. You will have heard it many times before. I am simply saying are not the Government right at least to address those concerns?

***Steve Valdez-Symonds:*** With respect, all I can do is refer to the previous answers and say that I think the Government are not right. Of course, there were many voices, including judicial voices, that have considered that the situation is satisfactory as it is, including the review that the Government commissioned.

**Q97 Sir John Hayes:** And that is the end of the matter from your point of view? You think it is perfectly reasonable to continue down this road, even though it is very different from the time-honoured principles that I have briefly articulated.

***Steve Valdez-Symonds:*** I do not accept what you have articulated, but you started by reading from a very recent Supreme Court judgment, which I understood you to agree with. I do not really see what you see as the problem. The Supreme Court has ruled on the matter. It is the highest authority for all the courts that will have to deal with the matter in the future and there is no ruling.

**Q98 Sir John Hayes:** Because the Supreme Court is taking a more permissive view around proportionality of the grounds for judicial review.

***Steve Valdez-Symonds:*** But it did not in the very matter that you have just read from in its very recent judgment.

**Q99 Sir John Hayes:** As a generality, the Supreme Court is doing that.

***Steve Valdez-Symonds:*** I do not accept that.

**Q100 Sir John Hayes:** We will have to agree to differ on that subject. You presumably would agree that there is an argument that the scope of the Bill might be widened. We heard earlier evidence that suggests that there is a case for a more widely drawn review of judicial review, for all kinds of reasons that I will not tire you with, because you can check the evidence we received earlier. If we are going to have a change in judicial review, presumably this is an opportunity to do so comprehensively.

***Steve Valdez-Symonds:*** I do not think I can add any more. I am sure the Government's review spent considerable time with considerable amounts of evidence—more time than this Committee will have to consider these things, unfortunately—came to a clear conclusion that there was no need essentially to revise the way in which judicial review works. It was working perfectly well—we agree with that.

**The Chair:** Sir John, my interpretation of what you are saying is that you want to widen the scope of the Bill. The scope of the Bill is already set, so with the indulgence of the Committee, I move to the next questioner, Andy Slaughter.

**Q101 Andy Slaughter:** I have a couple of questions for Louise Finer, first on the clauses on coroners. What is your view of those, particularly clauses 37 to 39, on discontinuance of investigation, on non-contentious inquests in writing, and on increased use of remote procedures for coroners' courts? Do you see any advantages or disadvantages in those?

***Louise Finer:*** Thank you for the question. On clauses 37 and 38, we feel that, although they might be appropriate in some circumstances, they introduce some very real risks into the coroner service. Reflecting on the recent report by the Select Committee on Justice, and the

extent to which it identified the continuing problem of inconsistencies and, essentially, a postcode lottery, depending on the coroner who hears the case, we are really concerned that there need to be some strong safeguards on clauses 37 and 38, to ensure that, in the kinds of cases that Inquest supports, day in day out, no new risks are introduced through the Bill.

What concerns us about these two clauses is very significant decisions being taken that could lead to the proper interrogation of evidence being curtailed at an early stage, when families would often not have legal representation to be able to argue the case to continue an inquest, or for an inquest to be heard. The kinds of cases that we have seen, were these clauses to be in place, include some where initially evidence suggested a death by natural cause, but where, as the inquest progresses, further evidence comes to light that suggests that the situation was anything but.

To refer briefly to one case, Laura Booth died in hospital after a routine eye procedure. She became unwell and developed malnutrition, due to inadequate management of her needs. In that case, the coroner was not initially going to hold an inquest, because it was considered a natural-cause death, but the family pushed for an inquest. The inquest reached such critical findings that it would have been quite shocking for that not to have occurred, had the inquest been discontinued. It was found that her death was contributed to by neglect, and that there had been a gross failure of care. We are suggesting that safeguards need to be built in, to ensure that cases such as that, which really need to be heard, in the context of a coronial system, where there is already a significant amount of discretion, should not be discontinued, and are in fact heard as appropriate.

On clause 39, on remote hearings and juries, we are really worried and broadly agree with the evidence of André Rebello. His conclusions were quite damning, to be frank, of the risks of remote hearings. Again, there may be some circumstances in which a remote hearing is appropriate. We see them as potentially very advantageous for pre-inquest hearings. A remote process can be very efficient. We do know some families who are happy to go ahead with a remote hearing but, of the families we support, that is a very small minority. Overwhelmingly, the families we have supported recently have very negative views and impressions of remote hearings.

We take issue with the Government's justification for that aspect of the Bill, which we think is weak and unevidenced. It claims that remote attendance will reduce distress. We are not sure what evidential basis there is for making that claim. It certainly does not match up with our experience of the many families we are supporting at the moment. Although there may be some benefits to opening up the ability to join remotely, we do not see those as being introduced as an add-on and an advantage, but more as a taking away.

The argument about bringing coroners' courts into line with other courts in terms of remote attendance glosses over the fact that the inquest process is quite a different process from that in other courts. We think there needs to be much more exploration, consultation and development and evidence to justify the proposal.

An inquest process can be a very traumatising experience for a family already traumatised. Imagine yourself having to sit through the inquest process and hear evidence about how a member of your family died. They may have been a long way from you in a prison or in a secure setting when they died. You may have no knowledge of how they died. The inquest process may be your first opportunity to find that out. Imagine doing that in your front room, without the support services that you would have in person at a hearing. We think that there are very, very real risks that families could be retraumatised and put through more distress rather than, as the Government claim, their distress being reduced.

We are concerned about remote juries. We have had recent experience of juries sitting in adjacent rooms to the coroner, and the coroner is then unable to see the jury as they would were they in the same room. We have seen some very concerning things, including jury members falling asleep, eating packets of crisps and so on and so forth. All such things would be much harder to safeguard against the more remote the setting. We think the Government need to provide more evidence to support their claims about remote hearings, to evidence much more clearly how they would work in the context of the inquest and how they would ensure that families were not put through more distress or their ability to participate effectively undermined.

**Q102 Andy Slaughter:** One other question. It appears that you heard Mr Rebello's evidence, and you will know that I asked about some of the other recommendations of the Justice Committee, in particular about non-means-tested legal aid for bereaved families in cases where there are state actors represented. To paraphrase his reply, given the inquisitorial nature of coronial proceedings and given that the state parties would often act in the interests of the court, and perhaps even to assist the bereaved persons, as well as their own clients, I do not think he necessarily thought it was inappropriate, but that he certainly did not seem to warm to it. What is your view of that?

***Louise Finer:*** Our view is that this Bill presents a crucial opportunity to address the inequality of arms that is at the heart of the inquest process. There have been many calls from authoritative reviews and inquiries to address this and it is a disappointment to us that there is nothing in the Bill to address that inequality of arms. The Justice Committee report—so recent—was absolutely clear on this point. It makes no sense that on the one hand Members are concluding that and on the other a Bill is introduced that does nothing to address that. There are many other issues in the Justice Committee report that remain unaddressed in the Bill.

The inequality of arms is acute. One example came last week in the Westminster Hall debate on the Justice Committee report. Tim Loughton MP referred to the Shoreham air disaster. He said that he supported the case for public funding for inquests because of his experience of the Shoreham inquest. Very early on it was unclear whether the families would get funding for legal representation, but it was immediately clear that all of the 18 public bodies represented at the inquest would have automatic access to funding to represent themselves. Yet there was a big question mark over whether the families of the victims would receive funding for inquests. We acknowledge that the Government are bringing forward some measures to address the means test for exceptional case funding, and we welcome those, but we do not think that they go far enough. We very much hope that the Bill will seize the opportunity to do something about that.

**Chair:** Andy, can I say that we have several more questioners, so I ask for shorter questions and, with respect to the panel, shorter answers.

**Q103 Andy Slaughter:** I will ask one more very quick question. Is there anything else in the Justice Committee report that you would like to see incorporated in the Bill? Perhaps list it rather than explain it.

***Louise Finer:*** I will be as brief as I can. There are many issues in the Justice Committee report and many recommendations for an appeals process, a coroner service inspectorate, and a national coroner service, which would help to eliminate the inconsistency in the system. We support all those recommendations and would welcome any of them being incorporated in the Bill. Most importantly, the Justice Committee called for families to be put at the heart of the inquest process. What we are concerned about is that clauses in the Bill could actually go the opposite way. Instead of putting families at the heart, it could make it even harder for families to participate effectively.

**Andy Slaughter:** Chair, I was going to ask about judicial review, but I understand I will have time at the end.

**The Chair:** If we have time at the end. We have got three more questions that one or more of the panel may wish to answer. I call Tom Hunt.

**Q104 Tom Hunt:** This is for Steve. I have a certain understanding of the word "tyranny" and what it means. I can think of many regimes in the world that are tyrannies, sadly. There are too many where great harm is done to people's lives. In this country we have by and large a sound legal system that works effectively. I understand there is a debate here about whether a lower and upper tribunal is enough and whether it is appropriate for Cart JR to have a third bite of the cherry. The debate is ongoing. Do you regret that on 26 October you used the word "tyranny" and said the Government were promoting it in this Bill? Is it unhelpful or does it help the debate?

***Steve Valdez-Symonds:*** I do not regret the use of the word. I was drawing attention to the fact that there was considerable interference in the functioning of a judicial function in the tribunal system and the way in which the Government were legislating not just in this Bill—this is an important factor, which is not before this Committee—but in the Nationality and Borders Bill at the same time. If it is passed in its current form, it will impose direction on judicial figures in the tribunal system as to how they may perform their judicial function, and how they must or must not weigh and assess evidence and appellants in front of them, pre-empting what will be in front of them by statute.

It is a grave concern that at the same time as withdrawing in this Bill the oversight of our constitutional courts to ensure that the tribunal system works properly according to law, the Government are seeking to legislate to incapacitate those tribunal systems to manage independently and fully their own judicial functions. That is the effect of provisions in the Nationality and Borders Bill. You can look at them in clauses 16, 20 and 23. Provisions like that, although not going anywhere near as far—dating back to 2004, the time of the ouster that this Committee has discussed that was put forward by the Labour Government—have caused much confusion already.

**The Chair:** Steve, I really should have pushed Tom on this because it falls outside the scope of the Bill.

**Tom Hunt:** The comment made was in relation to this Bill, so I do not know where the Nationality and Borders Bill has come from.

**The Chair:** I think the witness tried to justify it in an explanation relating to a different piece of legislation.

**Tom Hunt:** It was a comment made by the panellist in relation to the Bill we are discussing today.

**The Chair:** Okay, we will continue.

**Tom Hunt:** Of course, the definition of tyranny is cruel and oppressive government—

**The Chair:** Sorry, Steve, you were answering.

***Steve Valdez-Symonds:*** The point I have made is that you cannot properly look at these two Bills in isolation, because clause 2 of this Bill affects whether there is any constitutional court scrutiny of whether the tribunal system performs the functions that Parliament has set it up to perform. At the same time, you have legislation to impede that tribunal's functions about whether it can perform those duties. You have legislation from the very Department whose decisions it will be responsible for regulating—the Home Office. I think it perfectly appropriate to raise the concern that if that sort of interference were going on in the courts of other countries, we would, as I said, describe it as tyranny. *[Interruption.]*

**The Chair:** Sorry; we are not taking questions unless they have been indicated. Tom has indicated that he has finished his questions. I call Paula Barker.

**Q105 Paula Barker:** My question is for Ms Needleman. You may have heard Ms Lomri suggest that you would be best placed to answer this question on clauses 19 to 26—*[Interruption.]*

**The Chair:** Order. We are not having a separate meeting on the side.

**Paula Barker:** Thank you, Chair. Ms Needleman, what are your views on the powers provided to the Lord Chancellor by the OPR provisions, and do you believe that they cause a democratic deficit?

***Stephanie Needleman:*** The provisions relating to the online procedure rules give significant power to the Lord Chancellor. The Government have themselves recognised that the broad powers provided to the Lord Chancellor could have a significant impact on access to justice and that some of those powers should therefore be subject to a requirement to obtain the concurrence of the Lord Chief Justice. However, there is a slight lacuna in the Bill, in that two powers are not subject to the same concurrence requirement.

Those are the power to require the online procedure rule committee to make rules, and a broad Henry VIII power to make consequential amendments, the latter power being subject only to a consultation requirement and the former to no requirements at all. That undermines the point of having a concurrence requirement in the first place. As Lord Judge pointed out on Report of the Courts and Tribunals (Online Procedure) Bill—the previous

iteration of these rules—taken together, those powers overrule the very rules that the Government themselves made subject to the concurrence requirement because of the wide-ranging impact the provisions can have on access to justice.

**Q106 Liz Twist:** Ms Needleman, do you have any concerns about the type of online convictions that might be used in future?

***Stephanie Needleman:*** Absolutely. As I said before, we do not think this procedure, as it stands, should be introduced at all, because of the lack of evidence and the concerns around protections in relation to the identification of vulnerabilities and inequalities. However, if it is introduced, we at Justice are calling for it to be restricted to non-recordable offences only.

Currently, the Bill would allow the procedure to be used for a range of offences that would cause people to have a criminal record. That could impact parents when it comes to failing to provide for the safety of children at entertainments, for example, or it could impact pub-goers and pub owners in relation to the offences of being drunk in a public place or selling alcohol to a person who is drunk. If the procedure is to be introduced, we would call for it to be for non-recordable offences only, because the implications of being convicted of those are smaller.

**Liz Twist:** You have answered my follow-up as well. Thank you.

**The Chair:** Andy, we have a bit of time left. Would you like to come back to your earlier point?

**Q107 Andy Slaughter:** Yes, Chair, just for completeness. This panel probably expected to deal primarily with part 1 of the Bill, so this question is for any of the witnesses, but I am guessing that it will be for Steve or Stephanie in particular. Do you think that any of the changes to judicial review in the Bill are justified? If not, can you say why you think that they are leading us into in error, or are unnecessary?

***Stephanie Needleman:*** I will take clause 1. Justice supports the introduction of suspended-only quashing orders. We think that, after Ahmed, the law could do with clarification, and that putting statutory suspended quashing orders on a statutory footing makes sense. We envisage that the orders would be used in exceptional circumstances such as those that existed in Ahmed, where there had to be retrospective legislation to deal with the issues it caused.

Crucially, suspended-only quashing orders come into effect and have retrospective effect, even if it is slightly delayed. However, prospective-only quashing orders do not have retrospective effect, and we oppose those measures. You have heard a lot of arguments about why they undermine the rule of law; in particular, they do not afford a remedy to the individual claimant in front of the court, and more generally to other people in the same situation as claimants. For example, if someone paid tax under a regulation that was later found to be unlawful, they would not be able to reclaim the excess tax they had paid, because the Bill as currently drafted requires the regulation to be treated as lawful up until the point of that judgment. In relation to benefits, if ineligibility criteria were later found to be unlawful, under the Bill people would not be able to reclaim benefits that they would have been entitled to, because the unlawful ineligibility requirements would be deemed to have been lawful at the time they claimed their benefits.

We are particularly concerned about the presumption. We have heard from various people in Government that the provisions increase judicial flexibility, but the fact that there is a presumption is entirely opposed to the idea of increasing judicial discretion and flexibility. The presumption constrains judicial flexibility and remedial discretion by requiring the prospective-only quashing order to be used in certain circumstances. We are concerned that the prospective-only quashing order will have a chilling effect on judicial review. Even if a prospective-only quashing order would not in any one case be given, the fact that the presumption for it exists in the first place creates a chilling effect, as it is an additional factor for a claimant in deciding whether to bring a judicial review in the first place. It may also make it harder to obtain legal aid, because the merits criteria require there to be sufficient benefit to the litigant if successful. Those are our main concerns about clause 2. I will let Steve talk about clause 2.

**The Chair:** The Minister has indicated that he would like to ask a quick question. Steve, could you answer quickly so I can try to squeeze him in?

***Steve Valdez-Symonds:*** I will do my best, and I will be led by you. I will say nothing about clause 1; we agree with the concerns raised. I ask the Committee to think back to the evidence of Professor Feldman. He is someone who supports clause 2, but he does so having expressed great disquiet about it in principle, and we agree with that. The principle of the matter is that statutory bodies, including statutory tribunals, which have limits on their powers set by Parliament, are required to be ordinarily subject to review by our constitutional courts to ensure that their powers are exercised properly and within the powers that are set, rather than, as he put it, being permitted to determine for themselves where the limits of their powers are. That is what clause 2 is removing.

There is nothing exceptional about Cart judicial review for immigration matters or the other tribunal matters that it relates to, except for the fact that it is a highly restrictive form of judicial review because of the particular practice direction by which the High Court has operated ever since the Supreme Court decisions in Cart and Eba, which curtail both the process, to make sure that it is less truncated, and the much higher test that has to be passed for the judicial review to succeed.

Professor Feldman then goes on to reach conclusions for suggesting why he none the less, despite his great disquiet, thinks it is appropriate to interfere in this way. There are several reasons why I think he is wrong about that, and why I think he misunderstands some of the things that have happened—including since Cart and Eba, and including those that are happening by legislation now—which more closely curtail the prospect of justice in this tribunal system. Perhaps in view of the direction from the Chair, I will write to the Committee immediately afterwards and spell out what those things are, so that the evidence is in front of you.

**The Chair:** I am afraid that brings us to the end of the time allotted for the Committee to ask questions of this panel. I thank the panel for making the time and effort to appear before us physically, which was much appreciated. Apologies to the Minister on the final question.

**Examination of Witnesses**

*Dr Joe Tomlinson, Aidan O'Neill QC and Michael Clancy OBE gave evidence.*

4.15 pm

**The Chair:** We have a fully virtual panel of three members this time. May I ask each panel member, starting with Dr Joe Tomlinson, followed by Aidan O'Neill and Michael P Clancy, to introduce themselves?

***Dr Tomlinson:*** Thank you. I am Joe Tomlinson, senior lecturer in public law at the University of York. I study all aspects of the public law system, and I have a particular interest in judicial review. Of particular interest to discussions today, I suspect, is that I have a particular interest in empirical studies of judicial review and immigration judicial review.

***Aidan O'Neill:*** I am Aidan O'Neill. I am a QC at the Scottish Bar and also the English Bar. I suppose that I practise primarily in the fields of public law and constitutional law. I have been involved in a number of recent cases that involved constitutional issues, among them Miller (No. 1) and the Cherry-Miller case, which referred to the prorogation of Parliament, and the Wightman case about article 50 and whether it could be unilaterally revoked. My area of practice is within judicial review on both sides of the border.

***Michael Clancy:*** Good afternoon, Chair and Committee members. I am Michael Clancy. I am the director of law reform at the Law Society of Scotland. I have a particular interest in constitutional law and some aspects of immigration law, and I am delighted to be here and to answer, or attempt to answer, your questions.

**The Chair:** Thanks very much for attending today's meeting. I will start with Dr Caroline Johnson.

**Q108 Dr Johnson:** I want to ask a question about judicial reviews, and in particular the numbers of cases. In earlier evidence, we were told that there were a 1,000 cases of judicial reviews per year. I wonder how many of those would be the Cart review that we are talking about in relation to the Bill. Do you have any figures on that?

***Dr Tomlinson:*** I do not have the exact full set of statistics to hand, but I would happily supply those to the Committee. The general picture of judicial review is that ordinary judicial review, by which I mean non-immigration cases, is around a few thousand cases issued every year. Numbers have been declining in recent years. On the immigration side, for a good period of time—a couple of decades—there have been more immigration judicial review cases. They are obviously mostly heard in the upper tribunal now. The numbers fluctuate for a variety of complicated reasons, but my understanding is that they have been coming down in recent years. Cart is a small subset of judicial reviews. I can provide the full statistics to the Committee, but that is the overall picture.

**Q109 Dr Johnson:** The other thing that we have been advised on is the success rate of the Cart review in immigration cases. We have been given figures of between 0.22% and 5.7%. Regardless of where in that range you feel that the real figure lies, it is substantially lower than the figure for a standard judicial review. What is the discrepancy, and why do you think it is present?

***Dr Tomlinson:*** If you do not mind, I would like to comment on the figure, which is an important starting point. The original figure provided by the independent review of administrative law was 0.22%, which is an incredibly low success rate, but that figure was arrived at through the IRAL's expert panel simply looking at published judgments. The Cart procedure is such that it is very unlikely to produce public judgments, so the panel looked only at a very narrow sample of the overall case load. The 0.22% figure is basically flawed. It is not correct, and the Ministry of Justice has since accepted that and provided a new figure of 3.4%, as I understand it. In various ways, I think that is also a deflated figure. Importantly, success is measured in the narrowest way possible. With a wider definition of success, you can get to a higher success figure.

It is difficult to say with any precision what the figure is, but I can say it is certainly not 0.22%. It is 3.4% with a very narrow definition of success, and it is higher than that if you have a different definition of success. The best figure, although it is not a precise figure, is that about one in 20 cases are successful. Of course, one in 20 is a relatively high success rate. You are challenging judicial decisions, so you would hopefully expect them to be of better quality, and so on. In my view, the success rate is not as low as the initial figure that was put out suggests.

**Q110 Dr Johnson:** Sorry, but the question was: what is the figure for a standard non-immigration-related judicial review, and where do you think the disparity comes from, if there is one?

***Dr Tomlinson:*** Again, I am not trying to dodge the question. It is very difficult to define in a precise way what success in a judicial review looks like. To take one example, most strong cases settle relatively early in the procedure. Settlement is a really important part of the judicial review system, but the way they show up in the statistics is that they look like withdrawn cases. The various statistics that we have vary, but I think we can accurately say that the Cart success figures are lower than the average judicial review success figures. By how much would be very difficult to say precisely, but one in 20 is still a reasonable success rate.

**Q111 Dr Johnson:** Professor Feldman, who is professor of English law at the University of Cambridge, gave evidence earlier in which he said the success rate for a non-immigration-related judicial review was over 50%. Why do you think that they are 10 times more likely than immigration-related judicial reviews to be successful?

***Dr Tomlinson:*** I think the figure that Professor Feldman is relying on in making that claim is the success rate after a hearing. As I have just explained, many judicial reviews—the majority of them—do not reach a full hearing. When you get to that point, the success and failure rate is roughly 50:50. It obviously goes up and down in various directions ever year, but it is roughly 50:50. Overall, the success rate is potentially a bit lower, depending on how you define success. Again, I would say that potentially the best explanation for why success rates are lower in Cart judicial reviews is that you are talking about judicial decisions, rather than administrative decisions, being challenged by judicial review, so you can potentially expect a better quality of decision that is likely to withstand judicial review a little more robustly.

**Q112 Dr Johnson:** Just to be clear, what you are saying is that in a standard non-immigration judicial review a good case is more likely to settle before court. Although 50% are successful in court, the likelihood is that even more cases taken forward will be successful, because the better cases will have been filleted out beforehand.

***Dr Tomlinson:*** Would you remind repeating that point? My connection dipped for a moment.

**Q113 Dr Johnson:** What you are saying is that 50% of the cases that ultimately reach court for a non-immigration judicial review are successful, but the likelihood of cases being successful is probably higher than that because the better cases will have been settled out of court. You also made the point that the Cart judicial review is the review of a judge's decision, and not a review of the Government's decision. In effect, it is not the same as other judicial reviews, because it is the court asking the High Court to judge the opinion of a court of the same level, rather than a judicial review, whose purpose is to hold Government and Government decisions to account. Is that correct?

**The Chair:** Sorry, there were two questions there. Before the witness had the chance to answer the one about the percentage of cases, you came up with another one. Were you clear on the first question, Joe?

***Dr Tomlinson:*** I think so, yes. The headline point is that the statistics we have on judicial review—as a wider point, what the Government collect on judicial review could be much better—only give you a limited insight on success rates overall at different stages.

On the second question, if I have understood correctly, yes, obviously, Cart judicial reviews are of a slightly different nature, in that they challenge decisions of the tribunal. However, there are good reasons potentially, still, to provide judicial review of those decisions. Ultimately, what is at the base of those cases are the rights of individuals. While I can see there is a distinction to be drawn there, which was extensively dealt with in the initial Cart decision by the Supreme Court, the distinction in some ways is immaterial to the rights of the people who bring these cases.

**Q114 Dr Johnson:** That being the case, if you are in support of maintaining the Cart review of judicial decisions in the upper tribunal, do you therefore believe that a review of all decisions at courts at that level should be available by judicial review? Do you think everyone should get the third chance? Would anyone else on the panel like to comment on that?

***Aidan O'Neill:*** The first issue, of course, if one takes the 5% figure by way of success—I agree with Joe Tomlinson that it is a high figure—is that one always goes back to the idea: is it better to let one innocent person be convicted of a matter or to let nine guilty go free? In a situation where you have one in 20 Cart or Eba judicial reviews being successful after a hearing, that shows that there has been an error in law in relation to the specific individual case, which has potentially incredibly serious consequences when one is dealing with asylum and immigration cases. In principle, I do not think it is a question of playing with numbers and saying, "Well, only 5% are successful, so it does not matter—we can get rid of the whole position in terms of allowing errors of law to be identified and reviewed at second instance and by way of judicial reviews in other cases."

I also agree with what Joe Tomlinson has said, which is that in the Cart and Eba situation, one is dealing with the fact that judges, both at first instance and in the upper tribunal, have looked at the matter and therefore are legally trained already, but they are not infallible. That is the whole point about judicial review; matters are not infallible. One would hope that there would therefore be a much lower percentage of areas in which they have been shown to err in law than is the case for simple administrative bodies, which are not necessarily particularly legally qualified and are certainly not judicial bodies.

I would be wary of the attempt to compare matters that are not alike by saying that there is a 50% success rate on non-immigration judicial reviews. I must say I would be very surprised at the basis of that statistic, but if it is the case, then—*[Inaudible.]* The point is that you are stopping those 5% of cases ever being rectified, and that is not a situation that I think Parliament should properly be allowing.

**The Chair:** Last point, Caroline, because there are other questions. Actually, Michael just wants to come in on your previous question, before you make your final point.

***Michael Clancy:*** I agree with what Aidan O'Neill has said. Of course, in Scotland it is a different question in some respects, because as far as I recollect from the IRAL report, there were no statistics about the situation of judicial review in Scotland. The scale of things like that in Scotland is quite different, and one might expect only 100 judicial reviews to get to the Court of Session in any one year. The proportionality arguments about the use of judicial time and the expense are of a different order and would need to be separately vouched, I would say, before the same kind of decision taken in relation to Cart would be taken in relation to Eba-type cases.

Let us remind ourselves exactly why we have judicial review, which perhaps creates a tension between what one might describe as ministerial legality or quango legality judicial reviews and other types. Lady Hale said in Cart that

"the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law—that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise."

I think that that grounds us on the basis for having a law of judicial review, and it is something that we should not depart from without very serious consideration indeed.

**The Chair:** Unless you have a really pressing question, Caroline, I would like to move on to the next speaker, because you have taken quite a bit of time.

**Dr Johnson:** I have just one quick question.

**The Chair:** Right, one quick question and one quick answer.

**Q115 Dr Johnson:** I do understand what you are saying about the importance where the decision has been taken by Ministers or Government, but I am still

not clear why it is important to review the opinion of another judge. How do you ensure that the number of erroneous judgments falls? Although I can see that having the Cart review has picked up some cases where judgments were unlawful or wrong, how, on an ongoing basis, do the judiciary make sure that those numbers fall?

**The Chair:** Who wants to take that?

***Aidan O'Neill:*** I do not understand the question. How does the judiciary make sure that—

**Dr Johnson:** Some people say that 0.2% of the judgments are incorrect, and some people say 5%.

***Aidan O'Neill:*** Nobody is saying 0.2% reputably. I do not think one can take that on board. The IRAL report even accepts that its figure was wrong, so do not even start on that. You start with the claims made subsequently when this Bill was introduced, which were that the figure was at least 3%. That massive change was made in response to work done by academics such as Joe Tomlinson. Let us not start from 0.2%; let us use the better evidence we have heard so far, which is at least, or around, 5%. Ask me the question on that basis.

**Dr Johnson:** Okay, so on the presumption of—

**The Chair:** Order. Janet Daby.

**Q116 Janet Daby:** I will direct my question to Mr Clancy. In its briefing, Transform Justice says:

"Online pleas compromise open justice principles by removing the opportunity for the plea hearing to be witnessed/observed."

What is your view on that?

***Michael Clancy:*** I am not entirely sure that I can comment competently on what is happening in the jurisdiction of England and Wales. It is certainly the case that there have been trials in Scotland of not only online pleas, but online trials with juries distanced from the courtroom. I do not know whether Aidan O'Neill would have more practical experience. The situations in the two jurisdictions are quite different, and my latest information is that we have almost reached pre-covid levels of conduct of trials in Scotland, which may have an element of online activity.

Of course, there are distance issues with some courts in Scotland. I remember one solicitor describing the fact that being able to conduct trials or provide pleas to court from Inverness in three courts in rural areas over the online system was actually quite a boon. I do not know whether that goes so far as to answer your question, but it is an observation that I can make from the Scottish jurisdiction.

**Janet Daby:** Would anybody else like to respond?

***Aidan O'Neill:*** Echoing what Michael Clancy has said, I would just say that, at least anecdotally in terms of the situation in Scotland, full criminal trials, rather than simply online pleas, seem to have been working quite well. In fact, in terms of satisfaction levels, jurors seem to quite like the idea of turning up at a cinema, rather than at a court, and being more comfortably seated and better looked after while still being able to see and, apparently, participate in the criminal trial that is taking place elsewhere.

That is not answering the detail of your question, which I think was more directed towards the idea of things going online meaning less public participation. I would have thought that that was really a matter depending on the software or program used to allow for greater observation by the public online. On some levels, it is easier for the public to participate when cases and trials are online, precisely because they do not have to go all the way into court—the physical location—to watch it. I am unsure whether that addresses what it was you were asking.

**Janet Daby:** Would you like to respond, Dr Tomlinson?

***Dr Tomlinson:*** I have spent quite a lot of time looking at the online proceedings question in England and Wales, and there are lots of interconnecting challenges around the move to online hearings. I have not spent much time looking at the criminal context, but rather at the use of online proceedings in tribunals. The challenge there with open justice is that online proceedings can potentially enhance open justice in various ways, but also diminish it. There is a real need for clarification of strategy in terms of key things like open justice, but also other areas, such as digital exclusion, in the reforms that we are seeing.

**Q117 Angela Crawley:** My question is to Michael Clancy. In its report, the Law Society of Scotland outlined questioned the Government's conclusion that a legislative consent convention does not apply to the abolition of Cart judicial reviews in respect of reserved tribunals in Scotland, and that judicial review is a devolved matter under the Scotland Act in section 126(4). Why does the Law Society of Scotland consider that a legislative consent motion is required? Will one be required for clause 2 of the Bill?

***Michael Clancy:*** We do take the view that the provisions of clause 2 engage legislative consent, otherwise known as the Sewel convention, which would require the consent of the Scottish Parliament. The reason for that is a piece of law that is a bit complicated and a bit tricky. Nevertheless, you began by identifying that judicial review of administrative action is part of the definition of Scottish private law, which is contained, as you say, in section 126(4) of the Scotland Act 1998. That is a significant element in terms of recognising that it is a devolved matter exclusively; it is not split between the reserved areas of law and the devolved ones.

I freely recognise that the Government have taken steps in terms of new clause 11A(5) of the Tribunals, Courts and Enforcement Act 2007, which states:

"Subsections (2) and (3) do not apply so far as provision giving the First-tier Tribunal jurisdiction to make the first-instance decision could…be made by…an Act of the Scottish Parliament, or…an Act of the Northern Ireland Assembly passed without the consent of the Secretary of State."

However, while the Scottish Parliament does not have the power to modify the law relating to reserved matters, paragraph 2 of schedule 4 to the Scotland Act makes provision that applies only to the rules of judicial review insofar as

"the rule in question is special to a reserved matter".

Special to a reserved matter would of course be a rule that would relate to something like an immigration tribunal, employment tribunal or employment appeal tribunal. Those are the kind of tribunals that one would think about.

In the 2010 Supreme Court case of Martin *v.* Most, there was a decision that a general rule that applies to both a reserved and devolved matter is not special to a reserved matter. Therefore, our conclusion is that if we follow the rule in Martin *v.* Most we get to the position where the decision in Eba—in fact, all judicial review matters under Scots private law—engage the Sewel convention and would therefore require the consent of the Scottish Parliament to be complied with, because of course it is declared in section 28 of the Scotland Act that

"the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

Of course, section 28 provides that the UK Parliament can always legislate for Scotland. That is not in dispute. It is whether the Sewel convention is engaged. I hope that that answers your question.

**Angela Crawley:** It did, thank you very much.

***Aidan O'Neill:*** Can I just add to that very briefly?

**The Chair:** Very quickly, as we are running short of time and we have a number of questions to come.

***Aidan O'Neill:*** Absolutely. I think the Sewel convention is engaged because, apart from anything else, the reform proposed in the Bill would also require an amendment of section 27B(3) of the Court of Session Act 1988, because that embodies the Cart/Eba test, and that is a statute falling within devolved competence. At the moment, I do not see that the Bill attempts to amend that Act, and I think it needs to do so if it is to apply properly in Scotland. That makes it plain that it is a Sewel convention issue.

**Q118 Sir John Hayes:** I want to deal with the issue of the courts being used to either resist or counter the Crown and Parliament—both the Executive and the legislature. In the evidence to the independent review of administrative law, which has been raised a number of times today, Sir Stephen Laws wrote:

"Ultimately, law cannot guarantee individual liberties or good governance unless it is supported by a culture of responsible politics".

He went on to say:

"The risk of too much intervention by the law in politics is that it can undermine the culture on which law itself depends for its effectiveness in relation to other matters…Responsible politics requires incentives to listen to other points of view and to conduct civilised debate to convince others. None of that is necessary if the authority of the law can be enlisted to force the views of one side on the other."

Inasmuch as this Bill goes some way to redress the balance between that authority and the democratic will of Parliament, is it a helpful and useful step? In what ways might it go further in redressing that imbalance?

***Aidan O'Neill:*** I am happy to speak briefly on that. There is not an imbalance. We are all subject to the rule of law—Parliament as much as the Executive and the courts—and it does involve a mutuality of respect. There is absolutely no doubt about that, but the Parliament has to respect the basic fundamental rights and the procedures by which those have been maintained over centuries in this country without a revolution. It is all a matter of that maintenance of a mutuality of respect, and I have seen absolutely no evidence to suggest in any way that there has been any breach by the courts of those basic fundamental principles in which all three organs of government—courts, Parliament and the legislatures generally, and the Executives of the Union—seek to respect the rule of law and fundamental rights, and the procedures that allow those to be vindicated.

**The Chair:** Just one follow-up, John, because I am trying to get everybody in.

**Q119 Sir John Hayes:** But you would accept that that view is not universally held. It is certainly not the view of the Attorney General. It is not the view of some senior judges or some of those who have contributed to this debate so far. There has been a change in the character of the usage of judicial review. I mentioned in an earlier session the application of proportionality increasingly as a means of effecting that change. Your view is particular and well informed, but by no means the general view.

***Aidan O'Neill:*** I am not sure whether it is the general view. I am certainly speaking from my own experience, having been involved in a number of cases of some import over the past 30 years of my practice. But I am also echoing the views set out in the formal response to the IRAL consultation by the Faculty of Advocates, which generally said that one thing that one ought to avoid in any discussions of the constitution is the notion of absolutism and of the zero-sum game—that if courts say something, that means that somehow the rest of us are—*[Inaudible.]*

We all benefit from the dialogue that goes on and the maintenance of a balance of powers. Frankly, I would not accept any suggestion that the courts have in any sense in recent years or earlier overstepped the boundaries of their stating what the law is, and the obligations that fall upon all of us to respect it, whichever position we are in. "Be ye never so high, the law is above you", and that applies of course to lawyers and the courts as well, but it does involve this mutuality of respect, so I am sorry, I am afraid that when one looks at the evidence, there is absolutely no basis for declaring that the courts in recent years or earlier are overstepping any mark.

**Q120 Andy Slaughter:** Given the time, I will ask one broad question in two parts, if I may. First, we have heard some very strong opinions, on both sides, on the provisions for suspended orders and prospective-only orders, on the presumption on Cart per se, and on the use of the ouster. Do you have any particularly strong views either way on those issues?

Secondly, we have heard—particularly this afternoon—about the effect on individual litigants, and that some of the provisions may be a discouragement, whether in mounting a case in the first place or in obtaining a remedy. What is your view on that?

***Dr Tomlinson:*** I have concerns about both provisions. I will summarise my view in headline form.

In relation to clause 1, I would first like to clarify that I do not think it reflects what IRAL proposed; it goes further that what IRAL proposed. The risk with the changes to remedies is that they will leave some individuals without a remedy in their particular case—for instance, where a remedy is prospective only. There will also be a potential chilling effect on claimants. Why would you bring a case if there were a chance that your remedy is

not going to apply to you? Why would you take the various risks involved? It is okay, in an academic sense, to separate out the issues of remedies and say, "They come at the end of the case," but the practical reality is that claimants consider what will potentially come out of a case at the end, so remedies are relevant to that initial analysis on whether to bring a case in the first place.

Clause 1 also potentially puts judges in a position of having more power, in terms of remedies, than they have currently. Given the points that have been made today and in discussion with this panel, I am not quite sure that the way that will operate in practice is what is intended. I think clause 1 will leave some significant uncertainty that might also generate further litigation.

I have already spoken about clause 2, but very briefly, there are two really important points. One is the point of principle: does Parliament want to enact an ouster clause and is that a thing that Parliament should be doing? The second key point is the use of judicial resources: is Cart judicial review a proportionate use of judicial resources? The really basic calculation, to my mind, is that you have a roughly one-in-20 success rate. The cost of those cases is around £364,000 a year according to the MOJ's figures—not a great deal of money. As I said earlier, the success rate is potentially higher than that.

The financial figures produced by the Ministry of Justice are, I think, a little bit too high in various respects—they include, for instance, the cost of cases won by claimants. Overall, I think there is a question there: is that cost worth it, given the kinds of errors that this Cart system protects against? There can be reasonable disagreements about that. My view would be that the cost of the jurisdiction is worth it because of the errors that it protects against—you have heard case studies of the impacts of those errors today. Those are my concerns in relation to clauses 1 and 2.

**The Chair:** Michael, do you want to come in? I know you tried to get on the previous question—I do apologise. If you can, please keep it very short. We only have seven or eight minutes left, and two Government Members want to come in.

***Michael Clancy:*** Thank you, Chair. On clause 1, we were delighted that the Government decided to adopt a remedy that was in section 102 of the Scotland Act, allowing for the suspension of an order to give the parties time to fix the problem.

On clause 2, I made reference to the case of CM (Petitioner) in my written evidence to the Committee. It comes to the conclusion that the first tier, upper tier and the Lord Ordinary in the Court of Session may have misunderstood the claimant's evidence in CM, and that a remedy for that is an extraordinarily well-placed provision for access to justice.

Turning to the last question prior to this one, I align myself with much of what Aidan O'Neill said. His quotation of Lord Denning—that no matter how mighty you are, the law is above you—is very apposite. I am not a politician and I am not going to get involved in a political debate, but it may be the case that the transformation of our legal system from one of a distribution of powers between Parliament, the judiciary and the executive into one where there is much more separation has given voice to some of the concerns. However, we are still in the early days of having that more strict separation of powers, and at some point in the future, when there is a change of Government, I think views might be quite different.

**The Chair:** Marco Longhi, followed by the Minister. You have five minutes, so a very quick question from yourself, Marco.

**Q121 Marco Longhi:** Mine is a question of consistency. There are no other aspects of the law, whether it be the public or private realm or whether it be employment law, family law or local government, in which applicants have more than two bites of the cherry, but it is immigration, and immigration alone, that seems to fall into a special category in which they have a third bite of the cherry. How can this be justified in a point of consistency?

**The Chair:** Just one of the panellists. Who wants to take it? They do not look willing. Are you directing it at anybody in particular?

**Marco Longhi:** Dr Tomlinson.

***Dr Tomlinson:*** I would point out that Cart judicial reviews are not just immigration cases. While the caseload is made up mostly of immigration matters, they are not necessarily all immigration cases. My view would be that there are lots of different appeal routes and mechanisms across the justice system and in different areas of the justice system. As I said earlier, there can be reason for disagreement about that, but in my view the Supreme Court in Cart got the question right, and I think its reasoning was correct that the procedure that is potentially open to review in a Cart judicial review is one where there needed to be a limited—I stress limited because the Supreme Court made it limited—scope for review, and that has proven to be a relatively successful and cheap way of picking up important errors that affect people's lives.

**Q122 James Cartlidge:** Going back to the question from the hon. Member for Lewisham East, about the England and Wales measures in terms of magistrates courts and so on, on the point of the principle of access to justice and technology, which is important for this Bill, there was an emphasis in some of the evidence that we heard earlier that having online procedures is negative for access to justice in many ways. However, from what Aidan O'Neill said earlier and the experience of the pandemic, particularly in England and Wales, technology is important for keeping access to justice. Would you agree that the expedited development of technology that was necessary because of the pandemic has improved access to justice, while we do need to have safeguards in place?

**The Chair:** You have a minute and a half to answer.

***Aidan O'Neill:*** My experience—paradoxically much to my surprise—has been remarkably positive: that remote courts have worked. In the area that I am primarily involved in, which is public law but also employment cases involving witnesses and the like, there has been greater efficiency, so long as there is the proper ability for people to watch as part of access to justice. From a user perspective and from my experience, there are certainly positive benefits to it, but as Joe Tomlinson said, one must be aware of the potential negativity involved in terms of digital access and the like. However,

open justice is an absolutely central point, and now that we have courts that are available online, just as the Supreme Court has been, I see that as a positive development.

**The Chair:** Thank you very much; that is spot on. I thank the witnesses for attending today's meeting. We have greatly appreciated your contributions and I thank you on behalf of the Committee as a whole.

*Ordered,* That further consideration be now adjourned.—*(Scott Mann.)*

5 pm

*Adjourned till Thursday 4 November at half-past Eleven o'clock.*

## Written evidence reported to the House

JRCB01 Law Society of Scotland

JRCB02 Fish Legal

JRCB03 INQUEST (Briefing for Committee Stage: Part 2, Chapter 4, Clauses 37, 38 and 39)

JRCB04 INQUEST (Briefing on funding for the bereaved at inquests)