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Justice Committee

Family Legal Aid Reform

Eighth Report of Session 2008–09

Report, together with formal minutes, oral and written evidence

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1 Introduction

1. The Legal Services Commission published a consultation document, *Family Legal Aid funding from 2010: a consultation*, in December 2008. The Commission proposed new arrangements for funding representation, advocacy and expertise in relation to public and private family law.[1] The proposals are part of a broader strategy for legal aid reform outlined in July 2006 in Lord Carter's report, *Legal aid—a market-based approach to reform*.[2]

2. Lord Carter's strategy was, in essence, a staged move from the then mixed economy of fixed and graduated fees, uplifts and other add-ons and hourly rates for different areas of the law to a market-based system of competitive tendering for block contracts. The interim step was envisaged to be fixed fees for different types of cases. Lord Carter's work was described to our predecessor committee as, in itself, a stage in a long-term shift from pure piecework to block contracts; from paying for time, to paying for outcomes.[3]

3. Our predecessor committee reported on the implementation of Lord Carter's strategy in 2007. That committee supported the fundamental aims of the reforms, recognising the necessity to control legal aid expenditure, but, overall, our predecessors concluded that: "the Government has introduced these plans too quickly, in too rigid a way and with insufficient evidence". The report found that:

- unsustainable increases in legal aid expenditure were limited to Crown Court defence work and public law children cases;
- plans for a transitional phase of fixed fees were complex, rigid, based on inadequate data, likely to impose unsustainable cuts in solicitors' income and should not proceed;
- there had been inadequate research into the effects of competitive tendering;
- competition on price for legal aid contracts raised questions about the continuing quality of advice and the peer review quality assurance scheme was unproven;
- there were doubts over the practicality and effectiveness of the Government's plan to involve fewer but larger firms in the legal aid system;
- the impact on black and minority ethnic legal aid suppliers and their clients would be disproportionate and might constitute a breach of race equality legislation; and
- there had been a clear breakdown in relations between the LSC and suppliers and trust had to be rebuilt before any reforms could be implemented successfully.[4]

1 *Op. cit.,* hereafter, the 'LSC consultation paper'

2 *Op. cit,* hereafter, 'Lord Carter's report'

3 Constitutional Affairs Committee, Third Report of Session 2006-07, *Implementation of the Carter review of legal aid,* HC 223, para 53

4 *Ibid.,* summary and paras 38, 129, 134–5, 160, 174, 183, 187, 203–4, 222–3, 229 and 237

4. The Legal Services Commission's stated objectives for its family legal aid reforms are: the control of rising costs to ensure sustainable provision of services; recognition of increasing provision of advocacy by solicitors and reform of the legal services market proposed by the Legal Services Act 2007; the preparation of solicitors for best value tendering via simplification and standardisation of the payment system for family law representation and advocacy.[5] These plans are manifestly part of the groundwork for the Government's preferred model for the legal services market heralded in the over-arching regulatory system, and the potential for alternative business structures, provided for by the Legal Services Act 2007.[6]

5. In essence, the Legal Services Commission is proposing two new funding schemes, one for representation in private family law, and another for advocacy in both private family law and care proceedings. Both schemes are based on fixed fees for different types of cases. The Commission also proposes to stop funding solicitors for acting as independent guardians and to stop funding for independent social work in cases where the Children and Family Court Advisory and Support Service (CAFCASS) does not provide a guardian under Rule 9.5.[7] In addition, the Commission proposes to cap fees for independent social work to the same level as that paid by CAFCASS.[8] The deadline for responses to the consultation was originally 18 March 2009 then extended to 3 April 2009 in response to concerns about the underlying data.[9] The planned date for the Legal Services Commission's response to the consultation with final proposals was originally August 2009 but, as this report was being prepared, Lord Bach's office informed us: "This was a joint MoJ/LSC consultation and we intend to announce the consultation response by Written Ministerial Statement. We would be criticised if we made such an announcement during the recess, therefore our aim is to make our response before Parliament rises on 21 July.[10]

6. The Legal Services Commission's proposals, the evidence on which they are based, the proposed timetable for implementation, and other aspects of the consultation process, have given rise to a storm of protest from the judiciary, barristers and solicitors, guardians, independent social workers, as well as the Ministry of Justice's own advisory body on the family justice system, the Family Justice Council. Serious questions have been raised about the substance, implications and likely impacts of the Commission's proposed system, the adequacy of its evidence base and the extent to which the Commission has engaged with all of its stakeholders in a meaningful and timely manner. [11]

7. In response to representations on this matter, we held an informal meeting in March 2009 with representatives of family law practitioners. We wrote to Lord Bach about the issues raised. The plans of the Legal Services Commission in relation to guardians and

5 LSC consultation paper, paragraphs 2.06-9

6 *Ibid.,* paragraphs 2.4 and 2.11-12

7 Rule 9.5 of the Family Proceedings Rules 1991, as amended, allows a judge to order a child to be made a party to family law proceedings with separate representation—i.e. distinct from that of either parent—in order for the child's 'voice' to be heard and/or to enable the child's welfare, or best interests, to be more effectively determined and pursued.

8 LSC consultation paper, paragraphs 2.14-32

9 Ev 35

10 E-mail from the Ministry of Justice to the Committee, 7 July 2009

11 See, for example, Ev 13ff, Ev 34ff, Ev 55ff and appendix.

independent social work also give rise to issues of joined-up government and cross-departmental co-ordination and, therefore, we wrote to Beverley Hughes MP, Minister for Children within the Department for Children, Schools and Families. The replies we received on these issues from Ministers did not satisfy us that these matters were receiving adequate attention[12] and we found time for a formal evidence session on 16 June 2009 which included the Legal Services Commission. What we heard, and subsequent further written evidence we received, gave rise to such serious concerns about the future of family legal aid provision that we felt obliged to report to the House as soon as possible.

8. We continue to support of the fundamental aims of legal aid reform, recognising the need to control that expenditure. However, neither the Commission nor the Department have provided evidence that the approach being taken will achieve the desired outcomes and we are not convinced by their contentions. In particular, we are disturbed by the Commission's grudging approach to sharing information. There seems to be little doubt that the concerns expressed by our witnesses, lawyers and non-lawyers alike, are motivated by a genuine concern for the welfare and best interests of children and families. Set against these fears, there have been strong assertions by the Legal Services Commission on the need for change but little objective evidence defining an effective way forward. The late commissioning of research, which should have been undertaken before formulating proposals, suggests an attempt to find support for conclusions already reached, rather than a genuinely evidence-based approach to reform.

12 Ev 32ff, Ev 69ff and Ev 78

2 Family legal aid: a service for vulnerable children and families

9. Much of the debate about family legal aid reform inevitably revolves around fees and payments, which gives the impression that the issues are solely about how much to pay lawyers. It is all too easy to lose sight of the overall purpose of family legal aid which is the provision of a service to families, and particularly to children, to enable them to gain access to justice and to help them navigate effectively through an increasingly complex system. The families, and particularly the children, involved are often confused, emotionally damaged and vulnerable. As Lord Laming stated in his progress report on child protection in the wake of the Baby Peter case:

> "Children are our future. We depend on them growing up to become fulfilled citizens well able to contribute successfully to family life and to the wider society. It is of fundamental importance that the life and future development of each child is given equal importance. Every child needs to be nurtured and protected from harm."[13]

Family legal aid is part of this nurturing and protection and provides a vital service for vulnerable families and children. Their need for this service is as basic as their need for health, education and social services.

10. The Association of Lawyers for Children, representing both solicitors and barristers in family law, cited Lord Bach, legal aid Minister, as saying in 2008 that:

> "were it not for the quality of children lawyers that we have at work in this country, then the vital job [they] do would not be done, children and families would not be represented, miscarriages of justice would be the norm, the children themselves would suffer, and the state would end up footing a far greater bill, socially as well as financially, in consequence."[14]

We asked what assessment had been made of such future costs to different services arising from family law cases not being dealt with fully and properly in court. Caroline Little, Co-Chair of the Association, told us: "We deal with the difficulties in society in relation to children. We have always asked for government to look at the knock on impact of not doing the work properly at care proceedings level. It is a very difficult measure. There has been no research in relation to that."[15] The key driver for the Legal Services Commission's current proposals seems to be, to use Lord Bach's words, the bill that the state is footing up front for family legal aid.

11. The Legal Services Commission says:

13 *The protection of children in England: a progress report*, The Lord Laming, March 2009, HC 330, paragraph 1.1

14 Ev14, paragraph 13

15 Q 5

- Since 2001, the estimated net cash cost of family legal aid has risen by 46 per cent. While this partly reflects a rise in case volumes, average case costs have risen far in excess of volume.

- More money has been spent helping fewer people with, for example, private law cases rising 7.7 per cent. in volume but up 14 per cent in average cost per case (in public law family cases, the equivalent figures are rises of 5.7 percent in number and 31 per cent. in average case cost.

- In particular, payments under the Family Graduated Fee Scheme (which covers advocacy by self-employed barrister) have risen by 32 per cent. over the last five years and now represent 10 per cent. of the overall civil legal aid budget (with the instruction of experts having increased by 58 per cent since 2004-05.[16]

The Commission's consultation document, however, provides no analysis or explanation of the drivers behind these rising average cases costs.[17]

12. Lord Laming's recommendations following the Baby Peter case included one for the Ministry of Justice to take action to "lead on the establishment of a system-wide target that lays responsibility on all participants in the care proceedings system to reduce damaging delays in the time it takes to progress care cases where these delays are not in the interests of the child."[18] The Government accepted the recommendation, responding that:

> "The Ministry of Justice is working closely with the Department for Children, Schools and Families to establish a system wide target for reducing delays that draws in all participants within the care proceedings system. Whilst the detail is yet to be finalised with the relevant key partners, the intention is to have an overarching objective, related to the timetable for the completion of proceedings for an individual child, supported by a suite of Key Performance Indicators owned by individual participants in the system. This will include commitments to continuous performance improvement in order to avoid unnecessary delay by Her Majesty's Courts Service, the Legal Services Commission, and the Children and Family Court Advisory Support Service. Improvement and success will be measured in a Balanced Scorecard."[19]

13. Sir Mark Potter, President of the Family Division, observed that:

> "It is noteworthy that neither in Lord Laming's recommendation, nor the Government response, does any reference appear in relation to the provision of resources or the eventuality that a system already struggling under the constraints of limited and reducing budgets, may prove unequal to the task of achieving the

16 LSC consultation paper, paragraphs 2.06–9

17 We do note however, the Legal Services Commission's willingness to fund trials of more radical measures to address cost factors in some instances such as the mediation scheme pilots being undertaken in Birmingham, Milton Keynes, Plymouth, Reading and Sheffield. See appendix to this report.

18 *The protection of children in England: a progress report*, The Lord Laming, March 2009, HC 330, paragraph 8.11

19 *The protection of children in England: action plan—the Government's response to Lord Laming*, May 2009, Cm 7589, page 53

> 'continuous performance improvement' to which they will be obliged to commit themselves.
>
> That, as it seems to me, is a very unfortunate omission. It is indeed a failure to acknowledge the elephant which, if it is not already in the room, has already planted its front feet well over the threshold. Overarching objectives, key performance indicators and commitments to continuous improvement are all very well, but they cannot alone achieve anything significant if they are unrealistic in relation to the resources available to the key partners in the system."[20]

We agree with this view.

14. The Association of Lawyers for Children set out what it regards as the key factors increasing costs of family court cases. These include:

- the vast area of new jurisprudence and obligations arising from incorporation of the European Convention of Human Rights (ECHR);
- the ever-increasing volume of papers in children's proceedings arising from the ECHR, new forms of documentary evidence and greater judicial expectations;
- the use of e-mail which increases client expectations of contact and explanation by an order of magnitude;
- the ever-increasing amount of case law, practice directions and legislative and other initiatives; the preparation requirements under the Public Law Outline;[21]
- the increased focus on the whole 'care plan' in public law proceedings (rather than on the question as to whether to make a care order or not);
- advances, and on-going research, in medical science, especially related to injuries, and in the understanding of child abuse;
- fact-finding hearings in private law hearings;
- the recognition of the need to take proper account of diversity issues;
- and increasing numbers of litigants with English as a second language, and of litigants with learning difficulties, both of which impact on the pace, length, nature and cost of appropriate proceedings.[22]

15. The Family Law Bar Association emphasised the thorough critical analysis that must be undertaken by all concerned in relation to evidence that may lead to a child being permanently removed from their home without good reason, or returned back to a home where they may be at risk of suffering harm.[23] The Association also highlighted the work of

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20 See appendix to this report.

21 The Public Law Outline is a case management system for care proceedings developed by the Family Division judiciary with a heavy emphasis on case preparation to reduce the burden of court proceedings on the children in question.

22 Ev 15 and 16; and see the analysis of the Family Justice Council at Ev 59ff.

23 Q 2

Dr Deborah Price, King's Institute for the Study of Public Policy, on the reasons for case complexity.[24] In addition, the Association of Lawyers for Children (ALC) argued that local authorities were under-funded for the burdens placed on them by care proceedings and related duties and that this leads to longer proceedings, more hearings and more need of external expertise. The ALC also referred to a lack of experienced guardians due to under-funding of CAFCASS; increased numbers of litigants in person which can reduce court efficiency; a lack of family judges, sitting days and courtroom space; and to court closure and loss of court legal advisers.

16. Our witnesses argued that that none of the key factors driving up case costs were practitioner-led and described them as being the result of Government policies and decisions. They criticised the Government's strategy for dealing with the fall-out, characterising it as bearing down on the very resources needed to meet increasing systemic demands.[25]

17. We recall a key finding from our predecessor Committee's 2004 report on civil legal aid:

> "It is vital for the Government to ensure that part of the cost calculation of policy initiatives includes an assessment of the impact on the legal aid budget and that there is adequate liaison between the Constitutional Affairs Department and departments such as the Home Office which legislate in relevant areas. This is a key recommendation; we expect the Government to be able to demonstrate that it has significantly improved its system for ensuring that legislative changes proposed by departments are costed to take into account the full impact on the legal aid budget."[26]

18. **In seeking to control the costs of family legal aid, the Government seems to have failed to examine the factors pushing case costs up and has, therefore, not taken direct action—including in response to previous recommendations—on the actual pressures on the legal aid budget.**

24 *Work of the Family Bar*, Debora Price PhD & Anne Laybourne MSc, on behalf of the FLBA, February 2009, chapter 14

25 See, for example, Ev 16, paragraph 20, Ev 57, paragraphs 18-21 and Ev 58–9, paragraphs 34–37.

26 Constitutional Affairs Committee, Fourth Report of 2003-04, *Civil legal aid: adequacy of provision*, HC 391, para 15

3 Process: conduct of consultation

Quality of data

19. Evidence presented by lawyers' representative bodies was highly critical of the data on which the Legal Services Commission had based its proposals. The Family Law Bar Association wrote:

> "There is real cause for concern about the accuracy of the data upon which these proposals are made. Extensive corruption and mis-classification have been revealed. The time for the consultation response was extended at the request of the Bar Council and the FLBA (supported by many of the solicitor organisations) to enable efforts to be made by the LSC to clean the data."[27]

Resolution, an organisation representing family lawyers committed to non-adversarial resolution of disputes, wrote that the Legal Services Commission had sent data to individual solicitors' firms offering a comparison of payments under the new scheme; "in many cases the data … [were] simply wrong", "based on wrong assumptions" and included "some straightforward misunderstandings of the stages in [cases] to which the data relates."[28]

20. The Association of Lawyers for Children told us: "while it was utterly right that the response deadline for this consultation was extended to 'cleanse' what on its face was manifestly flawed data, that does not excuse that flawed data being used in the first place, especially when so much was built on it."[29] The Family Justice Council, the Ministry of Justice's non-departmental public body responsible for advising the department on family justice issues, was "dismayed" to learn of "considerable concerns surrounding the integrity of the data" that underpinned the LSC's consultation and was "disappointed" that such issues had not been brought to its attention directly rather than via its individual members.[30]

21. In response to our letter raising these concerns, Lord Bach told us that:

> "Whilst we are naturally concerned to ensure agreement can be reached as far as possible on any remaining data issues, I understand that none of the issues identified has been of sufficient statistical significance to materially impact on the proposals. The LSC is confident that the data is sufficiently robust to underpin the new fee scheme, and will write to stakeholders to clarify the position when it has considered the consultation responses received."[31]

27 Ev 36, paragraph 10

28 Ev 105

29 Ev 23, paragraph 81

30 Ev 57, paragraphs 22 and 23

31 Ev 70

In response, Lucy Theis QC, chair of the Family Law Bar Association, said that "with all due respect, I would fundamentally disagree with that".[32] The Association point to the headline figure for spending under the existing Family Graduated Fee Scheme for self-employed advocacy — claimed by the LSC to be nearly £100 million and rising — which had recently been the subject of revised figures showing a consistent spend, over the last three years, of around £90 million. On 16 June, the Association told us "There are still very serious data issues in relation to the foundation of these proposals and here we are, six months later, and they have not been resolved."[33]

22. Carolyn Regan, Chief Executive of the Legal Services Commission, told us on 16 June that: "as of this morning, I was told this was the best source of data available."[34] The Commission told us that the data had been improved by the process of consultation and the "extremely helpful" process of cooperation with the Bar, but: "so far nothing has been raised that has shown a material difference to the proposals that we consulted on."[35] Sara Kovach-Clark, Head of Civil Policy Development (Family) at the Legal Services Commission, told the Committee that: "the data that we formed our consultation proposals on, was fit for purpose, is still fit for purpose and I am confident will continue to be fit for purpose."[36] The Law Society, Resolution and the Legal Aid Practitioners Group, representing solicitors whose advocacy is rewarded under a different scheme, were of the view that, on balance, progress could be made notwithstanding the flaws in the existing information.[37]

Economic analysis

23. On 23 January 2009 the Legal Services Commission invited tenders for a piece of research into the potential economic impact of its proposals on the supplier market. The research, said by the Commission to be costing about £63,000, was aimed at assessing:

- the market segmentation of family advocacy services;
- the current levels of supply of family advocacy services, and whether or not there is excess supply (including issues of regional variations, the level of experience of advocates and quality assurance measures);
- price elasticity of supply for family advocacy services (including the risk of a drop in supply due to the proposed changes in rates for self-employed and in-house advocates);
- rates of utilisation of self-employed and in-house family advocates; optimum annual earnings of a fully utilised self-employed barrister under the proposed rates (including impact of inefficiency in the system e.g. cancelled hearings, over-running hearings, waiting time etc.);

32 Q 9

33 Q 8 and see ev 52

34 Q 27

35 *Ibid.*

36 Q 28

37 Ev 76, 77 and 111

- the extent to which different types of advocate compete for the same family advocacy work.

The Family Justice Council wrote in its response to the consultation that: "It is very surprising (to say the least) that this research was not commissioned *before* the Consultation proposals were made."[38]

24. The Family Law Bar Association was informed of this work on 20 March 2009, two days after the original deadline for responses to the consultation. The Legal Services Commission said that this had been as early as procurement legislation allowed.[39] Although initial findings from the study were expected in June, the Commission originally intended the findings of this research to be utilized, alongside consultation responses, to inform the final policy on family advocacy remuneration with the final report of the study formally published as part of its consultation responses in August this year, 2009. The Family Law Bar Association, the Association of Lawyers for Children, and other witnesses, see this research as fundamental to the character of the system that the Commission was seeking to put in place and the family Bar described the timetable as "deplorable".[40] The Association of Lawyers for Children wrote that: "if ever there was a demonstration of the principle of 'verdict first, evidence later', then this was it".[41]

25. The majority of our witnesses condemned the fact that there would be only a limited opportunity to see the findings of the study before the Legal Services Commission (LSC) finalised its proposals and that the Commission had originally given no guarantee to take account of responses to the study from stakeholders. Lucy Theis QC, of the family Bar, told us "it makes a mockery of the consultation process to produce such an important piece of evidence without the courtesy of even a meeting after the report has been produced. They [the LSC] have rather grudgingly said that they are going to share it with us."[42] This approach by the Legal Services Commission does not appear to be in line with the stated aims of its consultation paper or the principles of public consultation set out by the Cabinet Office.[43]

26. In response to a letter from the Chairman of the Committee on this subject, Lord Bach wrote that:

> "As a courtesy, and as part of their continuous and transparent dialogue with providers on the consultation proposals, the LSC has informed stakeholders that they are carrying out this research, and as a further courtesy, the LSC has also agreed to share the final report produced with stakeholders when it is available.
>
> The research is not considered to be fundamental to the structure of the final fee scheme, nor is it considered that stakeholders needed the information produced in this report to respond to the consultation. The consultation asks stakeholders to

38 Ev 67, paragraph 126 (original emphasis).

39 Ev 35, paragraph 6, and Q 29

40 Ev 39

41 Ev 22, paragraph 76

42 Q 9

43 Ev 40

> consider the proposed structure of the fee schemes and not the principle of harmonisation, which is already widely accepted. The research will, however, be relevant in any final impact assessment of the effects of the proposed scheme. We await the outcome of the research with interest, and I can assure the Committee that we will act as fairness dictates in relation to its findings."[44]

27. We found the line taken by Lord Bach to be highly unconvincing. The structure of the fee scheme is likely to be the crucial factor determining whether the proposed reforms work with, or against, the grain of legal services provision, encouraging or deterring providers from offering effective, high quality services while enabling the Legal Services Commission to remain within budget. The principles behind the scheme are generally accepted but the Government's over-riding statutory duty to ensure provision from a suitable range of providers will depend on the impact of the new scheme on those providers; and this is what the research in question was designed to determine. The Family Law Bar Association described the study as "a critical piece of evidence in relation to the impact of what they are proposing, particularly when that impact falls on the most vulnerable in society".[45]

28. We pursued the question of the role of the Ernst and Young economic study with the Legal Services Commission in oral evidence.[46] **The Legal Services Commission initially said that they had never regarded the Ernst and Young study as "fundamental" to the shape of the proposals. It was additional economic analysis which they would have done anyway and the timing was a "resource issue". However, the Commission did concede that an assessment of the impact on suppliers of its proposals—part of the Ernst and Young study—was very important, as a substantial drop in supply would cause a "significant problem", and that the study was "fundamental" to the decision on whether the new fee scheme went ahead. We agree.**

29. This is not the first time that controversy has arisen in relation to work commissioned by the Legal Services Commission (LSC) on this issue. In November 2006 the LSC received a report it had commissioned from Andrew Otterburn Consulting on the impact of Lord Carter's initial proposals on suppliers. However, the paper was not published until after our predecessor Committee had made representations to the Secretary of State. In the relevant report our predecessors said the following:

> "This [second Otterburn] study … was critical of the short transitional period between the introduction of the fee schemes and the roll-out of competitive tendering and of the lack of adequate evidence to come to a reliable assessment of the risks associated with the Lord Carter's fixed fee proposals. It warned that changes to the timetable of the reforms should be made.
>
> …
>
> While we accept the apology by the Lord Chancellor for what looked like an attempt by his Department and the LSC to suppress an important piece of research relating

44 Ev 69-70

45 Q 9

46 QQ 29-32 and 44-48

> to the speed of the current reforms, we remain profoundly troubled by the handling of the Otterburn issue on the part of the LSC. It suggests an inability on the part of the LSC to address fairly and openly a critical aspect of the reforms: the ability of the supplier-base to survive the reform proposals."[47]

30. **We emphasise and welcome the undertaking given to us in oral evidence by the Legal Services Committee that, "we have always been clear that we would show stakeholders a copy of the [Ernst and Young] report and allow them some time to comment on it." We regard a very much higher and consistent level of constructive engagement between the Commission and all its stakeholders is required if effective progress is to be made with family legal aid reform this year, 2009.**

Conclusion

31. Clearly, there is a significant discrepancy of views between the Legal Services Commission and its stakeholders on the scope and quality of data that would constitute a satisfactory evidence base on which to erect a new system of fixed fees for legal services in family law. We note that these issues have some pedigree. Our predecessor's 2007 report on Lord Carter's proposals for legal aid reform said that a meaningful process for developing a new system for the future of the legal aid market could only be undertaken on the basis of adequate knowledge of case costs presupposing the right data and statistical research. The report concluded:

> "It appears that the LSC has inadequate information on which to base its proposed fixed and graduated fee schemes.
>
> Equally, there is very little reliable statistical information about the economic situation of the legal aid supplier base on which valid predictions of the impact of changes to remuneration or procurement arrangements could be based".[48]

32. The lack of transparency and the last minute nature of data-gathering and publication means that, **we cannot come to a definitive view on the statistical significance of the outstanding data issues. What clearly is significant is that the existence of flaws in the evidence base has damaged the confidence of practitioners in the process that the Legal Services Commission is conducting. At the same time, the LSC has commissioned—extremely late in the process—fundamental economic research into its supplier base where hitherto it was relying on anecdote. These discrepancies and gaps in its evidence, which can come as no surprise to the Commission, should have been sorted out in advance of any proposals being published. The objectives of the economic research could have been discussed with stakeholders before it was commissioned. The Legal Services Commission has made a substantial rod for its own back by not doing so.**

47 Constitutional Affairs Committee, Third Report of Session 2006-07, *Implementation of the Carter review of legal aid*, HC 223, paras 235–6

48 *Ibid.,* paras 127 and 128

4 Substance: implications of the proposals

Introduction

33. The Legal Services Commission is proposing two schemes of fixed fees for legal services: the Private Family Law Representation Scheme; and the Family Advocacy Scheme. The representation scheme builds on the standard fee scheme introduced in October 2007 which the Commission asserts has shown early signs of success in controlling the cost of legal aid, encouraging less litigation and rewarding settlement. The proposals would bring the remainder of the private family law budget within a standard fee system. The advocacy scheme would cover public and private family advocacy for both self-employed and in-house advocates including those private law cases previously undertaken, under the existing Family Graduated Fee Scheme, by self-employed barristers. Standard fees are claimed to be based on cost neutrality overall. The main principles underpinning the reforms appear to be: "swings and roundabouts", whereby likely lower payments for more complex cases will be balanced by higher payments for less complex cases; paying for "outcomes achieved rather than time spent"; and moving to "equality of reward" or "harmonisation", where work is paid for at the same rate no matter who undertakes it .[49]

Swings and roundabouts: complex and simple cases

34. The Family Law Bar Association set out the issue as follows:

> "The main concern about the LSC's advocacy proposals is that they grossly over-reward simple cases and under-reward the more complex cases. The fees are flat and there is no variation to reflect the complexity (or relative simplicity) of a case (other than an uplift if the case is in the High Court). For example, an advocate could attend the local county court and conduct three 5-minute directions hearings in private law cases and be paid nearly £600. Yet if there was a 5 day fact finding hearing (where the court determines disputed evidence regarding allegations of physical / emotional / sexual abuse of a child) before deciding what orders should be made in the interests of the child, the advocate will be paid £198 (or less than £40 per day)."[50]

35. The principle of swings and roundabouts is based on a vision of the legal services market in which providers, whether individuals or firms, undertake work both on 'swings' and on 'roundabouts' so as to take advantage, or at least cover costs, via what the Family Justice Council calculate to be the remuneration of simple hearings at twice their previous level at the expense, within a fixed budget, of more complex hearings. The Family Justice Council described this pattern as "difficult" for the Ministry of Justice and Legal Services Commission "to justify as a proper distribution of public funds."[51]

36. The Association of Lawyers for Children told us:

49 LSC consultation paper, paragraphs 6.7 and 6.43; and see Ev 59 and 71

50 Ev 36, paragraph 8

51 Ev 65, paragraph 106

> "In practice, the more complex case is undertaken by the more experienced advocate. That is the embodiment of common sense and proportionality, but it is also reflective of a sensible career structure that is manifestly in the public interest. Less experienced advocates cut their teeth on less complex work and mostly aspire to undertake more complex work."[52]

Under these conditions, the Association and the family Bar argued that the more experienced practitioners—the ones required by the courts to help keep complex and intractable cases on track—are unlikely to be undertaking the mix of cases, the swings as well as the roundabouts, needed to maintain their income under the Legal Services Commission's proposals.[53] Indeed, we recognise that it would be a tremendous waste of skills and resources—and not in the interests of justice—were they to do so (whether barristers or solicitor advocates). In addition, conflict of interest considerations militate against too much consolidation as separate representation and advocacy is needed for each party in each case.

37. Evidence from past and current presidents of the Family Division, and others, indicates that the result of channelling more resources towards simple, as opposed to complex, cases will be the exodus of experienced practitioners of all types from publicly-funded work leading to much less effective case preparation and management and therefore inefficiency and higher costs for the court system; not to mention the risks of miscarriages of justice.[54] The loss of experienced and committed advocates will undermine the Public Law Outline,[55] as well as reducing the number of senior practitioners suitable to become candidates for the family judiciary. The Association of Lawyers for Children was blunt: "If the [Legal Services Commission] has its way the [Public Law Outline] will fail. No ifs or buts … if the brief had been to design a scheme calculated to destroy the [Public Law Outline], the Legal Services Commission could not have done a better job."[56] Overall, Baroness Butler-Sloss, former President of the Family Division told us: "not only is there a real danger of inadequate access to justice which may create miscarriages of justice, but there is a double tragedy for children whose families have failed them. They are caught up in the justice system which is failing them further."[57]

38. The Association of Lawyers for Children suggested that the Legal Services Commission may be expecting the employment of in-house advocates by solicitors to fill any gap created by the withdrawal of self-employed barristers from publicly-funded family law work. However, the Commission failed to provide evidence that such advocates exist in the required numbers, or with the necessary skills and experience, to do so. The Commission did not convince us that it had the strategy, the resources or the determination to plug this predicted gap. The Association of Lawyers for Children asked: "who are these [solicitor] advocates? How many are there? What level of work do they undertake? Do they appear

52 Ev 17, paragraph 30

53 Ev 17 and see Q 15

54 Q 1, Ev 54 and 62-7 and appendix to this report

55 The Public Law Outline is a case management system for care proceedings developed by the Family Division judiciary with a heavy emphasis on preparation to reduce the burden of court proceedings on the children in question.

56 Ev 21, paragraph 63

57 Q 1

for all parties and in all courts? What is their experience? What is their quality?"[58] The Law Society, and other representatives of family solicitors, recognised that the complexity of cases needed to be recognised in any new family advocacy scheme better than it was in the existing proposals.[59]

39. The Family Law Bar Association claimed that the Family Graduated Fee Scheme had in fact succeeded in its objectives to "control costs and … retain those who specialise in family advocacy" but that this achievement may be at risk under the new proposals.[60]

Spending on the Family Graduated Fee Scheme[61]

	LSC consultation paper	MoJ revision letter, 26/5/09
2005	£90.6 million	£88.5 million
2006	£94.1 million	£90.4 million
2007	£98.2 million	£89.9 million[62]

40. The Family Law Bar Association offered survey information about the intentions of barristers to move away from publicly-funded family law work if the new proposals are brought in un-amended and of the difficulties solicitors are already experiencing in instructing counsel of appropriate skills and experience in more complex cases (to the perceived detriment of the case).[63]

41. As an example of the implications of the proposed scheme for the conduct of cases and access to justice, the Association of Lawyers for Children offered a case requiring determination of whether serious head injuries to an infant were accidental or not. This case involved 4 lever arch files of 1,200 pages of case papers, 29 hours of pre-trial preparation and four days in court (reduced from five to take advantage of early court availability thereby reducing the burden on the family). From issue to finding, 18 weeks elapsed and the judge explicitly congratulated the legal teams involved at length, highlighting the crucial importance of experienced advocates in achieving fast, effective and accurate results. Mrs Justice Hogg said: "…as a consequence an early decision was reached and the costs of litigation borne by the rate payers and reduced. It also had the happy consequence that the child … was returned to her parents".[64] Sixty-six hours were reported as expended on this case by the parents' advocate.

58 Ev 22, paragraph 74

59 Ev 76, 77 and 110

60 Ev 35, paragraphs 3 and 11

61 Ev 52

62 In written and oral evidence, the FLBA indicated that this figure may be reduced by a further £3 million (c. 3 per cent.) due to double-counting by the LSC of queried payments in that year (Ev 52 and Q 8).

63 Ev 36–8 and QQ 1, 14, 16 and 17

64 Ev 24

Remuneration for 66 hours work[65]

Standard private client rate	£9,900.00
Existing legal aid scheme for self-employed barristers (FGFS)	£4,875.25
New LSC scheme for family advocacy	£1,909.00[66]

Outcomes not time

42. The Legal Services Commission's consultation paper stated that: "we believe that the services we purchase should be expressed in terms of outcomes achieved and not time spent. We want public money to be spent rewarding quality work carried out efficiently, promoting equality and transparency within the legal services market."[67] The incentive for efficiency built in to a system of fixed fees is clear; but there is an equally obvious risk of the avoidance of the more complex and difficult cases, which will be less remunerative, and/or of skimped preparation where such cases are taken at the proposed lower rates. The Commission's focus on outcomes is to be applauded, but there is little evidence that the outcomes that the Legal Services Commission is looking to procure have been defined in terms of quality as well as price. Taking the case study set out above, it is difficult to see how the outcomes achieved could have been purchased by the new scheme.

Equal pay for equal work

43. The Association of Lawyers for Children, which represents both barristers and solicitors, wrote that: "If the intention of the consultation paper was to drive a rift between solicitors and barristers, offering increased riches to the former and savage cuts to the latter, then it has failed."[68] Payment for advocacy is currently handled differently depending on whether the advocate is a solicitor or a barrister. Solicitors' advocacy is paid on an hourly basis. Until the advent of fixed fees, solicitors' preparation for advocacy (as opposed to case preparation) was also paid for on an hourly basis. Since the advent of fixed fees, the preparation element for solicitor advocates is deemed to be included in the fixed fee. This was described by witnesses as disadvantaging the very group that the Legal Services Commission was seeking to encourage, those solicitors who undertake a lot of their own advocacy in all types of cases.[69] Similarly, the Association pointed out that there was no recognition in the fee structure for the assured quality and experience of family law solicitors who have gained membership of the Children Panel and this is reducing that pool of accredited expertise. Caroline Little, co-chair of the Association of Lawyers for Children, told us: "there were 2,500 Children Panel members who have now reduced to

65 Ev 25, paragraphs 93-6

66 *Ibid.,* and see paragraph 97

67 *Op. cit.,* paragraph 2.13

68 Ev 17, paragraph 24

69 Ev 19, paragraph 51

below 1,800 … and there are very few young ones coming through … there is a reducing body of [specialist] children's solicitor advocates."[70]

44. Resolution, representing solicitors committed to non-adversarial solutions, wrote that, on most calculations, independent barristers are almost always paid more for the same piece of advocacy than a solicitor advocate would be because of the structure of the Family Graduated Fee Scheme as opposed to what would be paid on an hourly rate. Resolution wrote that barristers received a substantial increase to their fees in 2005, whereas solicitors have received no fee increase for 14 years. Resolution argued that the inequality between solicitor advocates' fees and barristers' fees is a glaring anomaly. In some cases a barrister can be paid as much as four times the amount paid to a solicitor for undertaking the same piece of advocacy.[71] The Legal Aid Practitioners Group, representing solicitors, said:

> "We completely agree with the proposal from Resolution that fees for solicitors and barristers should be equal. It is not right that barristers are paid more for carrying out the same work. At present their overheads are likely to be considerably lower than solicitors' overheads so the proposal to harmonise does not equate to complete equality.
>
> We are greatly concerned about any delay in implementing the proposals. While in an ideal world we would like to see more money being paid by the government to run legal aid services we are realistic that at a time of recession all we can press for is for efficiencies to be tackled and for our members to be paid at a reasonable rate."[72]

45. The principle that solicitors and barristers should be paid the same for the same work is accepted by all the representative bodies of both barristers and solicitors who submitted evidence. The solicitors' associations generally see the current proposals, and the move from the Family Graduated Fee Scheme to the Family Advocate Scheme, as providing the first opportunity to achieve implementation of an equal payment scheme for solicitor advocates and barristers, and they do not want this to be delayed.[73]

Availability of supply and discrimination

46. The survey of family Bar work recently commissioned by the Family Law Bar Association highlighted that, in the event of cuts, then anticipated to be around 13 per cent., over 80 per cent. of the family Bar planned to change their practices and "move away from" publicly-funded family work.[74] The cuts now proposed are much higher than when the survey was carried out and the Association predicts that the exodus from this work is therefore likely to accelerate. Baroness Butler-Sloss, herself a former family law advocate, confessed that: "…nowadays, when students come to me and say 'You are a family judge, should I go into family law?' I advise them not to."[75] We note her opinion that: "They will

70 Q 16

71 Ev 110

72 Ev 77 and see Ev 76, paragraph 10.6

73 *Ibid.,* and Ev 111

74 Ev 38, paragraphs 23-4 and Q14

75 Q 14

not get a good enough income and they will get a great deal of aggro in doing it."[76] In addition we received evidence from many witnesses of significant concerns about the disproportionate effect of the planned reforms on female practitioners and those of black and minority ethnic origin, many of whom choose to make a commitment to specialise in legal aid work and, particularly, family law.[77]

47. Sir Mark Potter, current President of the Family Division, recently set out the concerns of the judiciary on this issue:

> "The judiciary have been invited to comment on the various consultation papers issued by the LSC. I have urged in response the clear view of the judiciary that representations by the professions as to the effect of the proposals and the willingness of solicitors and barristers to undertake the work if they are implemented should be taken seriously. I have warned the LSC that the family judiciary is in no doubt that:
>
> Individual solicitors and solicitors firms of quality and experience are already abandoning publicly funded family work, and the rate of this process will increase if the proposals are carried into effect.
>
> Many members of the Bar have already either cut down on or abandoned publicly funded work in favour of privately paying work, and this too is likely to increase.
>
> Members of the Bar who can command privately paying work tend to be the more experienced, and their loss to this area of work will reduce a valuable pool of expertise.
>
> The less experienced and competent the representative, whether barrister or solicitor, the less efficiently is the case managed.
>
> Lack of representation will lead to more and more litigants appearing in person with the effects I have described.
>
> Loss of experienced and committed advocates will undermine the Public Law Outline, which as I have emphasised is dependent on the cooperation and expertise of the dedicated specialist lawyers who will operate it."[78]

Sir Mark concluded these remarks with a statement that he: "felt bound to observe that there is a discouraging lack of realism in the apparent determination of the LSC to disregard these warnings."[79]

48. As this report was being considered, the controversial Ernst and Young study was made available. A preliminary reading of its conclusions suggests that it predicts low price-elasticity amongst family barristers, challenging forecasts of an exodus of advocates from this area of the law. The Family Law Bar Association's provisional reaction appears to be that the study:

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76 *Ibid.*

77 Ev 36, paragraphs 13 and 14

78 See appendix to this report

79 *Ibid.*

- fails to distinguish between short and longer term responses to changing fees;
- fails to recognise that no dataset in existence permits the identification of supply elasticity without observation of how practitioners respond, other things being equal, to changes in remuneration over time; and
- fails to take into account the diversity of advocacy work and that simple 'excess of supply' may not enable matches between case complexity, on the one hand, and the skills and experience of advocate, on the other (this was said to chime with a view attributed to the Commission that, "any advocate can conduct any case").[80]

We note that the Family Law Bar Association has commissioned a study of the Commission's Ernst and Young study.

49. The family Bar argues that the potential effect of the reforms on women barristers, and those of black and minority ethnic origin is likely to reverse the progress made to date to encourage diversity at the Bar and, consequently, within the judiciary. The Bar points out, for instance, that the first woman member of the Judicial Committee of the House of Lords, and the first woman President of the Family Division, were both family barristers. In addition, women judges drawn from the family Bar have made a significant contribution to the fact that the judiciary has become more diverse. Of the judges of the High Court's Family Division, 38 per cent. are women, a much higher proportion than in any other division. That continued contribution to judicial diversity is said to be at risk by the Commission's proposals.[81]

50. The Legal Services Commission accepted that their proposals would disproportionately affect women and black and ethnic minority advocates but put the responsibility on systems for, and traditional pattern of, allocating such work within chambers; an area over which the Commission had no control.[82] We found this view thoroughly unconvincing and the Commission appeared to have no evidence to support this contention. However, the Commission reported agreement with the Bar's Equality and Diversity Committee that the only way to mitigate the impact on women and black and ethnic minority barristers was to look at introducing more "measures for complexity" into the fee scheme.[83]

Conclusion

51. We agree with the President of the Family Division on the significance of the current situation. Sir Mark Potter recently said that: "It is no function of mine as Head of Family Justice, to participate in negotiations between government and the professions as to the terms of their remuneration. However, it emphatically is my concern as Head of Family Justice to bring forcibly to the attention of the government the threat to the efficient working of the system in terms of both efficiency and delay if the [Legal Services Commission] proceeds regardless of the warnings of the profession and, in particular if

80 E-mail from the FLBA to the Committee on 7 July 2009

81 Ev 36–7, paragraph 14 and see evidence from the Family Justice Council at Ev 64, paragraphs 98 and 99

82 QQ 56–7

83 Q 56

those specialising in children cases abandon or cherry pick publicly funded work. Quite apart from the strain upon family judges and the courts' administration by HM [Courts Service], there will be significant further delays in the court process caused by inexperienced advocates undertaking more complex work; longer and less focussed hearings; a higher incidence of litigants in person and a greater likelihood of appeals where cases become derailed because of inadequate representation at first instance."[84]

52. **We recognise that a majority of family law advocacy is carried out by solicitors but that the more complex and serious cases tend to be conducted either by more experienced or specialist solicitor advocates or senior members of the family Bar. The vast majority of our evidence, from both solicitors and barristers, as well as the judiciary and the department's own advisory body on family law, is that the re-balancing of resources between complex and simple cases has gone too far and that the mantra of "swings and roundabouts" simply does not reflect the reality of how family law advocacy, in the most serious cases, is conducted. If the scheme is implemented as proposed there is a serious risk of an exodus of experienced practitioners from publicly-funded family law.**

53. **The overall fee reductions for family advocacy will fall disproportionately on female and black and minority ethnic practitioners who, for a variety of reasons, have tended to specialise in publicly-funded family law work. This is discriminatory. It also has serious implications for the development of a more diverse pool of experienced courtroom lawyers from which candidates for a more diverse judiciary can emerge.**

54. **We note an emerging consensus around a revision of the Legal Services Commission's proposals developed by the Association of Lawyers for Children. We urge the Commission to give these new proposals careful consideration.**[85]

84 Appendix to this report

85 Ev 26–31

5 Guardians and independent social work

55. The Legal Services Commission proposes to stop funding for independent guardians and independent social work in cases where a guardian is not provided under Rule 9.5.[86] In addition, the Commission proposes to cap fees for independent social work at the same level as that paid by the Children and Family Court Advisory Support Service (CAFCASS). By way of explanation, the consultation document states that: "Where the court appoints a solicitor to act as guardian or another non–CAFCASS or [non-]CAFCASS Cymru guardian, it is not reasonable for the legal aid budget to meet these costs. CAFCASS and CAFCASS Cymru provide an appropriate legal and professional framework for the delivery of quality assured guardian services and are funded by government for that purpose. If they fail in their duties then this should be challenged appropriately."[87]

56. It is clearly the case that a proportion of such services have been provided from the legal aid budget until now. If there is to be a transfer of responsibility there must also be a very clear and reasonably generous transfer of resources too. Having said that, there is clearly evidence of substantive benefits from the current approach to providing these services, and administrative tidiness from the point of view of a government department is not a necessary and sufficient cause for change.

57. Further, while Baroness Pitkeathley, former chair of the board of Children and Family Court Advisory Support Service (CAFCASS), claimed in the organisation's 2005-06 annual report that the service was no longer a "problem organisation",[88] CAFCASS still seems to be under pressure. We note Sir Mark Potter's observation that the substantial new duty for CAFCASS arising from the Children and adoption Act 2006 had been "regarded as 'cost neutral' by the Treasury" and no extra budgeting provision had been made. He described this evaluation as "an extraordinary example of the triumph of wishful thinking over realistic assessment" noting that it must have been obvious that the deployment of CAFCASS staff in these functions "was bound to reduce (as it has reduced) the amount of time available to individual officers for the purposes of reporting, giving advice to the court and implementing contact between recalcitrant parties."[89] Our witnesses supplied evidence of significant delays in producing court-ordered reports, inadequate reports and of children awaiting appointments of guardians: 270 in London and 600 nationally at the time this report was being prepared.[90] We note the Sir Mark's observation that: "thanks to the more generous funding of CAFCASS Cymru" by the National Assembly for Wales "that service has been largely immune from the resource difficulties and consequent delays" which have affected CAFCASS in England."[91]

86 Rule 9.5 of the Family Proceedings Rules 1991, as amended, allows a judge to order a child to be made a party to family law proceedings with separate representation—i.e. distinct from that of either parent—in order for the child's 'voice' to be heard and/or to enable the child's welfare, or best interests, to be more effectively determined and pursued.

87 LSC consultation paper, paragraph 8.24

88 *Op. cit.*

89 Appendix to this report

90 Q 7 and Ev 89

91 Appendix to this report

58. The National Association of Guardians Ad Litem and Reporting Officers (NAGALRO), representing children's guardians, family court advisors and independent social work practitioners and consultants, and the National Youth Advocacy Service (NYAS), an independent provider of advice and advocacy for children and young people, both argued that the Legal Services Commission's proposals completely ignored the needs and rights of children and were likely to frustrate court-ordered arrangements by establishing CAFCASS as a gatekeeper in sole charge of public support for guardians, representatives and independent social work in family cases.[92] They argued that, by the removing the ability of the system to meet the requirements of an order made by a Family Division judge—acting in the best interests of a vulnerable child after careful consideration of all factors—the changes will limit judicial discretion. This is particularly acute in cases where children are ordered to be provided with separate representation. The National Association for Guardians ad litem &c. quotes Lord Justice Wall as saying:

> "If I, as a judge charged with the duty to resolve an intractable contact dispute, take the view that the children involved need separate representation—and the Family Proceedings Rules and s122 [of the Adoption and Children Act 2002] give me the power to order than representation, then I will expect the children to be provided with the service I think they need."[93]

59. Our witnesses said that at a time when other parts of Government are seeking to raise ambitions for children's well-being, and strengthen the social care work force, it seems inconsistent for the Legal Services Commission to be:

- cutting public funding to a body of family law and family social care specialists developed over the last 30 years;
- attacking both saddles of the "tandem" model of children's representation, solicitor and social worker; and
- removing, or downgrading, the available welfare evidence, often gathered by independent social work, which judges need before them to determine the best interests of the child.[94]

60. The National Youth Advocacy Service (NYAS) is the most significant independent provider of guardianship and social work services dealing with about 160 of the most intractable cases each year. The Service argued that the Commission's proposals implied an increase in the workload of CAFCASS with which that organisation will simply not be able to cope. NYAS also emphasised the potential for alternative, genuinely independent provision (needed if relationships between CAFCASS and parents break down) to be lost and expressed the fear of the loss of experience and expertise in NYAS as well as the substantial trust built up between judiciary and the organisation over the years.[95]

92 Ev 80ff and 86ff and see QQ 18 and 21

93 Ev 83

94 Ev 80-1 and Q 18

95 Ev 83

61. The National Youth Advocacy Service's submission included a further example of judicial approval where Mr Justice Ryder said, in a judgment, that:

> "Fortunately, and despite the significant restrictions placed on that body by the legal Services Commission, an agreement was arrived at which permitted NYAS to represent the child. The consequence, as is the common experience of the senior judiciary, is that NYAS have negotiated a significant measure of agreement between the parents. … At a time when the future of NYAS hangs in the balance, being dependant on funding from Government and/or the Legal Services Commission and where steps are being taken to restrict NYAS' work this simple example ought to be made known so that some reconsideration can be given to the ability of agencies such as NYAS to provide needed services for families. The agency of the State, namely CAFCASS, was unable to provide what this family needed. This Court should not shrink from warning of the consequences should it be faced with demise of NYAS. Without that organisation's services this Court would have been involved in seven days of contested, damaging and ultimately unnecessary litigation at great cost, emotional and financial, to the State and everyone involved."[96]

Another senior judge in the Family Division put it another way, in front of a recent family law conference, when he said that, without NYAS, 'you might as well settle the more difficult family law cases by trial by combat'.

62. The National Youth Advocacy Service reported to us that, over the last two years, approximately two thirds of its referrals were due to CAFCASS being unable or unwilling to deal with complex cases (including breakdown of relations between CAFCASS and families) and one third were court orders made in response to administrative delays by that organisation. Judith Timms, of The National Association of Guardians Ad Litem and Reporting Officers, described the situation as: "part of a crude funding war" between the Department of Children, Schools and Families, the Legal Services Commission and the Ministry of Justice. She went on that the Commission was focusing on respective formal responsibilities and contrasted the Commission's vision of a clear divide between "social work input" and "legal input" with, for example, the National Youth Advocacy Service's "holistic" services provided in a way "we thought the Government wanted, a joined up policy in relation to children."[97] We note the analysis of the President of the Family Division that:

> "Following the constitutional upheavals associated with the abolition of the Lord Chancellor as head of the judiciary, [CAFCASS] has become answerable to the DCSF and works within the strategic objectives agreed by their sponsor department. The division of responsibility, between the DCSF to whom [CAFCASS] are now accountable, and the [Ministry of Justice], as the body responsible for HM Courts Service and the support of the judiciary, is scarcely an example of "joined up" government. It is in practice a serious fault line because, although the functions of [CAFCASS] (and hence their tasks and responsibilities) are dictated, and may be increased, by the demands of the judges and the [Ministry of Justice], the DCSF,

96 Ev 102

97 Q 18

which is the budget holder responsible to finance those demands, has its attentions and priorities largely directed elsewhere."[98]

63. The Minister of State for Children, Young People and Families, Rt Hon Beverley Hughes MP, responded to us in March that the Government fully appreciated the work of NYAS for vulnerable children and young people but she said that she did not want to comment and "pre-empt the consultation".[99] The Minister with direct responsibility, Baroness Morgan, wrote that, while CAFCASS was responsible for providing guardians (and was meeting its target for appointment within two days of referral in 65 per cent. of cases), the courts sometimes chose to appoint non-CAFCASS guardians under Family Proceedings Rules (including, but not only, because of limited CAFCASS capacity). We asked about the number of cases where the organisation had ceased to provide a guardian and provision fell to NYAS, but the Minister informed us that the information was not collected.[100] Baroness Morgan wrote that NYAS dealt with around 150 cases a year; only a small proportion of the 1,206 guardianships dealt with by CAFCASS in 2006-07.

64. **The Legal Services Commission, in oral evidence, denied that the issue of paying for guardians and independent social work in 9.5 cases was an "unseemly battle", or "argument over who should be picking up the tab", between departments.** Sara Kovach-Clark, of the Commission, told us "we have to give due regard to the financial pressures that are on this as well and so it is important that we fund what we are statutorily obliged to fund and that CAFCASS funds what they are statutorily obliged to fund."[101] **The Legal Services Commission said it was confident that discussion between the Commission and the three relevant departments "will provide a satisfactory result for all parties." We urge the Commission and the Government to remember that vulnerable children are the most important party to those inter-departmental proceedings, and to sort the problem out. We would like to share the Commission's confidence but we can see no objective grounds for its optimism. We urge the Government to monitor this situation, providing evidence of progress by the time the House returns.**

65. The way forward planned by the Government may be indicated by the statement that: "CAFCASS already commissions services from a range of providers, including NYAS, to help meet the needs of families … and the consultation proposals envisage that CAFCASS would continue to do so". However, the National Youth Advisory Service itself would resist the suggestion that it simply became a provider of services for CAFCASS because this would compromise its independence, which is very important to families whose relationship with CAFCASS has broken down.[102]

66. **We very much welcomed supplementary evidence from the National Youth Advocacy Service indicating that the Legal Services Commission was contemplating**

98 Appendix to this report

99 Ev 69

100 Ev 78

101 QQ 63 and 65–6

102 Ev 79

funding some social work via legal aid as well as developing a specialist children's contract for legal services in public law cases.[103]

103 Ev 102

6 Conclusions

67. The Legal Services Commission is running a substantial and complex consultation programme of inter-related initiatives aimed at shifting legal aid onto the footing identified by Lord Carter as the most cost-effective way forward. There have been more than 30 consultations launched since 2006.[104] More reform is inevitable. However, the consistent message from evidence received on legal aid reform is that the Commission is proceeding at speed with inconsistent data, a weak evidence-base and a poor understanding of the shape, the cost drivers, other motivating factors, and the structure of its supplier market. In addition, as Lord Carter himself emphasised strongly, this fundamental reform of legal aid provision—for 60 years the pride of the justice system in this country—requires the cooperation of those who deliver the services.

68. We urge the Ministry of Justice and the Legal Services Commission to take an evidence-based approach to reform, to be much more open and transparent with their data and to make far greater efforts to engage the legal profession and the other professionals on which they rely, at a much earlier stage, initially in gathering evidence and then in the process of developing any further proposals. Crucially, the Government and the Commission must not drive the system towards the endgame identified by Lord Carter faster than the existing pattern of legal services provision can bear. The Commission seems to be relying on a mantra of 'swings and roundabouts' and points to the potential for consolidation, increasing use of in-house advocates and the legislative and regulatory framework for 'alternative business structures'.[105] However, however, there is minimal evidence of any of these developments taking place on the ground in family law.[106] **The legal aid structure being designed by the Legal Services Commission seems to be based on a pattern of supply which simply does not yet exist. The Commission appears to have failed to take an objective evidence-based approach to delivering the outcomes identified for it by the Government.**

69. **The Legal Services Commission says that its proposals are "not about cuts", and the lawyers told us that they are not asking for more money. Such fundamental accord should create a platform on which it should be possible successfully to design an effective system that will deliver the best possible outcomes for those who find themselves enmeshed in the family legal system and need advice and representation, whether on a relatively straightforward case or a whole cluster of complex matters. We believe that the two key issues raised with us are the equality of reward for equality of work and the need to fund the more serious and complex cases properly and in a way that reflects the real dynamics of the profession. We believe that these issues are capable of resolution on the basis of constructive engagement between the Government, Legal Services Commission and stakeholders; but there needs to be a fundamental change of attitude on the part of the Commission.**

104 See annex for a list of LSC consultations since 2006

105 LSC consultation paper, paragraph 2.10

106 Ev 68, paragraph 131 (Family Justice Council)

70. **We are also concerned about the argument over funding of guardians and independent social work. The Legal Services Commission told us that what was important was that it funded what it was statutorily obliged to fund and that the Children and Family Court Advisory and Support Service funded what it was statutorily obliged to fund. We do not agree. We believe that what is important is that vulnerable children trapped in intractable court cases, whether public or private, receive the advice and representation that they need and that the court has available the best welfare information it can have. If achieving these goals requires a funding model that upsets departmental silos, so be it.**

Conclusions and recommendations

Family legal aid: a service for vulnerable children and families

1. [The President of the Family Division noted that neither Lord Laming, nor the Government, made reference to the provision of resources in recommending and agreeing, respectively, system-wide targets, indicators and commitments in relation to reducing delays in care proceedings.] He described this as "a very unfortunate omission". We agree with this view. (Paragraph 13)

2. In seeking to control the costs of family legal aid, the Government seems to have failed to examine the factors pushing case costs up and has, therefore, not taken direct action—including in response to previous recommendations—on the actual pressures on the legal aid budget. (Paragraph 18)

Process: conduct of consultation

3. The Legal Services Commission initially said that they had never regarded the Ernst and Young study as "fundamental" to the shape of the proposals. It was additional economic analysis which they would have done anyway and the timing was a "resource issue". However, the Commission did concede that an assessment of the impact on suppliers of its proposals—part of the Ernst and Young study—was very important, as a substantial drop in supply would cause a "significant problem", and that the study was "fundamental" to the decision on whether the new fee scheme went ahead. We agree. (Paragraph 28)

4. We emphasise and welcome the undertaking given to us in oral evidence by the Legal Services Commission that, "we have always been clear that we would show stakeholders a copy of the [Ernst and Young] report and allow them some time to comment on it." We regard a very much higher and consistent level of constructive engagement between the Commission and all its stakeholders is required if effective progress is to be made with family legal aid reform this year, 2009. (Paragraph 30)

5. We cannot come to a definitive view on the statistical significance of the outstanding data issues. What clearly is significant is that the existence of flaws in the evidence base has damaged the confidence of practitioners in the process that the Legal Services Commission is conducting. At the same time, the LSC has commissioned—extremely late in the process—fundamental economic research into its supplier base where hitherto it was relying on anecdote. These discrepancies and gaps in its evidence, which can come as no surprise to the Commission, should have been sorted out in advance of any proposals being published. The objectives of the economic research could have been discussed with stakeholders before it was commissioned. The Legal Services Commission has made a substantial rod for its own back by not doing so. (Paragraph 32)

Substance: implications of the proposals

6. We recognise that a majority of family law advocacy is carried out by solicitors but that the more complex and serious cases tend to be conducted either by more experienced or specialist solicitor advocates or senior members of the family Bar. The vast majority of our evidence, from both solicitors and barristers, as well as the judiciary and the department's own advisory body on family law, is that the re-balancing of resources between complex and simple cases has gone too far and that the mantra of "swings and roundabouts" simply does not reflect the reality of how family law advocacy, in the most serious cases, is conducted. If the scheme is implemented as proposed there is a serious risk of an exodus of experienced practitioners from publicly-funded family law. (Paragraph 52)

7. The overall fee reductions for family advocacy will fall disproportionately on female and black and minority ethnic practitioners who, for a variety of reasons, have tended to specialise in publicly-funded family law work. This is discriminatory. It also has serious implications for the development of a more diverse pool of experienced courtroom lawyers from which candidates for a more diverse judiciary can emerge. (Paragraph 53)

8. We note an emerging consensus around a revision of the Legal Services Commission's proposals developed by the Association of Lawyers for Children. We urge the Commission to give these new proposals careful consideration. (Paragraph 54)

Guardians and independent social work

9. The Legal Services Commission, in oral evidence, denied that the issue of paying for guardians and independent social work in 9.5 cases was an "unseemly battle", or "argument over who should be picking up the tab", between departments. (Paragraph 64)

10. The Legal Services Commission said it was confident that discussion between the Commission and the three relevant departments "will provide a satisfactory result for all parties." We urge the Commission and the Government to remember that vulnerable children are the most important party to those inter-departmental proceedings, and to sort the problem out. We would like to share the Commission's confidence but we can see no objective grounds for its optimism. We urge the Government to monitor this situation, providing evidence of progress by the time the House returns. (Paragraph 64)

11. We very much welcomed supplementary evidence from the National Youth Advocacy Service indicating that the Legal Services Commission was contemplating funding some social work via legal aid as well as developing a specialist children's contract for legal services in public law cases (Paragraph 66)

Conclusions

12. The legal aid structure being designed by the Legal Services Commission seems to be based on a pattern of supply which simply does not yet exist. The Commission appears to have failed to take an objective evidence-based approach to delivering the outcomes identified for it by the Government. (Paragraph 68)

13. The Legal Services Commission says that its proposals are "not about cuts", and the lawyers told us that they are not asking for more money. Such fundamental accord should create a platform on which it should be possible successfully to design an effective system that will deliver the best possible outcomes for those who find themselves enmeshed in the family legal system and need advice and representation, whether on a relatively straightforward case or a whole cluster of complex matters. We believe that the two key issues raised with us are the equality of reward for equality of work and the need to fund the more serious and complex cases properly and in a way that reflects the real dynamics of the profession. We believe that these issues are capable of resolution on the basis of constructive engagement between the Government, Legal Services Commission and stakeholders; but there needs to be a fundamental change of attitude on the part of the Commission. (Paragraph 69)

14. We are also concerned about the argument over funding of guardians and independent social work. The Legal Services Commission told us that what was important was that it funded what it was statutorily obliged to fund and that the Children and Family Court Advisory and Support Service funded what it was statutorily obliged to fund. We do not agree. We believe that what is important is that vulnerable children trapped in intractable court cases, whether public or private, receive the advice and representation that they need and that the court has available the best welfare information it can have. If achieving these goals requires a funding model that upsets departmental silos, so be it. (Paragraph 70)

Annex: Legal Services Commission Consultations since 2006

Consultations since July 2006			
Consultation Name	Status	From	To
Legal Aid Reform: A Sustainable Future/The Way Ahead	Complete	13-Jul-06	12-Oct-06
LSC Unified Contract and General Criminal Contract	Complete	01-Oct-06	21-Nov-06
Making Legal Rights a Reality in Wales	Complete	05-Dec-06	02-Mar-07
Amendments to General Criminal Contract (Early Cover)	Complete	11-Dec-06	02-Jan-07
Police station reforms	Complete	12-Feb-07	10-Apr-07
Very High Cost Case (VHCC) Panel	Complete	12-Feb-07	23-Mar-07
Family Fee Schemes	Complete	01-Mar-07	16-Apr-07
Child Care Proceedings and Funding Code changes	Complete	01-Mar-07	24-May-07
Unified Contract Specification (Civil)	Complete	01-Mar-07	16-Apr-07
Duty Solicitor Call Centre and CDS Direct	Complete	09-Mar-07	01-May-07
Market Stability Measures	Complete	27-Apr-07	17-May-07
Review of Specialist Support Service and CLS Grants	Complete	18-Jun-07	10-Sep-07
Unified Contract specification - Mental Health category specific provisions	Complete	22-Jun-07	23-Aug-07
Quality assurance scheme for advocates	Complete	22-Jun-07	17-Sep-07
Litigator Graduated Fee Scheme	Complete	26-Jun-07	07-Aug-07
Proposed Amendments to the General Criminal Contract (implementation Oct 07)	Complete	28-Jun-07	09-Aug-07
Unified Contract Specification - Family Mediation category specific provisions	Complete	29-Jun-07	10-Aug-07
Best Value Tendering for Criminal Defence Services: A Response to Consultation (July 2008)	Complete	10-Dec-07	03-Mar-08
Unified Contract (Crime) July 2008	Complete	31-Jan-08	13-Mar-08
Very High Cost Cases (Crime) Contract	Complete	06-Feb-08	12-Feb-08
Single Equality Scheme: Respecting Diversity, Valuing Difference 2008	Complete	04-Apr-08	16-May-08
Managing legal aid cases in partnership - Delivery Transformation: A Response to Consultation (December 2008)	Complete	10-Apr-08	03-Jul-08
Reforming the Legal Aid Family Barrister Fee Scheme	Complete	18-Jun-08	10-Sep-08
Proposed changes to family guidance	Complete	10-Sep-08	27-Oct-08

Consultations since July 2006			
Virtual Court: amendments to the Unified Contract and Crime Specification necessary to support the national Virtual Court pilot.	Complete	10-Oct-08	19-Nov-08
Civil Bid Rounds for 2010 Contracts	Closed	31-Oct-08	23-Jan-09
Means Testing and the Crown Court	Complete	06-Nov-08	29-Jan-09
Family Legal Aid Funding from 2010	Closed	17-Dec-08	03-Apr-09
The Future of Very High Cost Cases (December 2008)	Complete	19-Dec-08	04-Mar-09
Prison Law Funding	Closed	10-Feb-09	05-May-09
Best Value Tendering for CDS Contracts 2010	Closed	27-Mar-09	19-Jun-09
Phase 1 Civil Fee Schemes Review: Proposed Amendments from 2010	Closed	01-Apr-09	13-May-09
Eligibility Rules for Membership of Duty Solicitor schemes and Local Scheme Boundaries	Current	15-May-09	26-Jun-09

Appendix: Speech by the President of the Family Division

FAMILY JUSTICE AT THE CROSSROADS

The Hershman/Levy Memorial Lecture delivered by The Rt Hon Sir Mark Potter to the Association of Lawyers for Children, 2 July 2009

Thank you for asking me to deliver this year's memorial lecture in memory of two men whose lives were literally dedicated to service in the Family Justice System and particularly to the interests of children. They were also lawyers steeped in the development of child care as reflected and promoted in the provisions of the Children Act 1989 and they would no doubt have been vocal, if they were still alive, in relation to the subject I have been asked to address in my lecture tonight, namely the problem of resources and its effects upon the Family Justice System which plays such a vital role in relation to the safety and well being of children in the throes of family breakdown.

"Children are our future. We depend on them growing up to become fulfilled citizens as well able to contribute successfully to family life and to the wider society. It is of fundamental importance that the life and future development of every child is given equal importance. Every child needs to be nurtured and protected from harm."

Those are the opening words of the Laming Report[107] issued in the wake of the case of Baby P which came forcefully to public attention in November 2008 at the conclusion of the criminal trial of those responsible for his death. One of its immediate side effects was to cause a dramatic upsurge in the number of care proceedings commenced by local authorities following a downward trend over the preceding 6 months while local authorities came to terms with the provisions of the Public Law Outline[108] and the large increase in court fees payable by them as the price of issuing proceedings in the course of their child safeguarding duties.

The context of Lord Laming's report, and the matters on which it principally focussed, were failures in the local authority's safeguarding system whereby care proceedings were never instituted in a situation where clearly they should have been. Consequently, the recommendations of the report—including those requiring the Department of Children Schools and Families (DCSF) sufficiently to resource children's services so as to ensure that early intervention and preventative services have capacity to respond to all children identified as vulnerable or in need[109]—are principally directed to improvements in local authorities' safeguarding prior to proceedings, in order to prevent repetition of such a tragedy. However, the point is well and forcefully made by Lord Laming that the duty of local authorities to commence and prosecute care proceedings in the courts is not a separate, but an integral, part of their overall duty to safeguard and promote the child's welfare, the role of the court being to decide where the truth lies in the event of dispute and

107 The Protection of Children in England: A Progress Report (March 2009)

108 The Public Law Outline: Guide to Case Management in Public Law Proceedings (April 2008)

109 Recommendation 55

what the legal consequences should be. In this context Lord Laming identified the need of the Ministry of Justice as the responsible department to take immediate action to address the length of delays in care proceedings in order (as he put it) to ensure that the Ministry is delivering its commitment to meet the timetable for the child[110]. The terms of his recommendation were that the Ministry should:

"Lead on the establishment of a *system-wide* target that lays responsibility on all participants in the care proceedings system to reduce damaging delays in the time it takes to progress care cases where these delays are not in the interests of the child.

The Government response to this recommendation published by the DCSF and presented to Parliament in May 2009[111], was as follows:

"the Ministry of Justice is working closely with the Department for Children Schools and Families to establish a system-wide target for reducing delays that draws in all participants within the care proceedings system. Whilst the detail is yet to be finalised with the relevant key partners, the intention is to have an overarching objective, related to the timetable for the completion of proceedings for an individual child, supported by a suite of Key Performance Indicators owned by individual participants in the system. This will include commitments to continuous performance improvement in order to avoid unnecessary delay by Her Majesty's Courts Service, the Legal Services Commission, and the Children and Family Court Advisory Support Service. Improvement and Success will be measured in a Balanced Forecast."

It is noteworthy that neither in Lord Laming's recommendation, nor the Government response, does any reference appear in relation to the provision of resources or the eventuality that a system already struggling under the constraints of limited and reducing budgets, may prove unequal to the task of achieving the 'continuous performance improvement' to which they will be obliged to commit themselves.

That, as it seems to me, is a very unfortunate omission. It is indeed a failure to acknowledge the elephant which, if it is not already in the room, has already planted its front feet well over the threshold. Overarching objectives, key performance indicaters and commitments to continuous improvement are all very well, but they cannot alone achieve anything significant if they are unrealistic in relation to the resources available to the key partners in the system.

As Head of Family Justice, I have since my appointment become increasingly familiar—and in the last 12 months or so, outside court hours, almost wholly preoccupied—with the problems already being experienced by the key participants in the Family Justice system who are now experiencing restrictions, and in various cases are under instructions to make reductions, in the resources available to them to perform their interlocking roles.

In my regular visits around the country, I have been hugely impressed by the good will and enthusiasm of all those involved in the Family Justice System in seeking to make the system more efficient while ensuring better outcomes for children in difficult times. Local

110 See paragraph 8.8 of the Report.

111 The Protection of Children in England: action plan. The Government's response to Lord Laming (May 2009).

authorities, social workers, Cafcass, children's lawyers, court staff and judiciary are flat out (literally so in some cases!) to achieve this objective.

It is the position in which the family justice system now finds itself as a result which has dictated my choice of title for this lecture. A cross-roads is something one encounters as one travels along a particular route. It requires one to pause and make a choice as to one's direction of travel. In this case, no doubt, the appropriate starting point of the road well travelled is the Children Act 1989, a ground-breaking and universally admired piece of legislation which provided for a uniform code of law and procedure governing the care and upbringing of children applicable across the board and which now operates in what has effectively become a unified family court. It also provided a uniform code of law governing the duties of local authority and social services to be provided for children in need, which laid to rest most of the defects in child protection law and practice which had previously existed and in relation to which the Family Division of the High Court, over the years, had expanded and developed its jurisdiction in wardship, in order to supplement the defects in the two main statutory schemes which had hitherto been applicable [112] and certain *lacunae* in law.

However, I now propose to "fast forward" to the year of my appointment in April 2005. By this time The Children Act had been in force for almost 15 years and its policy, philosophy and procedures had thoroughly bedded down. However, in the area of public law a number of features of the child protection system, together with a shortage of resources, had combined to render care proceedings more extended and more expensive than was anticipated or intended at the time the Act was passed. So far as the safeguarding of children by local authorities is concerned, there was, and has remained, a general difficulty in the recruitment and retention of social workers and others to do the demanding and often harrowing work of protecting children from harm and looking after them once harm has been done. From time to time a tragedy such as those of Maria Colwell, Jasmine Beckford and Victoria Climbie (to which the name of Baby P must now be added) would arouse public outrage, giving rise to publicised inquiries and a determination to improve. The general level of press reaction and the search for scapegoats was, however, scarcely conducive to recruitment. This position has continued to obtain and, its alleviation by institution of the various measures set out in the Laming Report can only be gradual and long term.

Meanwhile, the courts are obliged to continue their role in public law care proceedings in the context of those problems and in that context to resolve an increasing number of care proceedings as speedily as they can.

It is plain from the structure of the 1989 Act, the terms of the Review of Child Care Law which preceded it,[113] and the terms of Lord Nicholls speech in the House of Lords in *Re S*[114] that, whereas it is the function of the court to adjudicate and to make a care or supervision order if it finds that the threshold conditions are satisfied and that such an order would be in the best interests of the child, it is the responsibility of the local authority to decide how

112 Children and Young Persons Act 1969 and Child Care Act 1980.

113 Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party (HMSO 1985)

114 Re S (minors) (care order: implementation of care plan) [2002} 2 AC 291

the child should be cared for.[115] However that is not a position which it has proved possible or practical to preserve as a clear bright line since the Act was passed, for a variety of reasons. Two such reasons are built into the legal regime under which courts operate in care proceedings. The remainder are non-legal in the sense that they are the product of the various elements and resources of the child care system within which the courts operate and which inevitably affect the steps to be taken and the rate of progress made in care proceedings.

As to the legal reasons, first, the 1989 Act requires the court to treat the welfare of the child as paramount in relation to every order which it makes. Second, Articles 6 and 8 of the European Convention on Human Rights (as well as ordinary notions of justice and humanity) require the court to have regard for family life and to accord a fair hearing to parents faced with the removal of their children. Albeit European jurisprudence[116], like the Children Act, recognises the primacy of the child's welfare interests in children cases, those welfare interests require the courts to have regard to the long term as well as short term interests of the child. Thus the decision as to whether a child should be taken into care, or whether it should remain with its natural family under appropriate supervisory arrangements following expert assessments of the family situation and/or after a period of "planned and purposeful delay", inevitably involves the courts in examining the care plan proposed as well as the primary question of deciding whether or not the threshold for intervention has been established.

As to the non-legal reasons, by 2005 the court had for sometime been operating within a system where (whether for lack of time, resources, or both) necessary social work or other assessments had not been completed, or clear care plans formulated, which were essential to an informed decision by the court. This would, in complex cases, necessitate the instruction of experts in the course of the proceedings, which would become delayed in their progress by the extended reporting times required, the consequent emergence of further issues, and (frequently) the intervention of additional candidates as possible carers from within the extended family of the child concerned.

As a result, by the time of my appointment, the length and expense of public law proceedings had become unduly extended, despite the existence of the 40-week disposal target imposed by the Treasury through the DCA. While such delays were purposeful in many cases, as affording parents the opportunity to establish their suitability to retain care of their child within the family or extended family with appropriate assistance, in a far greater number of cases, (particularly in the case of very young children) they were operating so as to prejudice the long term welfare of the child, attachments being formed and ruptured in cases when adoption or long term fostering were the ultimate outcomes.

An inevitable incident of delay in multi-party proceedings is of course increased cost, and, when I was appointed President, the question of delay and cost (with the emphasis on the cost) in public law proceedings was receiving the attention of government in the context of the Fundamental Legal Aid Review, to which I was nominated by the Lord Chief Justice as the Judicial Liaison Judge prior to my appointment to the Family Division. That review

115 See: Review of Child Care Law: paras 2.22 – 2.26. *Re, S* per Lord Nicholls at para 28.

116 Yousef v Netherlands [2003] 1 FLR 210, ECHR.

identified two particular areas of disproportionate cost to the legal aid fund as being. First and foremost, was the huge proportion of the fund expended in respect of very high cost *crimina*l cases and, to a much lesser extent, but nonetheless requiring urgent attention, the cost of care proceedings.

In July 2005 the review published its report entitled "A Fairer Deal for Legal Aid".[117] It highlighted the need to contain the expanding cost of child care and related proceedings, in light of the fact that, while their volume had increased by 37% since 1999/2000, the cost to Legal Aid Fund had increased in real terms by 77%. It was recognised that there were a number of cost drivers causing the latter increase, in particular the proliferation of parties, the increasing use of expensive experts instructed in the course of proceedings and the number of expensive residential assessments to be paid out of the Legal Aid Fund.

What it did not identify was a phenomenon of which all engaged in the Family Justice System are acutely aware, namely the steady rise in the proportion of proceedings involving ethnic minority families with language difficulties and complex cultural considerations, which not only add to the difficulties of social services pre proceedings but substantially increase the length and cost of court proceedings. As all judges can testify, the need for an interpreter can double the length of court proceedings.

Having also identified the inherently high cost of multi-party proceedings, the Review recommended a further, cross–government, end-to-end review of the Child Care Proceedings system. This followed in the form of the Child Care Proceedings Review, an interdepartmental review with strong judicial input.[118] The terms of reference of that review stated its first task as being to:

"examine the extent to which the current system for deciding care cases in the courts ensures all resources (including children's services) are used in the most effective, efficient, proportionate and timely way to deliver the best outcomes for the children and families concerned."

The terms of reference included the obvious requirement to: "Identify good/innovative practice which enables children to be diverted away from court proceedings and, instead, to be supported in their families where this is possible" The third term of reference, much more radically, required the review to: "examine the extent to which the core principles of the Children Act 1989 are best met by the current overrepresented approach within the courts, and examine whether these principles could be better met by using a more inquisitorial system". It set out two options to consider, namely (a) "investigating the possibility of early low-level of judicial interventions to encourage parents to resolve problems themselves, thus avoiding the need for full court proceedings wherever possible and appropriate"; and (b): "examining whether the two stages of the court process in Child Protection cases (establishing the facts and determining the care plan) could be more formally separated with different attendees, procedures and levels of legal representation, and precisely where, and in what way, lawyers should be involved".

117 DCA "A Fairer Deal for Legal Aid",Cm 6993 (2005)

118 DCA *Review of the Child Care Proceedings System in England and Wales* (2006)

This last term of reference was no doubt included because the Fundamental Legal Aid Review had agreed in its discussions that, where proceedings are conducted within an adversarial system in which a number of parties are represented and entitled to legal representation and experts' assessments are largely being paid for out of the legal aid scheme, the streamlining of processes and the containment of lawyers' charges only tinker at the margins of what is an inherently expensive process once proceedings have been commenced.

In the event, the Review did not take the road, or even explore the route, towards a so-called "inquisitorial" or divided system. It limited itself to a number of unexceptionable recommendations, which aimed to "ensure that families and children understand proceedings and are, wherever possible, able to engage with them; ensure that S.31 applications are only made after all safe and appropriate alternatives to court proceedings have been explored; improve the consistency and quality of S.31 applications to court; improve case management during proceedings; encourage closer professional relationships".

In the wake of these recommendations and to achieve those aims so far as they lie within the power of the judiciary, once proceedings have started, a judicial team consisting of Munby J, Coleridge J and Ryder J, in close consultation with the DCSF, produced the Public Law Outline (PLO)[119] which has now been in force for just over a year. Its provisions were coupled with the rewriting of the DCSF statutory guidance to local authorities which dovetails with the requirements of the PLO and encourages local authorities to carry out assessments; through family meetings to engage with families prior to proceedings; and to prepare cases better before issue, where agreement is not possible. Its other objective was to achieve uniform improvement in case management on the part of the judiciary, focusing upon essential issues and providing for efficient case management in stages geared to the timetable of the child.

However, the success of these measures depends,—as the proper safeguarding of children and the conduct of care proceedings under the Children Act has always depended—upon the quality, performance and resources of the principal players. Under that heading, in addition to the local authorities and the parties, I include of course Cafcass and CAFCASS CYMRU the organisations which provide the personnel essential to the safeguarding of the interests of children in the course of the litigation, namely the child's guardian appointed under S.41 of the 1989 Act.

At this point in my Lecture, I should make clear that I shall for convenience adopt the abbreviation of Cafcass as covering both services, while making clear that hitherto, thanks to the more generous funding of CAFCASS CYMRU by the Welsh National Assembly, that service has been largely immune from the resource difficulties and consequent delays which have affected Cafcass in England.

So far, I have said nothing of the situation in Private Law children proceedings, in relation to which, so far as the courts are concerned, they are also highly dependent upon the availability of Cafcass (a) as reporting officers and providers of welfare reports in so many proceedings where difficult issues in relation to residence and contact arise, and (b) for

119 Ministry of Justice the Public Law Outline: Guides to Case Management in Public Law Proceedings (April 2008)

their invaluable services in the brokering of agreement between the parties at the First Hearing Dispute Resolution Appointment (FHDRA). At the time of my appointment in 2005, that latter function was being exercised under the provisions of the Private Law Programme, recently introduced by my predecessor Dame Elizabeth Butler-Sloss. At that time a substantial number of local schemes were in place and others being extended, but they were limited at that stage to county court centres and not available in most magistrates' courts. Since then, of course, county court schemes have been put in place nationwide, and are now being made available in the Family Proceedings Courts to enable the process of "cascading" down of appropriate cases to the FPCs under the new Allocation to Judiciary Directions. It can properly be said that, without the very high success rate achieved by the FHDRA, the working of the family courts would virtually grind to a halt.

So far as the production of reports is concerned, the difficulties faced by Cafcass in England, namely limited resources and expansion of their functions on the ground, plus the overall strains upon the family justice system to which I will now turn, have regrettably meant that, in cases where agreement between the parties has not been achieved at the stage of the FHDRA, long delays have been encountered in the receipt of reports essential to the progress of residence and contact disputes.

The statutory functions of Cafcass are to a) safeguard and promote the welfare of children's; b) give advice to any court about any application made to it in any family proceedings; c) make provision for the children to be represented in such proceedings; and d) provide information, advice and other support for their children and their families.[120] These functions are limited to family proceedings. Thus when Cafcass was originally set up as a non-departmental public body it was made answerable through its board to the Lord Chancellor, its relationship being controlled in a framework document which vested ultimate power in the Lord Chancellor's Department (now the MoJ) for controlling the range of Cafcass work and the way in which it was carried out. That position has not been maintained, however.

Following the constitutional upheavals associated with the abolition of the Lord Chancellor as head of the judiciary, Cafcass has become answerable to the DCSF and works within the strategic objectives agreed by their sponsor department. The division of responsibility between the DCSF to whom Cafcass are now accountable, and the MoJ, as the body responsible for HMCS and the support of the judiciary, is scarcely an example of "joined up" government. It is in practice a serious fault line because, although the functions of Cafcass (and hence their tasks and responsibilities) are dictated, and may be increased, by the demands of the judges and the MoJ, the DCSF, which is the budget holder responsible to finance those demands, has its attentions and priorities largely directed elsewhere

It is the unfortunate fact that since its inception, Cafcass has experienced considerable problems with shortages of staff, a lack of experienced guardians and consequent delay in the allocation of cases. From the outset there were difficulties in bringing about the centralisation of staff management and improving budgetary control in respect of an ungenerous budget. Upon the appointment of Anthony Douglas, its able and dedicated Chief Executive in 2004, the task of rectifying this position has been vigorously undertaken,

120 S. 12 Criminal Justice and Court Services Act 2000

but delays in reporting have persisted and in recent times have increased to a position which is acknowledged to be unacceptable. A number of factors have contributed to this.

I have already mentioned the surge of work in the Public Law field occasioned by the case of Baby P. But, well before that time, in various areas of the country, the courts were experiencing mounting delays in the appointment of guardians and the rendering of reports. In those areas, because of the shortage of staff I have mentioned, local blitzes upon Public Law would lead to reduced performance in the Private Law field and vice versa. Underlying this has been the growing demands placed upon Cafcass's child safeguarding function, which has eroded the time available for reporting and welfare work.

S.7 of the Children and Adoption Act 2006 introduced into the 1989 Act a new Section 16A, which requires Cafcass officers to make a risk assessment in relation to any child in respect of whom they are given cause to suspect risk of harm and to provide that risk assessment to the court irrespective of the outcome of the assessment, even if the Cafcass officer reaches the conclusion that there is no risk of harm to the child. This provision was passed against a background of reports by HMICA which had been critical of Cafcass's safeguarding procedures and the widespread and growing recognition and emphasis upon problems of Domestic Violence between adult partners and their adverse effects upon children. I understand that the imposition of the new S.16A provision was regarded as 'cost neutral' by the Treasury and no extra budgeting provision was made. If so, it appears to me an extraordinary example of the triumph of wishful thinking over realistic assessment, when it must have been obvious that the deployment of Cafcass staff in these functions was bound to reduce (as it has reduced) the amount of time available to individual officers for the purposes of reporting, giving advice to the court and implementing contact between recalcitrant parties.

At this point, I should make clear my view that hitherto many judges have, following unsuccessful FHDRs, been over ready to require full S.7 reports rather than simply to ask reporters focussed questions before proceeding further. This tendency has added to delays which might otherwise have been avoided. In this respect, I am optimistic however that recent consultations between the judiciary and Cafcass and the negotiation and current trialling of a draft revised Private Law Programme, agreed and underwritten by Cafcass, will assist progress in Private Law cases after the FHDR.

Meanwhile, however, and for whatever reasons, by November 2008, there were serious delays in the supply of section 7 reports up and down the country, most notably in Bristol, Sheffield, Lancashire and Wolverhampton where the waiting time for section 7 reports in Private Law contested hearings was anything between 20 weeks in Wolverhampton and 30 weeks in Lancashire. Delays generally have further increased rather than reduced since then, despite fire fighting operations by Cafcass in particular areas. It was approximately at this time that the dramatic upsurge in the number of care proceedings commenced by local authorities to which I have already referred began to occur. That surge of cases has lasted to date, though it has begun to tail off in some local authority areas. Thus, in addition to the problems of delay already being experienced, which had begun to reduce following introduction of the PLO, judges and the HMCS administration up and down the country are now faced with the formidable problem of accommodating this block of extra cases through an already strained system. Quite apart from the problems which that presents to

the limited number of judges up and down the country available to try those cases, the strain upon Cafcass's guardian service will be all the more acute.

Faced with these mounting delays, and in discussions with Anthony Douglas and the family judiciary, it is clear to me that, whatever the long term solution to these problems, urgent action is at once necessary to ease the position in the various "hot spots" across the country. To that end, I am currently engaged in a joint judicial exercise with Cafcass, CAFCASS CYMRU, DCSF, MoJ and HMCS for a stop-gap scheme to set out those areas in which, without compromising the interests of children, the statutory duties and requirements of Cafcass, or the provisions of the PLO, judicial restraint can properly be exercised in the requirements which judges impose upon Cafcass in all those cases where, upon proper analysis and consideration of the issues, reduced or delegated activity by Cafcass guardians and reporters can be sanctioned. This will reduce the time spent by the officers themselves in activities which are not strictly essential to their safeguarding and advisory functions.

Because of the need for urgent action; because of the need for arrangements to be implemented before July; and because the measures are limited to procedures appropriate as between the judiciary and Cafcass for the better performance of their functions, no wider consultation has taken place. This lecture is therefore an opportune moment to give advance notice to that branch of the legal profession concerned with children cases of the lines of the proposed Guidance which will shortly be put into final form.

Before the end of July, I shall issue Interim Guidance setting out measures which may be adopted in the short term under local agreements between Designated Family Judges and local Cafcass service managers to reduce backlogs and delays in reporting and the allocation of guardians having regard to the particular problems in the area. It will not be in the form of a long term Practice Direction, which is the form appropriate for implementation of standard practice nationwide, but of Interim Guidance encouraging the making of such local arrangements within particular parameters.

In Public Law it will permit care centres and/or groups of courts to enter into duty guardian schemes with Cafcass with the provision of advice at the first appointment to a solicitor appointed under S.41(3) of the Children Act 1989, provided that there is subsequent allocation to a named guardian prior to the CMC, to be responsible for the future continuous conduct of the case. This is a system long adopted at the Inner London Family Proceedings Court and which has worked well there in the past. Such assistance is likely to prove particularly welcome in Family Proceedings Courts who are presently having to decide, at the first hearing and without the benefit of a guardian, whether to grant applications for children to be removed from home under an interim care order. It will also provide that the guardian need not attend fact finding hearings save in so far as he/she is requested to do so by the court. At every hearing the court will consider with the parties whether the guardian is to be required to attend the next hearing in the case and will consider directing the guardian to file an issues based final analysis and recommendation in time for the advocates' meeting for the IRH rather than waiting for the final hearing.

In Private Law the Guidance will encourage the making of local agreements in court business committees to rationalise the days and venues upon which FHDR appointments

will be listed to make the most effective use of judicial and Cafcass resources in the local area. Detailed provisions will provide for the progressing of cases and the making of directions in appropriate conditions subject to the completion of safety checks. Where the safety checks are not yet complete, but there is on the face of it no reason to suppose the presence of risk, the court will be encouraged to approve or formulate an appropriate order indicating that it will, on the date fixed for the next appointment, make an order in these terms without the need for further attendance by the parties, provided that the safeguarding information which becomes available through Cafcass is satisfactory.

The draft Guidance also encourages a critical attitude to the necessity for full s.7 reports and sets out a menu of fixed time, issue driven, reports to be considered with specified time scales. Its provisions are consistent with the form of my revised Private Law Programme currently being trialled.

The Guidance will make clear that I shall conduct a review in January 2010 to consider how to stopgap measures provided for have affected the operation of the courts and the support they have received from Cafcass. It is at that stage that wide consultation will take place, including, importantly, with the Family Justice Council.

I must emphasise that, in agreeing what is in effect a reduced service from Cafcass as a pragmatic solution to immediate problems, I have made clear that such solution be recognised for the interim scheme that it is, and the form of the document being drafted makes this clear. It must not simply become or be adopted as the benchmark for the future, save to the extent that it sets out (as it does) what are recognised by Cafcass to be the appropriate timescales for delivery of reports in "normal" conditions. The whole point of the statutory provision of a guardian at the outset in Public Law cases is that, from the start, the child's interests should be represented and advanced from a point of view independent of both parents and local authorities and the outcome of steps taken for work done in relation to the child during the progress of the case should be maintained and brought to the attention of the court.

One of the principal matters I have in mind as rendering vital a review in January 2010 is the substantial and menacing shadow which hangs over the treatment of any interim working solution as a long term criterion for Cafcass's working methods, namely the current proposals of the Legal Services Commission in relation to the remuneration of Family Law advocates. So long as there are available experienced solicitors or counsel properly instructed and familiar with the work, it is possible to relieve the guardian of the need to be closely involved or present in court at various stages of the case. However, if, as a result of the LSC proposals, the future availability of such representatives, already under threat, becomes a nationwide reality, the need for the close attention of the guardian and increased participation at all stages of the case will become essential. And this brings me to the question of Legal Aid.

This Lecture is not the occasion for detailed examination of the latest proposals of the Legal Service Commission in this respect, although I am well aware of the concerns of the Association of Lawyers for Children so impressively stated in its 'Response to the LSC Consultation on Family Legal Aid Funding from 2010'.[121] Suffice it to say that, from the

121 http://www.alc.org.uk/docs/LSC_Fees_Consultation_ALC_final.doc

point of the view of the judiciary, it is essential that the services of a pool of experienced advocates in both public and private law proceedings remain available to the judiciary. It is, of course, one of the key assumptions upon which the PLO is based and which the Ministry of Justice effectively indorsed in assisting and promoting its introduction. Furthermore, it is the feature which, together with more robust case management by judges, is beginning to achieve improved performance in reducing the length and complexity of the care cases to which it has been applied since its national launch in April 2008.

Similarly, in Private Law cases, the legal profession, (both solicitors and barristers) play an essential role in achieving and promoting justice and in particular in securing settlement without the need for final hearings in Private Law Cases. Courts are throughout the country experiencing the increased difficulties, delays and frequent absence of co-operation which are inevitable in cases conducted by litigants in person and substantially extend their length. To the extent that the number of LiPs is bound to become swelled if they are unable to obtain solicitors ready and sufficiently skilled to act for them under the Legal Aid scheme for which many of them are eligible, these problems will multiply.

It is no function of mine as Head of Family Justice, to participate in negotiations between government and the professions as to the terms of their remuneration. However, it emphatically is my concern as Head of Family Justice to bring forcibly to the attention of the government the threat to the efficient working of the system in terms of both efficiency and delay if the LSC proceeds regardless of the warnings of the profession and, in particular if those specialising in children cases abandon or cherry pick publicly funded work. Quite apart from the strain upon family judges and the courts' administration by HMCS, there will be significant further delays in the court process caused by inexperienced advocates undertaking more complex work; longer and less focussed hearings; a higher incidence of litigants in person and a greater likelihood of appeals where cases become derailed because of inadequate representation at first instance.

The judiciary have been invited to comment on the various consultation papers issued by the LSC. I have urged in response the clear view of the judiciary that representations by the professions as to the effect of the proposals and the willingness of solicitors and barristers to undertake the work if they are implemented should be taken seriously. I have warned the LSC that the family judiciary is in no doubt that: individual solicitors and solicitors firms of quality and experience are already abandoning publicly funded family work, and the rate of this process will increase if the proposals are carried into effect; many members of the Bar have already either cut down on or abandoned publicly funded work in favour of privately paying work, and this too is likely to increase; members of the Bar who can command privately paying work tend to be the more experienced, and their loss to this area of work will reduce a valuable pool of expertise.; the less experienced and competent the representative, whether barrister or solicitor, the less efficiently is the case managed; lack of representation will lead to more and more litigants appearing in person with the effects I have described and loss of experienced and committed advocates will undermine the Public Law Outline, which as I have emphasised is dependent on the cooperation and expertise of the dedicated specialist lawyers who will operate it.

I feel bound to observe that there is a discouraging lack of realism in the apparent determination of the LSC to disregard these warnings. Since the time of Lord Carter's Review[122] the LSC has ignored his recommendation that in children cases a graduated fee scheme was necessary in the light of the difference in complexity of the infinite variety of such cases[123] and it has pressed ahead with its intention to propose a fixed fee scheme which, in parallel with Lord Carter's Review, the LSC had itself been devising internally to deal with the question of the mounting costs of the Legal Aid scheme. While it withdrew that scheme in the face of almost unanimous criticism, the LSC has never shifted from a mind set that the organisation nature and levels of work within firms of family solicitors and the potential for the expansion and/or rationalisation of the work of such firms to achieve economies of scale were essentially similar to those in the criminal law field, which was both the original and principal area of investigation by Lord Carter, responsible as it was for the vast proportion of the Legal Aid budget. That approach appears to have governed their thinking ever since. In particular, there is a persistent refusal to recognise that the nature of the work and the needs of the parties are wholly different.

Yet, Family law work (particularly in care proceedings) demands far higher levels of attention and attendance from qualified practitioners rather than paralegals, and is simply not amenable to rationalisation of the market and reorganisation of family solicitors firms in such a manner as to justify a system of low level fixed fees payable across the board of representation on a crudely averaged basis. Such a scheme presents intractable problems in the organisation of family work nationwide if it is to be properly done and it conjures up the spectre of advice and representation "deserts" developing across the country, as already exist in one or two cases.

Thus, while the judiciary have not considered it appropriate to enter into the detail of the fee scheme proposed by the LSC, they have felt able both as informed observers and affected parties, to comment that the inflexible fixed fee scheme proposed appears to be "too flat", rewarding as it does the simple short case at the same level as the long and complex case leading to the result perceived by the judiciary as inevitable, that solicitors will fight shy of taking on the complex cases (which are precisely the cases where the judiciary most need their assistance) and in the most difficult cases advocates will be forced to skimp on preparation. Firms will inevitably take those cases which offer the greatest reward for the smallest amount of work conducted over the shortage possible period, thus allowing them to move onto the next simple case.

So far as advocates are concerned, the proposal which most concerns the judiciary is the proposal that the fixed fee for interim hearings will be paid at a lower rate than for final hearings. This fails to reflect the reality of what is frequently involved. The PLO, the Adoption and Children Act 2002, and fact finding hearings in domestic violence cases all require advocates and solicitors to prepare the case early and fully. In residence and contact cases, fact finding hearings are frequently longer and more complex than final hearings and their outcome is often determinative, or near determinative, of the final hearing. That is their principal purpose. To pay a single fixed fee for all interim hearings is bound to have a chilling effect on the readiness of advocates to take on Private Law cases. The judiciary

122 Lord Carter's Review into Legal Aid Procurement published 13 July 2006

123 See paragraph 160 onwards

therefore anxiously awaits the outcome of the current extended negotiations with the LSC by both sides of the profession as a crucial factor in the future course and pace of proceedings.

I now turn very briefly to the third element of the system which, in circumstances of restricted funding, acts as a major cause of delay in the disposal of family cases, namely the shortage of judges and judge days available to try the increasing number and complexity of the cases within the system. These in turn are the product of resource restrictions in HMCS in which the head count is currently being reduced.

Again, this Lecture is not the place for a detailed consideration of those problems. Suffice it to say that High Court judges have an increasing workload, not only in relation to the heaviest care cases, but as a result of developments in other areas of family law than children, including new jurisdiction in their capacity as judges of the Court of Protection, under the Forced Marriage Act,[124] and in the steadily increasing number of Hague jurisdiction cases. Because High Court judges are only deployed in the most serious and complex of care proceedings, the burden of care work on County Court judges is increasing, thanks to the process of cascading down cases to the lowest tier of the judiciary appropriate to try them and the Public Law "surge". The capacity of the magistrates in the FPCs to handle this load is confined to the less complex cases and is hampered by a shortage of qualified legal advisers.

The District Judges, on whom the burden increasingly falls, and who handle the vast bulk of the Private Law work done in the County Court, are not only having to deal with expanded family lists but are also faced with expanded lists in other areas of the jurisdiction, such as civil disputes and bankruptcy. This creates great difficulties in "blocking off" successive days of their time to deal with care cases. No increase in judicial numbers is contemplated and the deployment of deputies and recorders as part time judiciary is diminishing, again for resource reasons. So far as I am aware, no increase in the HMCS budget will be available to ease the situation, despite the steady expansion in work.

There is, of course, no overnight solution to these problems, which are a product of our fractured and multi-faceted society and an increasing incidence of marital and partnership breakdown. The most promising way forward to ease the overall burden of delay and costs is to nip private law children disputes in the bud by early intervention. The "low level *judicial* intervention to encourage parents to resolve problems themselves" referred to in the Fundamental Legal Aid Review has already been provided by the expansion and application of the FHDR scheme under the Private Law programme which has, as already noted, been a lifebelt to the system. But, when early agreement cannot be reached (i.e. at or shortly after the first hearing) the solution must be for the judge, wherever feasible, to require the parties to mediate under the variety of schemes now available.

I have long been a proponent of compulsory reference to mediation against the conventional wisdom that parties cannot be obliged to agree. The Government has never accepted this. Happily, however, the LSC has been persuaded to fund both parties in schemes being trialled in Birmingham, Milton Keynes, Plymouth, Reading and Sheffield, in the expectation that the initial costs of mediation will yield a dividend of "cracked" cases at

124 Forced marriage (Civil Protection Act) 2007

an overall saving to the system in terms of costs and delay. Nonetheless, the high number of care proceedings and a hard core of uncracked private law cases are bound to remain in the system.

At the outset in this lecture, I highlighted the observations of Lord Laming in two respects. The first was the quotation that children are our future; that really needs no emphasis from me. It unites all who care about family justice and the importance of children, both as individuals and as the next generation of a society bedevilled by family breakdown. As individuals, it is their *right* and, as the future generation, it is in society's *interests* that they should be protected.

Second, Lord Laming emphasised the role played by the courts in the overall process of safeguarding children in public law proceedings and the recognition of the damage caused to them by delays in the progress of cases through the court system. The same logic applies and, as is increasingly well known, the same kind of damage occurs to children who are the subject of extended and unresolved disputes between warring parents engaged in battles over contact and residence. It is unrealistic to think that, in the current economic difficulties, the family justice system can escape the scrutiny of government, and, as one so often hears, "hard choices have to be made". However, unless realistic steps are taken, and, sufficient funding made available to sustain its key elements, the road ahead will be inevitably marked by increasing delays in the disposal of cases, whatever targets may be set for improvement.

Formal Minutes

Tuesday 7 July 2009

Members present:

Sir Alan Beith, in the Chair

David Heath
Mrs Sian James
Alun Michael
Julie Morgan
Dr Nick Palmer
Mr Andrew Turner
Mr Andrew Tyrie

Draft Report *(Family Legal Aid Reform)*, proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 70 read and agreed to.

Annex agreed to.

A Paper was appended to the Report as an Appendix .

Resolved, That the Report be the Eighth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report

[Adjourned till Tuesday 14 July at 4.00 pm

Witnesses

Tuesday 16 June 2009

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List of written evidence

Reports from the Justice Committee since Session 2006–07

Session 2008-09

First Report	Crown Dependencies: evidence taken	HC 67
	Government response	*HC 323*
Second Report	Coroners and Justice Bill	HC 185
	Government response	*HC 322*
Third Report	The work of the Information Commissioner: appointment of a new Commissioner	HC 146
	Government response	*HC 424*
Fourth Report	Work of the Committee in 2007-08	HC 321
Fifth Report	Devolution: A Decade On	HC 529
Sixth Report	Sentencing Guidelines and Parliament: Building a Bridge	HC 715
Seventh Report	Constitutional Reform and Renewal: Parliamentary Standards Bill	HC 791

Session 2007-08

First Report	Protection of Private Data	HC 154
	Government response	*HC 406*
Second Report	Work of the Committee in 2007	HC 358
Third Report	Counter Terrorism Bill	HC 405
	Government response	*HC 758*
Fourth Report	Draft Constitutional Renewal Bill (provisions relating to the Attorney General)	HC 698
Fifth Report	Towards Effective Sentencing	HC 184
	Government response	*Cm 7476*
Sixth Report	Public Appointments: Lord-Lieutenants and High Sheriffs	HC 1001
	Government response	*Cm 7503*
Seventh Report	Appointment of the Chair of the Office of Legal Complaints	HC 1122
	Government response	*HC 342*

Session 2006–07 (Constitutional Affairs Committee)

First Report	Party Funding	HC 163
	Government response	Cm 7123
Second Report	Work of the Committee 2005-06	HC 259
Third Report	Implementation of the Carter Review of Legal Aid	HC 223
	Government response	Cm 7158
Fourth Report	Freedom of Information: Government's proposals for reform	HC 415
	Government response	Cm 7187
Fifth Report	Constitutional Role of the Attorney General	HC 306
	Government responses	Cm 7355 and HC 242 (2007-08)
Sixth Report	The creation of the Ministry of Justice	HC 466
	Government response	HC 140 (2007-08)
First Special Report	Party Funding—Oral evidence from the Lord Chancellor on the role of the Attorney General	HC 222
Second Special Report	Scrutiny of Constitutional Reform	HC 907

Oral evidence

Taken before the Justice Committee

on Tuesday 16 June 2009

Members present

Sir Alan Beith, in the Chair

Alun Michael
Julie Morgan
Mr Andrew Turner
Mr Andrew Tyrie
Dr Alan Whitehead

Witnesses: **Baroness Butler-Sloss, GBE,** a Member of the House of Lords, **Lucy Theis, QC,** Chairman of the Family Law Bar Association, **Caroline Little,** Co-Chair, Association of Lawyers for Children, **Judith Timms, OBE,** Policy Officer, NAGALRO (Professional Association for Children's Guardians, Family Court Advisers and Independent Social Work Practitioners), and **Elena Fowler,** Chief Executive Officer, National Youth Advocacy Service (NYAS), gave evidence.

Q1 Chairman: Welcome. Do you think this debate has been conducted in the right terms, the debate about how we can provide for legal aid in the family law area on a maintainable basis? It tends to be very much in terms of the cost and quite clearly governments have had to take account in recent years of the rising costs. Is the debate being conducted in the right terms?

Baroness Butler-Sloss: I have not been involved in that part of it. Lucy Theis, who is chairman of the Family Law Bar Association, has been deeply involved in the last two years. Of course I have retired and I have only come along because I feel compelled to come because of what I see as the very damaging effect on the access to justice and the very damaging effect to children and to parents. I think the Legal Services Commission, with the problem of the £2 billion bill and the need to cut costs, has been going at it in a very broad, blunt way without looking at what might be a better way of using the relatively small amount of money, comparatively, that they want to allow family lawyers to have. If they would listen to the suggestions that are being made for a better use of the money, one of the major points that seems to me to stand out a mile is you should not be giving the same amount of money across the board to the simple case and the difficult case. If you do that, you do not look at the fact that a large proportion of care cases are extremely difficult. They have very complicated medical evidence. Social workers since Baby P have been of course putting a lot more children through the care system and this may or may not be the right thing for children, but it is a definitive moment in a child's life and you will all know it means it will change the child's life. Either the child remains with parents, which may not be the right thing, or the child will be going into an alternative home and lose their parents perhaps for the rest of their lives. Those cases need more money than the simple case. The LSC at the moment appear to be saying that you should have a more or less similar figure, regardless of what the work is. That will have an inevitable effect of voting with your feet by lawyers, barristers and solicitors from this work. It is already happening under the current figures and it will accelerate. I spoke yesterday to the president of the Family Division and your clerk may have told you that he was willing to give evidence if you wanted, but not today. He is the chairman of the Family Justice Council and you have their report. They are extremely concerned as are the Family Division judges and judges generally as to the impact of this. The impact means that they will not get the experienced lawyers to do the work. The cases will take longer, will actually cost more in judges taking longer, on legal aid, and be less well done by inexperienced lawyers and will not have the effect of the best that could be done for children. A very telling point I took, I think from the Family Justice Council, was not only is there a real danger of inadequate access to justice which may create miscarriages of justice, but there is a double tragedy for children whose families have failed them. They are caught up in the justice system which is failing them further. Is this what we are doing to our children?

Q2 Julie Morgan: You have already mentioned the complexity of the cases that need the extra effort and how important they are in children's lives. It is suggested that that is one of the reasons for the growth in legal aid spending. Could you describe to us what is the type of case? Why have cases become so much more complex? Could you describe the sort of situation that you are dealing with?

Baroness Butler-Sloss: Lucy, as chairman of the Family Law Bar Association, spends a great deal of her time doing these difficult cases.

Lucy Theis: They have grown in complexity for a number of different reasons. First of all, because there has rightly been a very critical analysis, not only by those who represent vulnerable families and children, but also by the courts, in relation to the statutory threshold that has to be passed, and the evidential basis for that, before there can be decisions made that may lead to a child being permanently removed from their home or not, or returned back home where they may be at risk of suffering harm. As a result of that there is a very careful investigation by the court and by those who

represent not only the children but also the parents and the other parties to the case in relation to the evidential foundation for the allegations that may be being made in relation to the risk of significant harm. Secondly, the complexity in many cases that arise from the medical evidence—for example, where there are non-accidental head injuries; where there are issues in relation to sexual abuse. Baroness Butler-Sloss chaired the Cleveland Inquiry and there are still cases even 20 years on from the Cleveland Inquiry, where there has been misdiagnosis in relation to allegations of sexual abuse. There is a very recent decision by Mr Justice Holman that deplores the practice that was undertaken in relation to the diagnosis in that case. It is a number of factors that have led to the complexity in relation to cases and demonstrates the increasing need for expertise in relation to those who conduct these cases, not only solicitors but also barristers. If you do not have that expertise—I think it is a point your Chairman made in a recent article in *The House* magazine—there is an adverse impact on the hearings if that expert advice is not available—they have been alluded to already by Baroness Butler-Sloss.

Q3 Julie Morgan: It is the most vulnerable children that are going to be affected by these proposals?
Lucy Theis: Absolutely. It is the children and families who are struggling, on the bottom rung of the ladder, who are by and large the subject matter of these hearings.
Caroline Little: The Association of Lawyers for Children's purpose is to improve outcomes and represent children through the legal process and enhance their representation. We reflect membership throughout the country. Our solicitor members are involved on a daily basis, seeing children in their placements and representing children at every tier of court. Our barrister members do the representation throughout the court. We work together. One of the effects of the fixed fees that were imposed on solicitors a year and a half ago in October 2007, which this Committee reported on previously, was that there was no recognition of the expertise of the Children Panel. The net effect of that is that, although children's solicitors are still Children Panel members, parents' representatives are not even solicitors any more. They are paralegals and often people who have very, very little experience of the matters dealt with in court. Children's solicitors are carrying these cases and often carrying the cases for parents' representatives because the outcomes for children are affected if parents' representation is poor. The other aspect is of course that, with the influx of cases recently, in a certain volume of cases children's solicitors and barristers are representing children without the benefit of a guardian for quite a large part of the case.

Q4 Chairman: I am getting a little confused. You are almost giving the impression that all children's cases are inherently complex, in which case it is not possible to advance the argument that there is an increasing complexity which is added to demand. Can you clarify that?
Caroline Little: They are not all inherently complex. There are some cases where you are dealing with the 11th child of parents with mental health or alcohol or drug problems and the outcome is almost inevitable when proceedings are brought. Those cases are dealt with very efficiently and work through the court system very, very well. Complexities can arise when other members of the family wish to come in and care for those children. There is always something in the case that makes it unusual.

Q5 Julie Morgan: If these cases are not dealt with fully and properly at the court hearing, has any assessment been made of the future cost to different services?
Caroline Little: No. It is a short term measure. We have always said that we reflect the difficulties that society has. We deal with the difficulties in society in relation to children. We have always asked for government to look at the knock on impact of not doing the work properly at care proceedings level. It is a very difficult measure. There has been no research in relation to that, although there is considerable research in relation to the complexities that families that come before the care courts have. There is independent research that provides a lot of information on the multidimensional difficulties that families have.
Elena Fowler: I am from the National Youth Advocacy Service. We represent children in private and public law proceedings and also offer advocacy and a range of support services in a socio-legal model. In private law proceedings the complexity issues are exactly the same but very often parents are not represented at all and those costs then will fall to the children's solicitor.

Q6 Chairman: I have sometimes had the argument put to me that parents who have access to legal aid in those proceedings are in a relatively stronger position than those who perhaps by a marginal difference in income do not have access to legal aid.
Baroness Butler-Sloss: That is true. You will appreciate it is now four years ago but I had 35 years on the bench doing children's cases for most of that time. In a great many private law cases where the parents either are not represented or are not very well represented—90% of children private law cases go through perfectly normally, but there are 5% to 10% of hard core cases which turn out to be quite a lot of cases over a year—the child needs to be represented, either by a CAFCASS guardian or very often by NYAS, where CAFCASS cannot cope and ask NYAS to do it. I have had those cases lasting six or seven years. I had them still going when I left the High Court, went to the Court of Appeal and handed them over to someone else. These parents become locked into something. The only way that one can cope with it is to try and get the child's position separately dealt with. It is extremely difficult to get a guardian for a child in a private law case and get it paid for.

Q7 Chairman: The LSC argues that CAFCASS is funded to provide this assistance.

Baroness Butler-Sloss: They are failing at the moment. There are 270 cases in London where they cannot get a guardian.

Judith Timms: I am Judith Timms from the National Association of Guardians. There are over 600 cases waiting nationally and this is the highest number that we have had in the last few years. We have heard about the pressures on the legal practitioners but what the Legal Services Commission proposals are going to do is also remove independent social work input from their funding scope in private law cases. That would remove a whole raft of welfare evidence which the judges need to have before them in order to determine the best interests of the child. We have in this country to our credit a wonderful system of tandem representation of the child, separate representation by both a children's solicitor and a children's guardian. What these proposals do is a double whammy because they attack both wheels of this tandem. The tandem model is a very sophisticated quality assurance mechanism for children. That is why it was set up and that is why we in the Association of Guardians are concerned about children, because guardians are the people who see the very heavy end cases. We are talking about in excess of 60,000 children a year. Guardians have an enormous amount of accumulated, front line experience. We are dismayed at the prospect that the independent social work input is going to be restricted under the proposals because that will certainly limit children's access to justice.

Q8 Dr Whitehead: During the current, recent consultation a number of concerns appear to have centred around the reliability of the LSC's data and indeed the extent to which you could say it has understood the legal services market. What progress do you think has been made in terms of elucidating that understanding during the consultation process?

Lucy Theis: Can I deal with both aspects of that? Firstly is the data and secondly is the question about understanding the market for family advocacy. In relation to the data, one of the reasons why the consultation period was extended from 18 March to 3 April was because of the concerns in relation to data. Six months after the consultation was published on 17 December, here we are now on 16 June and there are still serious data issues. The FLBA, the Bar Council and other organisations have engaged very constructively in relation to trying to resolve the data issues. We have had weekly meetings with the various statisticians; from the LSC, the Ministry of Justice, and from the Bar Council, Professor Martin Chalkley. Professor Paul Fenn has been brought in by the LSC from the University of Nottingham and also there has been statistician representation from the Law Society. The most recent meeting was this morning. It finished at five to one. I have spoken to Professor Martin Chalkley, who was present at that meeting today, and the fact is that they are still unable to agree the basic data that underlies the proposals that are being made. If I can just tell you what he told me, firstly, that there is broad agreement that the LSC's existing model is inadequate because it is based on assumptions about which there is very little idea as to validity regarding in particular the cost of solicitor advocacy. There is broad agreement between the statisticians on the structure of the model upon which to evaluate alternative proposals but, he says, the model is only as good as the data upon which it is built. Essentially, there is still a considerable amount of work to be done in relation to agreeing the data upon which to build the structure on top. From the meeting this morning, both Paul Fenn and Martin Chalkley are going away to look again at the data and they are going to report back next Friday. They have a further statisticians' meeting on Tuesday 30 June to discuss those issues further. The short answer to your question is that there are still very serious data issues in relation to the foundation of these proposals and here we are, six months later, and they have not been resolved. In relation to the barrister data regarding the family graduated fee scheme, many of the items that have been identified by Professor Martin Chalkley have been of great assistance to the LSC in the sense that we have helped them improve their ability to be able to collect the data and the systems by which they have been collecting the data. There was a difficulty discovered this morning that may mean there has been at least £3 million, 3% of the amount spent on barristers' fees, double counted in the data that we thought was clean. This is on the basis that, as we understand it, when a claim is made, if it is sent back to the barrister for further inquiries, that it is registered in the LSC data as having been a payment made. When it comes back and is paid on the correct form, it is registered as being paid again. Even at the most fundamental level—the family graduated fee scheme was meant to be a gold standard, with a relatively simple data system that was set up, yet there are still difficulties in relation to that. In relation to the solicitor advocacy, they have absolutely no idea as to what the current cost of solicitor advocacy is. The implications for this are that if they proceed on the basis of the flawed data in fact the impact in relation to the budget is completely unknown, because they may be right or they may not be.

Q9 Chairman: Lord Bach wrote to me before he knew about the example you have just quoted and said, "I understand that none of the issues identified has been of sufficient statistical significance to materially impact on the proposals."

Lucy Theis: I am afraid, with all due respect, I would fundamentally disagree with that. The most recent letter is set out in paragraph 11 of our briefing document. The complaint has always been that the family graduated fee scheme has been rising in cost. If you look at the last three years, the cost has remained pretty consistent so it has achieved what it set out to do, namely to provide cost control and to ensure that the expertise due to the graduation within the fee structure was retained to be able to

conduct the work. Can I deal briefly with the second point in relation to the advocacy market? As you know, nine days before the close of the consultation the LSC instructed Ernst and Young to be able to provide a report in relation to family advocacy. We regard that late instruction as extraordinary because we thought perhaps it may have been better to have got that evidence first before making the proposals that they have. We understand from the documents that we have seen that that report is going to cost somewhere between £70,000 and £100,000, so it is an expensive report that is being obtained. It is looking at fundamentals in relation to the family advocacy market, including the effect in relation to self-employed advocates continuing to be able to do the work. That report, first having been told it was going to be available in August, we are now told will be available at the end of June, but there is going to be no opportunity given to any of the stakeholders to be able to respond to that evidence. We would say it is a critical piece of evidence in relation to the impact of what they are proposing, particularly when the impact falls on the most vulnerable in society. In terms of the process, we say in effect that it makes a mockery of the consultation process to produce such an important piece of evidence without the courtesy of even a meeting after the report has been produced. They have rather grudgingly said that they are going to share it with us but in terms of providing an impact and the effect in relation to what is proposed it is extremely important. We say the process is manifestly unfair and fails to comply with what they said in their own consultation paper about inviting stakeholders to provide evidence to validate or challenge evidence that they had.

Q10 Dr Whitehead: I think I know the answer to this in terms of what you have said about the Ernst and Young research into the market. There has been no liaison between the profession and the LSC as far as the Ernst and Young report is concerned?
Lucy Theis: We have been continuing to have meetings at practitioner and statistician level. In relation to the LSC, they have been to see Dr Debora Price who you may remember produced the King's College Survey that the FLBA produced at the beginning of this year as a result of the survey in October. That obviously only relates to barristers. It was not commissioned to be able to deal with the advocacy market. We have been as helpful as we can in relation to providing whatever data we have from that. In relation to data concerning solicitor advocacy, the short answer is that there is no data, despite the fact that you in your own report in 2007 said that it was important that that data should be collected. Frontier Economics, who were then the Department of Constitutional Affairs' own expert advisors and reported in 2003, said that this data should be collected. We are aware, after the instruction of Ernst and Young, that a survey was put out to solicitors on the LSC website. We were told last week that the response to that survey was eight. It has absolutely no statistical basis at all. That is the bottom line.

Q11 Chairman: Not eight solicitor advocates; just eight responses?
Lucy Theis: Eight responses. I am unclear whether it is firms or individuals, but I do not think it would make any difference, frankly. There were over 1,600 responses to the King's College but it was commissioned for an entirely different purpose. Debora Price has had two meetings I think with Ernst and Young to provide what assistance she can.

Q12 Dr Whitehead: Lord Bach has said to us that the Ernst and Young research is in his consideration not relevant to the fundamental structure of the LSC's proposals and that the sharing of the report with the profession was a courtesy. You do not apparently agree with that.
Caroline Little: We do wonder why the research has been undertaken if it has no value in the context of the advocacy consultation that is taking place. What is apparent from the solicitors' point of view is, when the initial Carter consultation came out and fixed fees were being imposed, the LSC and government have no idea of the extent and breadth of solicitor advocacy at every level of court. They have no idea and no information at all. Indeed, from a response that has been sent to you yesterday or today to a review of the fixed fee regime, you will see that solicitors have not been rewarded for preparation for advocacy since October 2007 and that is a serious deficit for solicitor advocates. It discourages solicitor advocacy.

Q13 Dr Whitehead: Could I turn briefly to the question of overall spending? The Ministry of Justice has now released revised figures for spending on the family graduated fee scheme which show spending falling in 2007 and 2008 from the previous year and the total spend at under £90 million rather than the £100 million which was referred to in the original consultation. That seems to me quite a difference. Has that in your view made any difference to the LSC's approach as far as consultation and post-consultation is concerned?
Lucy Theis: The short answer is no. We have tried to persuade them that the family graduated fee scheme is a scheme that works. It provides cost control and it retains expertise. We have made suggestions about recalibrating parts of it so that it can be extended to solicitor advocates. In fact, when we first suggested it in 1999, we suggested it should be an integrated advocacy scheme to cover all advocacy, whoever does it. We have no difficulty with that as a principle. That is something that we have said right from the beginning, but it has to be a scheme that rewards the work that is actually undertaken but does not over-reward the less complex work at the expense of the more complex work. A matter of very great concern for us is the fact that, even though this Committee has clearly expressed some very real concerns about the impact and the effect of these proposals, we were told last Friday that the LSC nevertheless are going to make their announcement on 14 August, come what may. They have made that decision in the knowledge of the concerns being expressed not only by all the different stakeholders but also by this

Committee. If I may say so, it is treating this Committee with contempt in relation to the way that it wants to steam on with the proposals irrespective of the Committee's views and failing to give those who should have it an opportunity to be able to respond and make a contribution to evidence that is being produced in defiance of fairness.

Q14 Chairman: Can I turn to the LSC's view that it is really all about swings and roundabouts? In this, as in other aspects of the law, what you lose on the swings you gain on the roundabouts. Is that no longer in any way an appropriate method in the area of legal practice?

Caroline Little: Solicitors have been working under a fixed fee regime since October 2007. The swings and roundabouts method is one that you will not find any applause for among childcare practitioners. As I said earlier, solicitor Children Panel's members are carrying a very heavy burden at lesser pay than parents' representation. When the original consultation came out, we said quite properly believing in a system where parents should have quality representation as well as children that parents' representation should be paid at a greater rate because it is more difficult. They do not have professional clients. Unfortunately, because there is no measure of who represents them any more, the solicitors are carrying that burden at a lesser payment. They are falling between the fixed fee and the escape, which is double the fixed fee, quite regularly now. In relation to advocacy, the swings and roundabouts model does not work at all because, from a solicitor's point of view, if you want counsel to do a complex case on behalf of a family member or a child, you will not be able to get one if the fee is not correct for such a complex case. It is as simple as that. It is not the same as solicitors conducting the work to prepare the case. It is trying to get an advocate to conduct it.

Baroness Butler-Sloss: I am sure this Committee knows that the Family Bar divides up into those who do financial cases with private clients who make a good living and those who do children cases who make very often a relatively small living. They earn just about enough to pay chambers and all the rest of it and have an income, but it is not a part of the legal profession, either Bar or solicitors, who are in it for making the money. It is also very stressful, very emotional, very exhausting for judges and for lawyers. The return on it at this moment is not particularly good, to the extent that I nowadays when students come to me and say, "You are a family judge. Should I go into family law?" advise them not to. They will not get a good enough income and they will have a great deal of aggro in doing it. If the new scheme comes in, of course one should not be advising them to do it.

Lucy Theis: In relation to the position regarding fixed fees, the fact is that the Bar tends to do the more complex cases. If you have a system of fixed fees with no graduation, the flight from the bar from doing this sort of work will happen. It will become a stampede to the door. Debora Price in her report then, when we were facing cuts of 13%, concluded as a result of the survey that over 80% of those doing the work were either going to reduce the amount they do or stop doing it. I can give a living example of that in relation to a case I was involved in last week, which was a private paying money case. My opponent was a junior barrister of 20 years' standing, very experienced, who up until last year was doing 100% of publicly funded childcare work. He has now reduced that to 40% and he is going to reduce it even further. Many colleagues of his of the same experience and expertise are doing the same. It is already happening. In relation to the impact of these proposals and the flight from this work, that is what will happen.

Baroness Butler-Sloss: I know solicitors where the family partner is under considerable criticism from the other partners for being carried by the other partners. Certainly two or three firms I know, particularly down in the West Country, have had to give up because the other partners will not allow them to continue to do family work.

Q15 Chairman: Do you think the LSC is assuming that a legal services market has developed, rather as envisaged under the Legal Services Act, when it has not actually done so?

Baroness Butler-Sloss: Yes. I think that is right.

Lucy Theis: That is precisely the point. There is an aspiration in relation to what they want the market to be but that is not what is happening. The fact is that solicitors and the Bar have shared rights of advocacy for many, many years. They operate in the way that they do because that is the division in relation to expertise and roles. We suspect, as we have set out in our report, that there are in fact two distinct markets. We will wait with interest to see what Ernst and Young say in relation to their report. Our difficulty is that at the moment on the LSC's stated timetable neither this Committee nor the stakeholders will have an opportunity to be able to respond to that. Effectively, the opportunity to respond to one of the most critical pieces of evidence is going to be denied in relation to the decision that will be made.

Q16 Chairman: You mentioned the survey with eight responses. Does nobody know how many solicitor advocates there are in family law?

Caroline Little: We know that there were 2,500 Children Panel members who have now reduced to below 1,800 and that we are getting older and older. There are very few young ones coming through. It is Children Panel solicitors who tend to be the expert advocates on behalf of children to provide consistency of representation, through seeing them in their homes and appearing at every court level for them. There is a reducing body of children's solicitor advocates.

Q17 Chairman: In-house solicitor advocates?

Caroline Little: Those are in-house. They are solicitors who conduct the cases from beginning to end. We are independent. The reduction in expertise has been marked for the last three years in specialist solicitor representation.

Elena Fowler: If I can broaden this into what is happening in relation to independent social work, under these proposals, exactly the same drift will happen because by removing independent social work as recommended in the proposals and putting it under CAFCASS we will lose the expertise of the most experienced child care practitioners. We will actually see a loss in terms of legal representation and in terms of the social work input which will be very serious in relation to outcomes for the most vulnerable children that we work with.

Baroness Butler-Sloss: The other problem which is very serious is that, through no fault of CAFCASS, they cannot cope at the moment. Therefore, to suggest that they should be taking anything more on when they really have grave problems of managing the work that they have at the moment is pie in the sky. It just is not going to happen.

Judith Timms: It would have a disastrous impact on children because there are so many children waiting for guardians already. It would mean extra cases for CAFCASS to absorb. I do not think anybody believes, as Baroness Butler-Sloss has said, that CAFCASS has the capacity to do that.

Q18 Chairman: The LSC believes that they are funded to do it. How have they got into this degree of error?

Judith Timms: Exactly. This is part of a crude funding war, if you like, between the DCSF and the LSC and the MoJ. What the LSC are trying to do is to slough off the responsibility for funding all independent social work and push that onto CAFCASS and say, "Right, that is your responsibility. You do the social work input. We will do the legal input." It is a very crude split. That is why NYAS's work has been hit so hard because NYAS is the only holistic service for children that provides both those services, the independent social work and the legal input, in a manner we thought the government wanted, a joined up policy in relation to children. I think there is a misunderstanding between DCSF and the LSC about how they are interpreting the over-arching agenda in relation to safeguarding children as set out in *Every Child Matters.* I was concerned in speaking to the LSC that they do not appear to be accepting the wider government responsibility for the over-arching strategy in relation to child protection. After all, all of these matters which we are concerned with and all the lawyers, solicitors and social workers in court are there because we are trying to salvage the best interests of some very vulnerable children. There does need to be that clarification about how the LSC are interpreting their responsibility in the wider safeguarding agenda, because there is no evidence of it in the proposals.

Elena Fowler: To suggest that the welfare principle is not at the heart of legislation for children makes a mockery of children's access to justice.

Caroline Little: The ALC sat on the care proceedings reform stakeholder and ministerial groups and the one thing that is very clear from that is that the desire for excellence seems to stop at the doors of the court. The responsibility moves from one department to another. I would invite you to say that that is an incorrect assumption in relation to children. There should be excellence through the court process for children at every level.

Q19 Julie Morgan: The ALC has expressed concerns about the impact of these proposals on the public law outline. Could you explain to us what those concerns are?

Caroline Little: Yes. The public law outline relies on expertise of the lawyers doing the work. The idea is that you have fewer hearings but they are very carefully focused on the interests of the children and progressing the case speedily and well. That means that the people attending court on behalf of children and parties need to know how to do the work. They have to be experts. They have to do the work behind the scenes before going to court. They have to be very focused on the agenda for the child, the timetable for the child, what is required, what expertise the court needs. You cannot do that without expert representation. It is as simple as that.

Baroness Butler-Sloss: It is a judicially led process. My successor, the president of the Family Division, and the judges of the High Court Family Division have put together this particular outline, which is a case management arrangement, so that they can get the best, the most efficient, and have fewer court hearings but make the court hearings work with less expense in one sense. The judges gave a response to this LSC consultation paper, as indeed the Family Justice Council has, chaired by the president, with their very great concerns about the impact of these LSC proposals on the judicial process. It is under great pressure anyway, but it will not be working properly under the new schemes. This is why the judges are so concerned.

Q20 Mr Tyrie: This is all about money really, is it not, and the fact that there is not any? If you were given the same amount of money, do you think you could do this job much better with a completely different structure and, if so, how would you go about it?

Lucy Theis: We do not ask for more money. I made that perfectly clear, I hope, in our document that we submitted. The short answer to your question is yes, we think we can and we think it should be a graduated fee scheme in relation to advocacy along the lines of the existing scheme that is currently paid to the Bar, with some recalibration. It is a system that has been demonstrated to work. The data is there hopefully nearly clean. With the appalling history in relation to data issues and the Legal Services Commission, it would be extremely dangerous to embark on yet another scheme that may have difficulties in relation to not only the data being kept but also the budget.

Q21 Mr Tyrie: Could I ask you to speculate on why, if that seems so manifestly clear to almost everyone close to this subject, there is so much persistence with this reform?

Caroline Little: I think it is because historically there has been so little understanding of the cost drivers in care proceedings. There is a great deal more information about that, but it was all put at the doors of the lawyers. That is not the case. There is a lot of

information that this Committee has about what has driven the cost in care proceedings, the complexity, the court delays and having a well qualified system of representation oils the justice system much better and ensures that things are dealt with in a timely way.
Elena Fowler: In private law proceedings, I think it is perceived as a quick fix to shift the cost of social work intervention onto another department when what we need is a joined up approach between those departments to value a holistic approach that we know through our work achieves much better, much quicker outcomes, making a substantial saving to the public purse in the long run both in terms of the legal proceedings, which we do close down considerably more quickly, but also in terms of the long term damage to the child. If these significant issues are not addressed at the time of family breakdown, you end up with children going into mental health problems, secure accommodation, antisocial behaviour, etc.
Baroness Butler-Sloss: It impressed me that the Bar are not asking for more money. What they are asking is for a redistribution of the money in a more effective way to pay people who do the more complex cases and to pay less to people who do the simpler cases. That seems a practical way of approaching it.

Q22 Mr Tyrie: I do not want to put words in your mouth but I invite you to sum up by saying there is no joined up government.
Caroline Little: Absolutely.

Q23 Mr Tyrie: There seems to be agreement on that. Waste of public money going on, which would be better spent in another way?
Caroline Little: Yes.

Q24 Mr Tyrie: And children put at risk by failure to address these mistakes?
Caroline Little: Absolutely, yes.

Q25 Mr Tyrie: That is quite a serious condemnation of public policy.
Caroline Little: I would remind you that solicitors have not had any rates increase for 15 years.
Chairman: Thank you all very much.

Witnesses: **Carolyn Regan,** Chief Executive, **Hugh Barrett,** Executive Director (Commissioning), and **Sara Kovach-Clark,** Head of Civil Policy Development (Family), Legal Services Commission, gave evidence.

Q26 Chairman: Welcome. You were all here during the earlier session so you have heard the evidence and we will probe you in more detail about it but what is your initial reaction to the strength of feeling and the unanimous view that there must be a better way of doing this?
Carolyn Regan: We agree with some of what was being said in terms of trying to reach a solution within the resources we have available. That is why we are working with the FLBA and others to try and address some of the key issues. It was quite difficult to hear but one of the key issues was about complexity of cases and that is a piece of work which is going on. The second point is of course the issue of fairness and equality of pay, recognising that 63% of advocacy in these family cases is undertaken by solicitors. That is another issue we are trying to address.

Q27 Dr Whitehead: You have heard the concerns that have been expressed about the data and the basis on which the data that is available is being used and indeed the emergence of data during and after the period of consultation. Are you confident that the data on which you are relying is sufficiently robust and accurate to give you the underpinning for your proposals that one might think it should?
Carolyn Regan: The feedback I had from the meeting this morning was that this was described as the best source of data available in terms of its cleanliness, if I can put it like that, at the state it is in now. Obviously, as has been mentioned before, we are using the advice and oversight of Professor Paul Fenn as well as the existing statisticians to continue those discussions which have been numerous. As at this morning, I was told this was the best source of data available.
Sara Kovach-Clark: We consulted on the data as well as the structure. We shared data as part of our consultation process. During that the Bar has been extremely helpful in raising issues and helping us to resolve those issues. As issues have come up we have resolved them. There is one remaining issue that we have still yet to resolve but I am confident that we can resolve that issue certainly by the end of next week. So far nothing has been raised that has shown a material difference to the proposals that we consulted on. I think we will have an excellent set of data by the end of this consultation period.

Q28 Dr Whitehead: Forgive me but is it not more normal practice to have data which informs the beginning of a consultation rather than data that emerges during a consultation and is refined after the end of it?
Sara Kovach-Clark: Data has not emerged in that sense. Issues with the data have emerged which we have resolved and shown that the data that we consulted on and the data that we formed our consultation proposals on was fit for purpose, is still fit for purpose and I am confident will continue to be fit for purpose.

Q29 Dr Whitehead: The Ernst and Young research which commenced after the end of the consultation and has been suggested as not being, strictly speaking, relevant to the consultation appears to be central to it, does it not?
Sara Kovach-Clark: I would not say it was central to the consultation. It is an additional piece of information, a piece of economic analysis that will

help inform us as to the final impact of our final proposals. We have always been clear that we would show stakeholders a copy of the report and allow them some time to comment on it. I am very grateful to the Bar for the work that Dr Price has done with Ernst and Young. That has been very helpful and we ourselves have I think, through Ernst and Young, been helpful to the Bar who have instructed their own economic consultants to look at some of the issues that Ernst and Young are looking agriculture. When we awarded the tender to Ernst and Young, we shared the terms of reference and what Ernst and Young were looking at with all of our stakeholders as soon as we were allowed to do so under the terms of procurement law so we could be as open and transparent as possible, so I think we have been fair and open there. We will be allowing people time to comment on the proposals and the Bar have instructed Oxera, a firm of economic consultants with whom Ernst and Young have cooperated in terms of the work that they are doing.

Q30 Dr Whitehead: Why was it commissioned when it was commissioned then? Should it not have been commissioned somewhat earlier? What is the cost of the commissioning in any event?
Sara Kovach-Clark: I understand that the cost of commissioning is about £63,000, not £100,000. We always intended to instruct economic consultants once the proposal had gone out. It was an issue of resources for us as the LSC and it was always an additional piece of information. We never saw it as fundamental to what we were consulting on.
Carolyn Regan: It is additional, economic analysis. It is not fundamental to the shape of the proposals we consulted on.

Q31 Chairman: Why is it worth spending £63,000 on it?
Carolyn Regan: Because it is ongoing, additional, economic analysis which we would do anyway. That is part of what we continue to commission as we look at the impact of the ongoing changes.
Hugh Barrett: One of the key things we are going to get out of the economic research is an assessment of the risk of a drop of supply. We are also going to look at the possible increase in supply because one of the implications of our proposals is that the rates we are paying solicitors will rise as a result of this. It is important to recognise that currently 63% of advocacy in family courts is done by solicitors, not by self-employed barristers.

Q32 Dr Whitehead: If it is described as the cherry on the cake but there was not apparently a cake in the first place as far as data was concerned, is that not a rather odd way to go around organising data, whether it is central or peripheral, for a consultation process?
Carolyn Regan: There was a set of proposals which is what we consulted on. They were about addressing this issue of fairness and the fact that we are paying solicitor advocates and independent advocates different rates at the moment. As Mr Barrett said, 63% of that work is done by solicitors. We have also looked at cleaning up the data on an ongoing basis in discussion with the family Bar and others.

Q33 Dr Whitehead: You have specifically written to the family Bar stating a little while ago that the in-house employment of advocates by solicitors is a statement made on the basis of anecdotal evidence. You do not keep a written record of anecdotal conversations that you have had, but these are things that come up time and again. Do you know the number of in-house advocates or are the anecdotes the basis on which some of the planning has been done?
Sara Kovach-Clark: The consultation has not just been done on the basis of anecdotes. We have had several pieces of evidence that have come through in responses to other consultations as to why solicitors instruct counsel to do advocacy. That is the anecdotal evidence that I think you are referring to in that letter. I do not have a copy in front of me. While it may not be hard facts and data, solicitors have said to us on numerous occasions, both in response to formal consultations and in public consultation events face to face, that there is a variety of reasons why they instruct counsel and they are not all about complexity. Often, it is about convenience as well.

Q34 Chairman: You told us that the employment of in-house advocates by solicitors is a statement made on the basis of anecdotal evidence. You have not carried out any specific research into this area. What do we know and how do we know it about the number of in-house advocates employed?
Sara Kovach-Clark: All we can know is what solicitors choose to tell us. We have tried to obtain that information from solicitors. They have not told us that. We do not have specific figures on in-house advocates because you do not have to necessarily be a trained solicitor advocate with higher rights of audience to be able to do advocacy. Lots of solicitors do it as an ordinary part of their work.

Q35 Dr Whitehead: Could I turn to the statement that you made about swings and roundabouts in terms of the fee payments and so on for practitioners? Is that not counter-intuitive in a system where practitioners graduate from simple to complex cases as their career progresses? Certainly, if we are saying that that looks counter-intuitive does that not imply that advocates can actually be paid less as they become more senior?
Sara Kovach-Clark: In the proposals that we are looking at in conjunction with our stakeholders, the Law Society, the Bar and other solicitor representative bodies we are looking at being able to reflect complexity more effectively in the final proposals. So those barristers who just do complex work should find themselves more appropriately remunerated, I would suggest.

Q36 Dr Whitehead: If you do want to encourage solicitor advocates—and state they should be paid the same as barristers—why then was that group penalised in the 2007 reforms by the failure to separate out payments for preparations for hearings, as opposed to the more general preparation that all solicitors do?
Sara Kovach-Clark: The 2007 fee scheme was based on the historical cost of cases and so preparation would have been recorded as part of the solicitors' profit costs and so those preparation costs were included in the 2007 scheme. However, one of the things that we have been looking at with our solicitor stakeholders is a way of appropriately remunerating those solicitors who do their own advocacy and do preparation for that advocacy, and I am confident that the new scheme will reflect that appropriately.

Q37 Dr Whitehead: When you say you have been looking at it, is that material that is in the consultation or post consultation or is it in train?
Sara Kovach-Clark: We had a separate consultation on the phase one fee scheme review. We did a report that looked at the operation of the phase one fee scheme where these first 2007 schemes were looked at again. In that group we suggested that as the historical costs of preparation of advocacy were included in the existing scheme one way of appropriately remunerating those who do their own advocacy was to take a proportion out of the representation budget and put it into the advocacy budget and that is what we are looking at doing at the moment.

Q38 Mr Tyrie: Have you made any estimate of the long-term effect of these changes on other areas of public spending?
Sara Kovach-Clark: With respect to independent social work, yes, we have. We have been talking to the Department for Children, Schools and Families and with CAFCASS as well and we are very clear about it would not be appropriate for us to make any changes where we have not considered the effect on them as well, and we will continue to talk with them on that.

Q39 Mr Tyrie: Is that in the public domain?
Sara Kovach-Clark: Not at the moment because we are working together to provide joint advice to our ministers and so it is important that we get that advice to ministers first and that they have an opportunity to consider it.

Q40 Mr Tyrie: Do you not think it might be a good idea to get it in the public domain as soon as possible?
Sara Kovach-Clark: I think we would like to do that very much but it is obviously important that ministers get our advice first.

Q41 Mr Tyrie: That takes a day or two. When do you think you can publish this?
Sara Kovach-Clark: The final response to our consultation will be published on 14 August.

Q42 Mr Tyrie: I do find it astonishing that you are relying on a bit of anecdotal evidence from some solicitors in order to come to these conclusions on policy and that, as you put it, you are relying on what solicitors choose to tell you. Why do you not commission a small piece of survey evidence based on a representative sample?
Sara Kovach-Clark: That is what we attempted to do with the Ernst and Young survey and we asked solicitors to respond to that survey; but, as you have heard, they chose not to do that.

Q43 Mr Tyrie: Then you have to send people round and ask solicitors if they will sit down with a surveyor.
Sara Kovach-Clark: As I have said before, just because evidence is anecdotal it does not mean that we do not hear it all the time from solicitors. We talk to them a lot; they have responded in writing to various consultations saying the same things and, as I said earlier, they say the same things in meetings; so I think we are reasonably confident that solicitors do their own advocacy for different reasons. But the fundamental point is that when they do their own advocacy they should be paid the same amount as barristers for the same work.

Q44 Mr Tyrie: Did I hear you earlier say, Mr Barrett, that you had done an assessment of the risk of a drop in supply?
Hugh Barrett: No, I said that that was part of the work that Ernst and Young were doing for us.

Q45 Chairman: That will be produced when?
Hugh Barrett: At the end of this month.
Carolyn Regan: The end of June.

Q46 Mr Tyrie: Do you think that it would pose fundamental problems if there were a sharp drop in supply?
Hugh Barrett: If there were a significant drop in supply yes, it would case a significant problem.

Q47 Mr Tyrie: In which case why is this research described as not fundamental to the structure of the fee scheme?
Hugh Barrett: It is fundamental to the decision whether we proceed with the fee scheme.

Q48 Chairman: That is a pretty significant point.
Hugh Barrett: Yes.

Q49 Mr Tyrie: I have to say that as I listen to this I can sense all confidence from everyone who is dealing with every aspect of this proposal draining away and I really do wonder whether it might not be a better idea if you delay implementation of all this until you have collected the data properly, understood it a little better and won the confidence of some of the people who are involved in actually having to implement these proposals. Would you be prepared to discuss that with your political masters?
Carolyn Regan: We know that we have an issue with increasing costs per case not matched by the increase in volumes. We also know that we have an issue with

equality of payments to different groups of people doing similar work; and we also know that we have to work within a fixed budget. Obviously some of the issues that you have mentioned are under discussion and we are trying to come up with a scheme which picks up some of the previous points around complexity and preparation and I am sure that you will have seen the letter sent today from the Law Society, which actually supports an approach to equalise, for example, advocacy rates paid. I know it is very late but we are trying to balance those different interests and of course the points that have come out today are in our submissions to the Ministry of Justice on an ongoing basis.

Q50 Mr Tyrie: So, the short answer to me could have been no, we are not considering a pause in the implementation.
Carolyn Regan: We are taking all of this into the mix and trying to come up with something which resolves these outstanding issues. The two current ones are not that the principle of paying the same rates for equal pay are in disagreement; the disagreement is how you do that within a fixed budget, recognising some of the things that we do know as factual about the increase in cost per cases and not matched by the increase in volumes. We also know that graduated fees are not a good way of controlling the budget and actually have seen an increase of 30% in family graduated fees over the last five years. So clearly we have issues about complexity and preparation and how do we balance those different interests and not impact on either the supply of people doing this work or the work of the courts, of which we are very mindful.

Q51 Mr Tyrie: So the real driver is long-term public expenditure threats?
Carolyn Regan: I do not think it is only that. It is, as I have said, trying to recognise that we have an inherently unfair system at the moment and trying to reward the people doing the work and indeed encourage the future generation. But clearly public expenditure is one of my concerns within a fixed budget.
Chairman: I am tempted to wonder if we locked you in a room with the previous witnesses and went away and came back a day or so later you might have actually come up with a satisfactory answer.

Q52 Mr Tyrie: The alternative might be that there would be rather fewer of you left than there are now!
Carolyn Regan: We are in constant discussion and we have mentioned a meeting this morning both about the data and trying to address some of these issues, and also having a scheme which has some long-term future; so I do not think we need to be locked in a room to continue those discussions. I believe—and Sara is much closer to it—that we are making some progress and there is some agreement, but clearly we need to come up with something which is advice. As was said, it is not us publishing our response, it is a ministerial response and the scheduled date is 14 August.

Q53 Chairman: If you go to the ministers and say, "We think we have cracked the problem between us within the budgetary constraint you have set" they are not going to turn round and say, "No, go away again," are they?
Carolyn Regan: No, no, absolutely not; I would hope not.

Q54 Julie Morgan: You do not have to stick to August 14 do you, surely?
Carolyn Regan: We do not have to but we are re-letting all the civil contracts next year, April 2010, so obviously we have a window to link it in with that.

Q55 Julie Morgan: It just seems very important, would you agree, that if you could settle it between you that you did put off the date?
Carolyn Regan: Yes.
Hugh Barrett: But we have conflicting pressures on us. We have one half of the profession wanting it implemented quickly—equalising pay—and we have pressure from other parts of the profession saying that they would like it delayed.
Chairman: Some of that is outside the main legal term, is it not? We are talking about August now and I know family cases have to continue then, but it is a window of opportunity there.

Q56 Julie Morgan: We are told that this would disproportionately affect women and black and minority ethnic people. I know you have a Provider Diversity Reference Group and have you had discussions with them about the impacts of these proposals and what do they say?
Carolyn Regan: We have discussed with them and we have also discussed more recently with the Bar's Equality and Diversity Committee and we have also commissioned some focus group work additionally to get some views of people working in this field. Do you want to talk about the discussion with the Equality and Diversity Committee?
Sara Kovach-Clark: Yes. We had a very constructive discussion last week. We are agreed that the only way to mitigate the impact on women, black and minority ethnic barristers is to look at introducing more measures for complexity scheme and that is what we are looking at in conjunction with our stakeholders. We are also agreed that the reason why so many black and minority ethnic barristers and women barristers are affected more by these proposals is because of the allocation of work in the chambers—they traditionally get more of this type of work when their white male colleagues get less of it. So that is a factor that the Legal Services Commission has no control over but we are working with the Equality and Diversity Committee to obtain the best possible evidence that we can to inform the impact assessment of our final proposals.

Q57 Julie Morgan: So you accept that the proposals will disproportionately affect that group?
Sara Kovach-Clark: They will and we will do our best to mitigate those, but there are matters without our control and the allocation of work in chambers is not within the control of the Legal Services Commission.

Q58 Julie Morgan: It just seems a matter of concern that you are going to proceed along this line if it is going to have this effect.
Sara Kovach-Clark: We have an obligation to mitigate as far as we possibly can and that is what we are looking to do.

Q59 Alun Michael: Can I ask you about one specific thing and that is the exclusion from scope of the guardianship services of guardianship services and independent social work. Could you tell us what discussions you have had on those aspects and on that exclusion?
Sara Kovach-Clark: We have had a number of discussions with CAFCASS because they and we both agree that this is work that should be more properly funded through CAFCASS rather than the Legal Services Commission. However, we recognise that if we were to take independent social work out of scope that would have an effect on CAFCASS resources and so we are in discussions with them at the moment as to how to deal with that.

Q60 Alun Michael: Could you tell us what comments you have received on that aspect? I am sure that people have commented on it even though you have defined it as out of scope.
Sara Kovach-Clark: Many respondents to the consultation agreed with us that this is work that is more properly funded through CAFCASS. There are many others who do not and who believe that there is a conflict of interest with CAFCASS and in some cases then it is appropriate for the Legal Services Commission to pay for independent social work. Our view is that independent social work should be paid for as a matter of expertise and not as a matter of course and often we find ourselves paying for independent social work when CAFCASS have been unable or unwilling to allocate a guardian and that cannot be right.

Q61 Alun Michael: You heard evidence earlier that a lot of the scene is a financial battle between different bodies. Do you want to comment on that in relation to this?
Sara Kovach-Clark: Yes, I do. That is an unfortunate impression because we have been in discussions all along with CAFCASS about this and I do not think we have any intention of allowing this to be an unseemly battle and we will not be making any proposals to ministers without fully understanding the impact on CAFCASS and fully advising ministers both at the Ministry of Justice and DCSF to the impact on resources.

Q62 Alun Michael: On reflection would it not have been better to put it in scope and allow that discussion to take place during the consultation?
Sara Kovach-Clark: I do not think so, no; I think it is very important that we get the message out there that legal aid is for specialist legal advice and for expert evidence it is necessary for them to make that advice and representation relevant.

Q63 Alun Michael: But there is a relationship between the two, is there not, at a variety of different levels. Would you not accept that there is a concern that there could emerge from this consultation a constraint on judicial discretion in the making of appropriate orders in particular cases?
Sara Kovach-Clark: We would not want to constrain judicial discretion; however, we have to give due regard to the financial pressures that are on this as well and so it is important that we fund what we are statutorily obliged to fund and that CAFCASS funds what they are statutorily obliged to fund.

Q64 Alun Michael: But getting the right organisation commissioning or paying for particular parts of work is in a sense an administrative issue. Is not the exclusion of this from scope really resulting in rather a fractured discussion about the issue?
Sara Kovach-Clark: I do not think it is. I am confident that the discussions we are having with CAFCASS and DCSF and our colleagues at the Ministry of Justice will provide a satisfactory result for all parties.

Q65 Chairman: Let us be clear, we are not talking about some administrative technicality but the representation of children in cases where their entire life and future is at stake. Surely this ought not to descend into what appears to be an argument between two organisations about who should be picking up the tab.
Sara Kovach-Clark: There is not an argument between who should be picking up the tab. What we are discussing at the moment is how we make sure that services to children are maintained and how we make sure that each agency properly funds what it is statutorily obliged to.

Q66 Chairman: So your view is that it is a CAFCASS responsibility to provide for guardianship services and independent social work, but you can see that there are cases where a conflict of interest might arise and an independent social worker needs to be appointed. In those circumstances do you think that it would be better for LSC to be paying rather than CAFCASS, given that we are talking about a potential conflict of interest? Are you satisfied that CAFCASS would in effect be paying for both?
Sara Kovach-Clark: I think in cases of conflict where CAFCASS could be in a position to commission independent social work themselves from outside of CAFCASS to provide advice in cases of conflict, where the Commission should be funding—and we are not proposing to take it out of scope—is independent social work where parents are challenging the social work that has been done by a

local authority who are taking their child into care. That, to me, is expert evidence and that to me is properly funded by the Legal Services Commission.

Q67 Chairman: You will have obviously gathered from this session not only that there is considerable concern within the professions involved—people doing the work—and a wider concern; but that there is also, I think, a recognition that you do have financial problems to deal with. Without wishing to put words into the mouth of the Committee, which has not freshly reported on the issue, we share a lot of the concerns and we would want to be sure that the timetable that you have imposed on yourselves does not preclude reaching a satisfactory solution. Can you give us some assurance that you will not allow that to happen, bearing in mind that in your impact assessment you actually said, "Depending on the outcome of the consultation, the new fee schemes will be implemented in 2010." We are not even suggesting to you at the moment that a scheme should not be implemented in 2010, but that the timetable between now and then should not prevent you from reaching a solution which most of those concerned believe is a sensible use of the money reflecting the realities of the work. Can you give me some assurance on that?

Carolyn Regan: We obviously need to address some of the issues which have been raised today and that is why discussions will continue, I think I am right in saying at least on a very regular basis so that we can resolve the issues raised, some of which have come up today and some of which have come up in our previous discussions. So we are aiming for 2010 but we will obviously continue the discussions with a view to resolving those outstanding issues.

Q68 Chairman: Implementation in 2010 is not necessarily precluded by changing aspects of your scheme or even allowing a little more time, for example, for the research to influence both the scheme and the way that people respond to it.

Carolyn Regan: Absolutely. Obviously we want to take into account both that research and the research that has been commissioned by the Family Bar from another consultancy; so both of those are relevant. There are other drivers, of course, on family law which we are looking at, together with the Bar and the Law Society—for example, costs of medical experts which has been mentioned—and all of those discussions form part of our recommendations to ministers.

Chairman: We will continue to take close interest in this. Thank you very much for coming this afternoon.

Written evidence

Written evidence submitted by the Association of Lawyers for Children
(copy of response to Family Legal Aid Consultation (extract))

DETAILS:

The ALC is a national association of lawyers working in the field of children law. It has over 1,200 members, mainly lawyers who act for children, parents, other adult parties, or local authorities, as well as other legal practitioners and academics. It also has associate members such as Children's Guardians, social workers and other professionals such as medical staff. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of England and Wales, including London, Birmingham, Manchester and Leeds, as well as in shire counties and small rural areas. Several leading members are specialists with over 20 years' experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children law and several hold judicial office.

The Association exists to promote access to justice for children and young people within the legal system in England and Wales. Within that framework, it lobbies in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice and lobbies against the diminution of such mechanisms; is a provider of high quality legal training focusing on the needs of lawyers concerned with cases relating to the welfare, health and development of children; is a forum for the exchange of information and views in relation to the development of the law in relation to children and young people; and is a reference point for members of the profession, Governmental organisations and pressure groups interested in children law and practice.

The Association also provides regular training for lawyers, social workers and medical experts with the aim of promoting good practice and a multidisciplinary approach to access to justice for children.

FAMILY LEGAL AID FUNDING FROM 2010: A CONSULTATION ALC RESPONSE—PART ONE

1. The response of the Association of Lawyers for Children (ALC) to the Legal Services Commission consultation paper—*Family Legal Aid Funding From 2010: A Consultation*—is in two parts.

2. Within this first part, the ALC sets out its own approach to the main issues raised by the consultation paper, makes comments about the approach of the LSC, and introduces in outline its own advocacy scheme—one that has been informed by its own in-depth understanding of practice and that is intended to make good the significant deficiencies identified in the proposals of the LSC.

3. As will be apparent from its content, there is within this response much criticism of what the LSC proposes. It is—and should be seen as—constructive criticism. Ultimately, those in government and those in practice should aspire to the same goals. The real issue is how to achieve them. We very much hope that what we see in this consultation paper represents simply the start of the collaborative process, but we cannot and accordingly do not assume that is so. We have to work on the basis that this is what government intends, which is why we have pulled no punches in the criticisms that we have made. That we have put forward our own measured proposals, however, testifies to the constructive nature of our approach.

4. Within the second part of our Response, the ALC answers the specific questions raised by the consultation paper insofar as it is within the remit of the ALC to answer them.

THE ALC APPROACH

5. The ALC is a national association (with over 1,200 members), principally composed of solicitors and barristers, whose concern is children law, public and private. We are not lawyers for children in the narrow sense of only acting for them. We are lawyers for children in the broadest sense—seeking to ensure justice for children within the family justice system as a whole and in particular in proceedings in which their welfare is at the forefront of the court's consideration. Thus, our members have extensive experience of acting for all parties to children's proceedings and at all three levels of first instance court and at appellate level.

6. We make that clear at the outset, because much of what the consultation paper proposes touches upon the practice of children law and much of its approach is predicated upon the principle of equality of pay for equality of work. As the major stakeholder group composed of solicitor and barrister advocates, we believe that we are in a unique position to comment and assist.

Why is children law important?

7. It may seem extraordinary that in the 21st century this question need be asked, but it is salutary that we continue to remind ourselves of the answers. We do so, mindful that the consistent message that we have had by way of feedback from our members is that those who would push this consultation paper simply do not understand what we do and the value of our doing it so well.

8. Children law is important because children are important. Their welfare is important, their safety and protection are important, and their futures are important.

9. In public law proceedings, courts are involved in the most difficult, important and far-reaching decisions about the safety and futures of children, in which the stakes could not be higher and the potential outcomes more draconian. A wrong decision one way could mean a child returned and left at home only to be abused again, possibly fatally. A wrong decision the other way could mean a child removed permanently from their family of birth for no good reason. The premium in not getting these decisions wrong could not be greater, and the public interest in getting these decisions right could not be higher. Increasingly complex, stressful and time-consuming for all who have to deal with them, care proceedings inevitably are a burden on the public purse but are a burden, we believe, that the public can rationalise. The public understands at the broadest level that, in a civilised democracy, it is vital, wherever possible, to get these decisions right. But the public understands also the more personal dimension—that there is nothing more precious than the life of a child, which is why it is essential that those children and families who have the misfortune to be caught up within these proceedings should have a quality of representation that ensures that their voice is heard, that their case is put and that justice is done. No justice system can ever be perfect. Miscarriages of justice will occur, as they will within any justice system. But, if the aim is (as it must be) to avoid them wherever possible, then it is simply essential to ensure that the parties in these cases are properly represented. This is not an area of work where anything less will do.

10. In the private law sphere, the family justice system is involved in managing parental separation and in many cases taking decisions which can have profound implications for the lives and futures of the children involved within them—not just in terms of their living arrangements but also in terms of their fundamental safety. Again, the stakes can be very high. A wrong decision one way could see a child ordered to have contact with a parent who ends up murdering that child.[1] A wrong decision the other way could deprive a child of a meaningful relationship with their non-resident parent and of the benefits to that child's welfare that such a relationship could bring.[2] Especially given the numbers of children enduring parental separation,[3] the public interest in the issue of the division of parenting time and the various pressures that brought about the Children and Adoption Act 2006 and associated reforms, the public can readily rationalise the cost of ensuring that these decisions are taken properly, on sound evidence, and with the assistance of high quality representation for the parties involved.

11. What unites both spheres of children law practice is the concept of investment. By committing to getting the decisions involving these children right, the State is not only abiding by its obligations under the ECHR[4] and the UNCRC,[5] it is investing in the future of these children and of society as a whole, which benefits when decisions about children are got right and which suffers and pays a bigger price when those decisions are got wrong.[6] Indeed, there is no area of law where money spent could be more accurately described as investment rather than expenditure.

12. We do not hesitate to remind those in government that the problems with which we as children lawyers have to deal on a daily basis are not of our making. They are the problems of others and of society as a whole. It may be embarrassing in this day and age that we can have tragedies like Baby P's, that we can have dysfunctional families of the kind that Shannon Matthews has grown up within, and that we can have the kinds of deep-seated, often intractable problems that are the daily diet of the family court. But that is what we as a society have, and that is what we as children lawyers have to handle and address.

13. We do a vitally important job, and we do it extremely well. That is not our own assessment. That is what Lord Bach, the Minister for Legal Aid, told us when briefly addressing our annual conference in November 2008. His points were well made, for, were it not for the quality of children lawyers that we have at work in this country, then the vital job that we do would not be done, children and families would not be properly represented, miscarriages of justice would be the norm, the children themselves would suffer, and the State would end up footing a far greater bill, socially as well as financially, in consequence.

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1 See *A Report to the President of the Family Division on the Publication by the Women's Aid Federation of England Entitled Twenty-Nine Child Homicides: Lessons Still to be Learnt on Domestic Violence and Child Protection with Particular Reference to the Five Cases in which there was Judicial Involvement*, prepared by Lord Justice Wall (March 2006).

2 See for example J Dunn, H Cheng, T O'Connor & L Bridges *Children's Perspectives on their Relationships with their Non-resident Fathers: Influences, Outcomes and Implications* (Journal of Child Psychology and Psychiatry, Volume 45:3, 2004, pp 553–566).

3 At the time of the HMG July 2004 Green Paper Parental Separation: Children's Needs and Parents' Responsibilities (Cm 6273), it was recorded that between 150,000 and 200,000 parental couples separate each year and that of the 12 million children in the country, about a quarter have had to endure the separation of their parents.

4 The European Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated into domestic law by the Human Rights Act 1998.

5 United Nations Convention on the Rights of the Child 1989.

6 By way of example of recent research in this field, see R Gilligan Promoting Resilience: A resource guide on working with children in the care system (BAAF, 2009).

The nature of the client and the demands of the job

14. The problems thrown up by the cases that we undertake are as varied as they are complex, encompassing all manner of neglectful parenting, emotional, physical and sexual abuse. They can range from cases with multiple problems[7] to those where there is in effect a single issue the resolution of which can make the difference between the legitimacy or otherwise of State intervention in family life.

15. The adult clients involved in these cases require considerable care and attention.[8] In the public law scenario, they are in most cases petrified of losing their children. The children clients by definition have either been abused or at are serious risk of being so. The level of care and quality of representation required for them ought to be self-evident.

16. Given the stakes involved, the lawyers who represent the publicly funded parties in these cases make no apology for doing their utmost to further the cases of their clients (whether adult or child) within the confines of the law and consistent with their professional obligations.

17. The job of acting within children's proceedings has never been easy, but there is no question that, year on year, it becomes more demanding, more stressful, more time-consuming and more complex.

18. As there seems to be some failure on high to understand why cases in themselves should be costing more year on year, we offer this non-exhaustive list of factors that are self-evident to those who practise on the front-line:

- — the continuing impact of the incorporation of the ECHR, which not only brought into direct application a new and vast area of jurisprudence, but which has had and continues to have a profound impact on the way litigation over children is conducted—we would highlight especially the impact that the rights-based approach has had in the public law field on the issue of rehabilitation and on the detail of the local authority plans for the child and in the private law field on the issue of parenting time, generating in both spheres in particular more (and more varied) assessments and more arguments about them;
- — the ever-increasing volume of paper involved in children's proceedings—in part, the consequence of the requirements for greater disclosure to ensure Article 6 ECHR compliance, in part the consequence of technological advances enabling newer forms of documentary evidence—the average court bundle is now over twice the size that it was prior to the incorporation of the ECHR, and the hundreds of pages within it all have to be read, understood and assimilated;
- — the advent and increased use of email, with its inevitable consequence for the amount of client contact that is expected to and does take place—the advocate will routinely return from court to find tens of emails on a variety of cases which all have to be dealt with;
- — the ever-increasing volume of relevant case-law, Practice Directions and legislative and other initiatives, which all have to be read and understood—in legal terms, family law is a fast-growing subject, as testified to by how the Family Law Reports (FLRs) have grown from one bound annual volume to three, and most family lawyers will get weekly, if not daily, legal updates which they must somehow find time to assimilate;
- — the allied greater judicial expectation of case paperwork—five years ago, closing written submissions at the end of a five day trial were a rarity, now they are the norm; the Bundles Practice Directions provides for preliminary paperwork from all parties for all High Court and most County Court hearings; while the effect thus far of the Public Law Outline has been to increase the level of paperwork preparation required to the point where the President of the Family Division has now taken the decision that the PLO's paperwork should be simplified;
- — in care proceedings, the increased focus on the importance of the care plan—when the Children Act 1989 first came into force, care proceedings were very much about answering a question (whether or not to make a care order), now they are very much about providing a solution for the child—a process rooted in the case-law[9] and formalised when Parliament introduced new 31A into the Children Act 1989 in 2005;[10]
- — advances in science, particularly pertinent to cases of non-accidental head injury—for example, there was five years ago no research indicating the incidence of birth-induced subdural haematoma—now no advocate can properly cross-examine a neuroradiologist without knowing of the Whitby research (ongoing), more recently the Looney research and most recently the Rooks research;

[7] Research indicates that most care cases contain multiple allegations of child maltreatment (i.e. more than one of sexual, physical and emotional abuse and neglect) and multiple concerns/allegations leading to failures of parenting including mental illness, drug abuse (and refusal to accept treatment for these), chaotic lifestyles, inability to protect a child from a violent partner, failure to be co-operative with health and welfare agencies, male violence, inability to control/cope with a child, involvement in crime (see J Brophy Key features in the profile of children and parents subject to care proceedings, in Research Review: *Child Care Proceedings under the Children Act 1989 (DCA, London, 2006)*).

[8] Research has shown that over 40% of adult clients in care proceedings have mental health problems, and that most are "parenting under conditions of extreme poverty and deprivation and often living on the margins of society" *(ibid)*.

[9] See Manchester CC v F: Note [1993] 1 FLR 419; Re J (Minors) (Care: Care Plan) [1994] 1 FLR 253; Re T (A Minor) (Care Order: Conditions) [1994] 2 FLR 423.

[10] By an amendment brought in by the Adoption and Children Act 2002.

— greater understanding of child abuse in its various forms—consider, just to take one more recent example, the impact in public as well as private law proceedings of the express inclusion of domestic violence within the statutory definition of harm;[11]

— in private law cases especially, the greater emphasis on holding fact-finding hearings in advance of the court's ultimate determination of the issues at final hearing;[12]

— the increased recognition of the need now to take proper account of diversity issues, which has impacted not just in an increase in expert evidence to ensure that fairness is done, but also in an added caution about ruling out parents as carers where, for reasons grounded in diversity, it might be unfair to do so;

— the impact on the length, nature and cost of proceedings of the increasing number of litigants for whom English is not their first language and who therefore require interpreters;

— the impact on the length, nature and cost of proceedings of the increasing number of litigants with learning difficulties who need the proceedings to be conducted at a pace that allows them to understand and be understood.

19. The factors identified above directly add to—what might be called—the advocate's burden, but it is right too to recognise four further factors that have contributed indirectly to the amount of work required by each individual case:

— the underfunding of local authorities—"child protection is getting worse, not better: that is not just about increased scrutiny, but also a result of the lack of long-term investment in an area judged by the government to be politically unimportant" (The Times, Commentary, 5 March 2009)—the structure of the Children 1989 was built upon the assumption that local authorities would be able to discharge their duties before, during and after proceedings—that assumption has not been borne out since, as overstretched, underfunded and target-laden local authorities have struggled to discharge the burdens placed upon them, with the inevitable consequence of longer care proceedings, more interim hearings within them and more outside expertise required within them;

— the initial underfunding of CAFCASS, which saw many experienced Guardians depart the family justice system and an influx of many less experienced Guardians, a process which led to the greater use by courts of expertise external to the case, and which saw solicitors appointed by the court having to operate without a Guardian for several weeks on occasion (in effect holding the system together);

— the increased prevalence of litigants in person,[13] some of whom may not have English as their first language and/or have their own problems (including personality disorders and learning disabilities)—a factor that inexorably bears negatively upon the ability of the family court to dispatch its business efficiently and which is largely consequent upon the increased unavailability of Legal Aid to those who would like to but cannot afford to be represented;

— a lack of family judges, family sitting days and suitable courtroom space, with significant cuts to the courts' services, leading to closure of courts and loss of legal advisers.

20. What unites the factors identified in both paragraphs above is that they are not the product of the practitioner, but of the acts of the State in its various guises (executive, legislature and judiciary), within whose framework and according to whose rules practitioners have to work.

21. What of course is striking about the four factors identified in paragraph 19 is that they are the product of short-termism—of narrow decisions, taken without a proper, joined-up appreciation of the wider consequences, which have ended up costing far more than they purported to save. Within the context of this consultation process, that is a lesson to be taken on board.

22. The burden upon the advocate has grown, but it is not the advocate who has grown it. The State cannot simply increase that burden and be surprised that such increase translates into more cost per case. Nor can they expect practitioners to shoulder more and greater burdens for the same or indeed less pay.

23. We have seen the results of the practitioner survey, commissioned by the Family Law Bar Association. It is an impressive piece of research that depicts family barristers as hard-working professionals, who do a stressful, difficult and demanding job, working excessive and often anti-social hours. It is a picture that we recognise and one, we believe, that accurately describes children lawyers as a whole. And, while the proper payment of family lawyers may not be the most obvious focus of public concern, the reality is that the issues of viable lawyer remuneration and justice for children and families are inextricably linked.

[11] An amendment to section 31(9) of the Children Act 1989, brought in, as from 31 January 2005, by section 120 of the Adoption and Children Act 2002.

[12] A process now formalised by the President's new Practice Direction: Residence and Contact Orders: Domestic Violence and Harm, in large part a product of Lord Justice Wall's 2006 report and of The Family Justice Council's December 2006 Report to the President of the Family Division on the approach to be adopted by the Court when asked to make a contact order by consent, where domestic violence has been an issue in the case.

[13] We have noted recent government assertions that the number of litigants in persons is falling. Having regard to the experiences of judges, practitioners and local Family Justice Councils nationwide, we have not the slightest doubt that those assertions are wrong and that any statistical research underpinning them is likely to be flawed and ought not to be accepted without the greatest scrutiny.

Solicitor and barrister advocacy and equality of pay

24. If the intention of the consultation paper was to drive a rift between solicitors and barristers, offering increased riches to the former and savage cuts to the latter, then it has failed.

25. Family solicitors believe a strong independent Bar to be a vital part of the family justice system. The Family Bar believes a strong solicitors' profession to be an equally essential component of the very same system. Collectively they recognise that the family justice system cannot function without advocacy at all levels and therefore cannot survive without advocates (solicitors and barristers) able to provide the quality of representation that the multitude of clients need and the range of cases require. Whatever new business models may be spawned by the Legal Services Act 2007, that is a reality that is not going to change.

26. Not all solicitors want to be advocates; some want to undertake advocacy to a certain level and no further; some undertake advocacy at a high level, and with great distinction. Crucial to an appreciation of solicitor advocacy is the role of the Law Society Children Panel,[14] set up in 1984 and designed to be a quality assurance benchmark for representation of all parties in care proceedings. Membership of the Children Panel is not some badge of honour but an assurance of quality at court and in court. The Children Panel member is required to give a personal undertaking to perform the advocacy on behalf of the child where possible, and wherever the case takes place—be it in the Family Proceedings Court (FPC), County Court or High Court. As an inevitable consequence of that undertaking, and of the experience and expertise in advocacy that its performance necessarily brings, the Children Panel solicitor will be slower to brief counsel, more ready to take on more complex advocacy themselves and therefore similarly vulnerable to any scheme that does not reward experience and complexity appropriately.

27. The Bar is a specialist advocacy profession. Its whole *raison d'être* is advocacy. It in no way devalues the accomplished solicitor advocates within the field to recognise that the bulk of High Court advocacy and the majority of contested County Court advocacy (especially advocacy for parents) is undertaken by family barristers. Nor is it wrong to recognise that on the whole that position is the consequence of the considered and informed view of the instructing solicitor. Tellingly, the position is as true in privately paying family cases as it is in publicly funded ones, so the rationale cannot simply lie in different payment structures. Paragraph 2.9 of the consultation paper may seek to highlight other reasons for the instruction of counsel, but we take it from its phraseology that the LSC accepts the reality that, in the main, as in privately paying cases, family barristers are instructed because the solicitor with conduct believes that the case and the client require the level of advocacy expertise that the given barrister can bring. It is important to recognise that reality, because, if the LSC believes that, by driving family barristers out of the system by making it uneconomical for them to practise, the gaps will be effortlessly filled by solicitor advocates prepared to accept the same uneconomical rates of pay, it is sadly mistaken.

28. What the ALC does recognise, has always recognised and has consistently fought to achieve is equality of pay for equality of work. It believes that, as a matter of principle, it is unconscionable for a solicitor doing exactly the same job as a barrister not to be paid exactly the same money, and vice versa. But what the ALC has also consistently made clear is that the notion of equality of work or service has to be properly understood, fairly applied and not just abused as a means to downgrade the quality of vital service that we provide. Differentials in pay should not be reflective of professional labels, but of what actually makes the difference to the level of service required in practice—the kind of work involved, the complexity of that work and the experience and expertise of those required to provide the level of service appropriate to the case.

29. Whilst all children's cases have some degree of complexity, the reality of practice is that some are more complex than others, with many properly described as highly complex. Were it otherwise, each case could be given the same allotted time, and there would be no need for different tiers of court, for different levels of judge or for any guidance on the allocation and transfer of cases.

30. In practice, the more complex case is undertaken by the more experienced advocate. That is an embodiment of common sense and proportionality, but it is also reflective of a sensible career structure that is manifestly in the public interest. Less experienced advocates cut their teeth on less complex work and mostly aspire to undertake more complex work. They do not and should not expect to be rewarded in equal measure, let alone in real terms at a higher rate of pay, for doing less complex work as those with greater experience should for undertaking the more complex cases.

[14] One of many flaws in the fixed non-advocacy fee regime introduced by the Legal Services Commission 18 months ago was its approach to Panel membership, and we have seen that flaw translate in practice into poor quality representation by those without the specialist expertise that Panel members have (just as Professor Judith Masson predicted in her evidence to the *Constitutional Affairs Select Committee in 2007*—see further at para 44 below). The scheme did not provide (as previously) for additional payment for Panel membership and thereby placed no value on the enhanced expertise that Panel members have. In this context, it is important to bear in mind that not all complex cases escape from the fixed non-advocacy fee regime and many do not precisely because of the expert input of the Panel member representative. To this error was added the methodology used to calculate the fee itself (see further at para 51 below), which did not sufficiently reward the preparation of hearings undertaken by solicitors undertaking their own advocacy. This was a state of affairs, initially intended to be temporary, which should have been, but was not, corrected by the Law Society/MoJ/LSC April 2008 judicial review settlement.

31. "I feel despair at these latest proposals". This was one piece of feedback that we had. Not from a barrister, but from an experienced solicitor advocate. We feel that it accurately sums up not just the feedback that we have had as a whole but the views of all advocates (solicitors as well as barristers) with or gaining experience, practising children law, upon whom the family justice system depends.

32. It may well be that the LSC will be able to find some solicitors willing to champion its proposals. It may well be that its roadshows, about which we have heard from our membership nothing but criticism, will tease them out. But the government should be extremely wary of them, and, if it thinks that it can build a family justice system around them, then it is simply deluded.

33. For those lacking in experience, lacking in expertise and lacking in ambition, the LSC's advocacy scheme is a godsend. As we set out below, its structure ensures that it overpays the most simple of interim hearings, the most straightforward of final hearings and the least complex of cases. So for those who undertake predominantly or exclusively the advocacy in that kind of work, superficially there is a killing to be made, especially if they are able, as they may think they are, to brief out the advocacy in the more complex cases within their caseload.

34. The fallacy of that thinking is the self-evidently flawed assumption that those whom they currently brief will still remain in the system, prepared to accept that they will earn much less doing the harder work so to ensure overpayment for those doing the easier work.

35. Any scheme that overpays the less complex work to the detriment of the proper funding of more complex work is doomed to failure, because it is destined to keep and attract only those interested in and able to conduct the less complex cases. That is the economics of common sense.

Value for money and access to justice

36. It is absolutely right that value for money should be the touchstone for the public funding of any area of law.

37. We state the obvious. Children lawyers *are* value for money—by virtue of the importance of what they do, by virtue of how well they do it, and because they deliver their professionalism (a word that they would stress) at a fraction of what they could earn in other areas of law and at a fraction of their private client charge-out rates.

38. And frankly when one sets up the comparatively minor spend on children law up against other areas of law—the millions of pounds of public money spent each year, for example, on lengthy and often fruitless criminal fraud trials—we have no doubt that the work that we do is not just worthwhile, but also constitutes good value for money, especially if one looks (as government often does not) at the long as well as the short term picture.

39. The irony is also not lost on us that we are seeking to justify to the Treasury the cost of proceedings about the welfare and protection of children at the very time that the same Treasury is pouring billions upon billions of public money into the banking industry to make good the colossal and self-interested mistakes made by those who have driven it to the point of collapse. Sacrificing children's need for bankers' greed is not a headline that we ever want to read, but it is one that will cry out to be written if the LSC's proposed scheme is implemented.

40. And we cannot emphasise enough that the *quality* of our work and that of our fellow professionals in the family justice system sounds in savings not in cost. Not just our view, but the opinion of those best placed to judge.

41. In a speech to Cardiff University in November 2006, Lord Justice Wall said this:

> "[T]here is a direct relationship in public law cases under the Children Act in particular between, on the one hand, the quality of the lawyers, social workers, guardians and experts in a given case, and, on the other, the efficiency with which the case is managed and the clarity with which the issues in the case emerge for decision… I am in no doubt at all that the process of decision making has been rendered clearer, swifter and—dare I say it—less costly in emotional and financial terms by competent advocacy and preparation."

42. For his part, Lord Justice Hughes, in a speech to the ALC in 2008, said this:

> "Good advocates and litigators save money, they don't cost money. Every judge will tell you that and every judge will tell you that they cannot do the job without them."

43. Not only do we endorse that observation but also its implicit corollary—that inexperienced, inexpert advocates are a burden (financial and otherwise) not a benefit to the system.

44. And, in saying that, we do no more than pick up and broaden the point that Professor Masson made in 2007 in her evidence to the Constitutional Affairs Select Committee. The Third Report of the Committee commented:[15]

[15] Ordered to be printed on 18 April 2007.

> "Sir Anthony Clarke, the Master of the Rolls, stressed the important role of specialist practitioners … and warned that it was "very important that when these proposals [to introduce fixed non-advocacy fees] are taken forward these specialists should not be lost to the publicly funded community". The likely consequences of this loss were pointed out to us by Professor Masson when we asked her about the potential effect of the abolition of the fee uplift in care proceedings for solicitors on the Law Society's Children Panel. She predicted that these very experienced and specialised providers:
>
> "[…] will leave, retire and not be replaced and, increasingly, we will have all the parties represented by non-specialist solicitors, who will move away from the negotiation and identifying what are the real issues and focusing […] much more into litigation and fighting the cases. I would expect there to be more contested final hearings, more delays when people do not ask at the right time for expert assessments of their clients so the cases will take longer".

45. But, if there is a limited pot of money, then there is another key dimension to the concept of value for money. If, as is asserted, this consultation is not about cuts, then the premium has to lie in distributing such money as there is in a manner that is both rational and proportionate, and which thereby ensures the sustainable provision of advocacy *at all levels*. Matching the experience and expertise of the advocate to the complexity of the case makes sense for the client and makes sense for the court. Reflecting that good sense within the applicable payment structure gives proper meaning to the concept of equality of pay for equality for work, and ensures genuine value for money for the client, the court and the public at large.

46. We must similarly be clear about what constitutes access to justice. For us, as children lawyers, access to justice is only delivered if it is meaningful access to justice. Being able to proclaim that more people are being served than ever before is pretty artificial if the numbers are being bumped up by small pieces of superficial assistance. The welfare state, of which legal aid is a proud part, was built on the premise that some people need more help than others. It comes as no salvation to the cancer patient that, while there is no money left to fund his treatment, at least more people are being told how to deal with the common cold. Meaningful access to justice is what counts, and that has to mean ensuring a level of service and representation for all clients, whatever their respective levels of need.

The Approach of the LSC

47. Set against the principles set out above, this consultation paper can only be judged an utter failure.

48. As we explore below, it appears to be built on a combination of practice ignorance, perverse logic, assumption, anecdote and uncertain statistics, and to adopt the approach (anathema to any lawyer) of verdict first, evidence later.

The deficiencies of the Family Advocacy Scheme

49. The other aspects of the consultation paper will be addressed within our answers to specific questions. Here we lay bare the deficiencies of the Family Advocacy Scheme that lies at its heart. We would frankly be staggered if anyone seriously concerned for the future of the family justice system could support it.

50. Its first most transparent failure lies in its failure to meet its own stated objective of providing a level remunerative playing-field for the barrister and solicitor advocate. There should be one figure that applies equally for both, with the scheme covering both advocacy and hearing preparation, the latter being something inexorably bound up with the former.

51. To achieve that transparent level playing-field, the LSC must now put right the error that it made when calculating the solicitors' fixed non-advocacy fee in 2007, which, in terms of this consultation, has become a millstone around its neck. It was told at the time that it should separate out the preparation for a hearing undertaken by a solicitor advocate from the more general preparation of the case. It chose not to, and instead adopted a methodology that was manifestly unfair to the solicitor advocate. Given, as noted above, that some solicitors undertake little or no advocacy and some a considerable amount, a process which simply excluded the cost of pure advocacy from the pot and averaged out the remainder was by definition bound to over-reward the former kind of solicitor and to under-reward the very group that the LSC purports to encourage—namely those solicitors who undertake a lot of their own advocacy. This explains why, in their pockets, most solicitor advocates felt that they were no longer being paid for hearing preparation and why they have consistently said as much.

52. As an association, we have always sought to be straight in our dealings with the LSC and principled in our approach. No practitioner should come out of this process being paid something for nothing or, in comparative terms, over-rewarded for what they do.[16] The aim must be to ensure *real* value for money and *meaningful* access to justice across the board—from the Family Proceedings Court up to the High Court, and for all parties to proceedings.

53. It follows that, if an adjustment needs to be made to the solicitors' non-advocacy fee to remove that element said to be referable to hearing preparation, so as to ensure transparent equality as between the barrister and solicitor advocate, then that should take place. As a matter of fairness, that has to follow.

[16] Though we are bound to observe that the fixed non-advocacy fee regime introduced at the end of 2007 seems very successfully to have over-rewarded the less hard-working and, as the longer cases are now being billed, to penalise the more diligent.

54. As trailed above, the second and most fundamental flaw of the advocacy scheme is its structure.

55. It is a structure that does not properly account for the time spent preparing hearings (a cornerstone of the Public Law Outline (PLO)),[17] it does not seem to recognise that case management expertise is best derived from trial experience, and, above all, it fails to understand that it is in the interests of the client, the court and the public at large for practitioners with greater experience and expertise to be engaged in the more complex hearings and cases and for those with lesser experience and expertise to start with the less complex work but aspire to the more complex work.

56. As we have argued above, value for money, seemingly the primary concern of the LSC, has to lie in public money being spent in a rational and proportionate way. But this is a flat scheme. It provides a fixed interim hearing fee, payable whether that hearing lasts 30 minutes or three days. It introduces the frankly bizarre notion of an up-to-two-day standard final hearing fee, with, if the trial exceeds two days, manifestly inadequate fees for each hearing day thereafter. Its effect self-evidently is to tie up too much of the budget on less complex cases and hearings (interim and final) to the detriment of the proper funding of more complex work. To express it in terms that every supermarket shopper would understand, the LSC has done the equivalent of taking the weekly shopping money and blowing most of it on the Wotsits. But this is public money. And it is wholly wrong that it should be misused in this way.

57. As will be apparent to anyone with an appreciation of existing advocacy rates, this scheme in real terms increases the fees paid for the least complex work, while at the same time slashing the fees for the more complex work (most of which remains outside the remit of the High Cost case regime). By way of example, under the scheme:

- a junior advocate can earn well over £100 per hour spent on preparation and at court undertaking a relatively unchallenging one hour final hearing in the FPC, and yet a more senior advocate undertaking a five day final hearing in the County Court or the High Court (a 60–70 hour task, including preparation and time at court) is expected to conduct this far more complex piece of work at a rate less than £30 per hour (County Court) and less than £40 per hour (High Court)—rates that amount to cuts of around 50% in the fees of those advocates undertaking that more complex work;[18]

- an advocate undertaking a two day private children law hearing involving the court's proper and critical early determination of allegations of domestic violence, could, because the scheme considers this to be an interim hearing, expect to earn around £9–10 per hour for each hour spent preparing and conducting this hearing, whilst the same global fee goes to the advocate undertaking an uncomplicated conciliation appointment;

- an advocate undertaking a two day interim public children law hearing involving the court's consideration of a parent's residential assessment application, which could be determinative of the proceedings as a whole, could under this scheme expect to earn around £13–15 per hour for each hour spent preparing and conducting this hearing, whilst the same global fee goes to the advocate undertaking the simple directions hearing in the FPC, which might involve the magistrates doing no more than checking that the case is on track.

Two questions inevitably arise. How in any meaningful way does this represent equality of pay for equality of work? And who on earth is going to be prepared to do hearings that are so poorly paid and which become more poorly paid the more complex and labour-intensive they are?

58. This scheme creates a perverse incentive to shy away from the more complex advocacy, which, market forces will inexorably dictate, will end up being undertaken (if it is undertaken at all) by those ill-equipped to carry it out.[19] We ask what advocate in the future will want to pursue a career in the field of children law when there is a financial incentive not to improve as an advocate by taking on more complex and challenging work?[20]

59. The implications for access to justice within the children law field are, we believe, utterly self-evident. If advocates are expected to make ends meet on a swings and roundabouts basis, then that can only mean more experienced advocates deskilling and less experienced advocates undertaking work that is plainly beyond them. Many experienced advocates will move away from the field (because they have skills which can be used and better paid elsewhere); those who might otherwise have pursued a career in this vitally important area of work will be discouraged from doing so; and, perhaps most importantly from the public interest perspective, those children and families caught up in the more complex cases will either be inadequately represented or, more likely, not represented at all.

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[17] The template for case management in the field of public children law was introduced on 1 April 2008.

[18] A fully worked example of a recently reported case is set out at para 89 et seq.

[19] As one of our members put it, "the natural consequence of a scheme designed by those who don't know what they're doing is that the courts will also be filled with those who don't know what they're doing."

[20] And without that incentive to remain in the system and become more experienced, who, in the LSC's brave new world, will be qualified and able to supervise other staff and train them to do anything?

60. We cannot but wonder what the media, given its current interest in this area, will make of that and what that will do for the public's confidence in the family justice system as a whole and care proceedings in particular. The Lord Chancellor's decision to open all family courts to the media will provide a very public window on to the destruction of the family justice system that will inevitably flow from the implementation of the proposals within this consultation paper.

61. We remind ourselves of the self-evidently accurate observations of the President of the Family Division upon the publication of the Public Law Outline:

> "Its success will largely be dependent on the co-operation and expertise of the dedicated specialist lawyers who will operate it."

62. In childcare work, it is manifestly vital that any advocacy scheme should be consistent with and work to support the Public Law Outline and its associated reforms. This scheme manifestly does not.

63. If the LSC has its way, the PLO will fail. No ifs or buts. And the fault will lie squarely with the government and not the practitioner. Bluntly, if the brief had been to design a scheme calculated to destroy the PLO, the Legal Services Commission could not have done a better job.

64. At the most obvious level, and despite the ALC arguing consistently to date that it should, the proposed scheme fails because it does not intend to pay a higher interim fee for the First Appointment, the Case Management Conference or the Issues Resolution Hearing, notwithstanding the additional work (particularly in preparation) that those hearings involve and their critical importance within the PLO scheme as a whole. That is a striking omission.

65. But the flaws of this scheme run far deeper than that.

66. As the ALC has already observed in its response to the Legal Services Commission's *Consultation: Civil Bid Rounds for 2010*,[21] the LSC, in wanting to simplify the provision of services and move away from the specialist supplier base, is almost inevitably accepting a downgrading in the quality of advice and representation available to clients. It does not seem to matter that all areas of the family court system, from judge to practitioner, have in recent times embraced and seen the advantages of specialism, with research bearing such out.[22] It does not appear to register that, when you have non-Panel solicitors and non-specialist advocates dabbling in children's cases, it results in poor advice, representation and case management, and accordingly longer and costlier proceedings.[23] The procurement dogma of the LSC dictates that we all have it wrong. Big firms with generalist practitioners are the way forward. BME clients will inevitably be disadvantaged, as will those in rural areas. But that does not seem to count either. So much for meaningful access to justice.

67. This advocacy scheme builds upon that folly. As we have already observed, for those advocates lacking in experience, in expertise and in ambition, it is a godsend. For those who actually are the lifeblood of the family justice system, it is a clear message that expertise will be penalised and experience will be discouraged. And the ALC gives this clear warning: whatever savings the government thinks this scheme will bring will be dwarfed by the cost of trying to run a family justice system without the experience and expertise of those who, because they know how to do the job, currently keep it afloat.

68. Why is the scheme such a disaster? For the simple but telling reason that the LSC does not seem to understand the area that it is seeking to reform.[24]

69. At the heart of children law, of the Children Act 1989, of the ECHR, of the Public Law Outline and of the Private Law Programme is the principle of proportionality. Yet, there is nothing proportionate about the LSC's scheme. There is nothing practice-reflective of cases being termed either standard or exceptional, let alone within the brackets chosen by the LSC. The idea that a one hour final hearing in the FPC should be equated to a two day final hearing in the County Court is simply absurd. The idea that an advocate should earn less in real terms[25] doing an "exceptional" case than an advocate undertaking a "standard" case equally so, ditto treating an interim straightforward case management hearing in the same way as a contested interim hearing that may last more than a day and be determinative of the whole proceedings.

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[21] Available at www.alc.org.uk.

[22] Available research demonstrates the strengths of the current family justice system with benefits for children and parents, compared with practices under previous legislation, with the input of specialist childcare lawyers central to that development (see J Brophy, supra).

[23] By way of recent example, we can detail a case in which a five day final hearing ended up taking 15 days because the mother in the proceedings (represented by a non-Panel solicitor who in turn had no informed idea of whom to brief) insisted upon pursuing groundless rape allegations within it.

[24] As one of our members put it, "the LSC speaks the language of procurement, it has no understanding of the language of practice".

[25] We explain this as simply as we can. Builder A is engaged to build a wall at a cost of £500. It is a job that takes him 10 hours to complete, working efficiently. Builder B is engaged to build a kitchen at a cost of £1,000. It is a harder job that takes him 40 hours to complete, working efficiently. We would say that in real terms Builder A is being paid more. The LSC would doubtless disagree, arguing that Builder B is getting an extra £500 for his work.

70. The LSC's obsession with "outputs" and moving away from hourly rates should not blind it to the reality of working life. Any scheme that does not have any regard to the time actually required to undertake a piece of work, even on the most efficient basis, is doomed.[26] In "output" terms, an operation to remove an in-growing toe-nail may be on a par with open-heart surgery, but the latter requires more skill, takes more time, is of greater value to the recipient and should be and is rewarded accordingly. We ask for the same common sense to be applied when dealing with our area of work.

71. The mantra that we hear supportive of the LSC's rigid fixed fee approach is that of "swings and roundabouts". It is a mantra that has no foundation in the practice of children law. On these proposals, it is virtually impossible to achieve a positive swings and roundabouts effect, which is dependent upon generating a sufficiently high volume of cases that turnover relatively quickly, and in consequence the scheme requires practitioners to take wholly unjustifiable risks with their practices. Furthermore, the swings and roundabouts effect for the more experienced advocate is as between complex and highly complex work,[27] so over-remunerating the least complex work, even if that were objectively sensible, provides no solace and safety net for them.

72. As flawed as the assumption that experienced practitioners will remain within the system on the "swings and roundabouts" basis is that which suggests that solicitor advocates will fill all the gaps left by departing barristers.

73. Yes, solicitor advocates rightly want to be paid the same as barristers for doing the same work. Yes, inevitably, barristers can in certain hearings currently earn more under the Family Graduated Fee Scheme than solicitors would on their hourly rates. But that is far from being so in all cases. In the contested final hearing of three to five days, the staple for many a barrister, solicitor and barrister advocates currently earn roughly the same amount under their respective payment schemes (or would do so, if solicitors' hearing preparation were fully remunerated as before)[28] and therefore stand to lose similarly. So what kind of perverse logic is it that makes the LSC believe that, if it halves the amounts payable for those kind of hearings, solicitor advocates will suddenly stream in to take all of them on?

74. To the flawed assumptions underpinning the scheme is added anecdote. The LSC indicates that it has anecdotal evidence of solicitors' firms taking on previously self-employed advocates.[29] If that is so beyond the usual transfer rate between the professions and is said to be a serious foundation for a scheme that seeks so obviously to undermine, if not destroy, the publicly funded independent Family Bar, then let the LSC be clear. Who are these advocates? How many are they? What level of work do they undertake? Do they appear for all parties and in all courts? What is their experience? What is their quality? Where is the impact assessment for the client and for the court of their use?

75. As to the LSC's file review, upon which it seems to place such store, we state the obvious limitations of that exercise so far as advocacy is concerned. Those files will not contain transcripts of evidence. They will mostly not contain transcripts of judgments. They will not indicate the value to the client of the advocacy that was undertaken. Nor are they likely to indicate either its value to the court or its impact on the proceedings. Speaking to judges, magistrates and the clients themselves would have been a far better use of the LSC's time.

76. We have already observed that the LSC does not seem to understand the area that it is seeking to reform. What is equally apparent is that it does not seem to understand the market in which that reform is to take place either. It frankly beggars belief that it should initiate such a radical consultation and then, half-way through the response period, commission the very market research which ought to have informed its initial proposals. If ever there was a demonstration of the principle of "verdict first, evidence later", then this was it. But that exercise of itself also introduces intrinsic unfairness into the consultative process. Given the breadth of its remit, the commissioning of this market research can only be seen as recognition that there was a significant evidential gap at the time that this consultation was launched. The market research will be produced after the deadline for consultation responses has passed. That timetable provides no opportunity to assess or scrutinise the market research itself or to assess or scrutinise the consultation's proposals in light of it. So much for a fair and transparent consultative process.

77. Other stakeholders with greater resources than ourselves will address the soundness or otherwise of the statistics that purport to support the consultation paper as a whole, the Family Advocacy Scheme in particular, and especially the boast that it will make solicitors better off than before.

78. For our part, we make these observations.

79. Our solicitor members know what they earn and can calculate what they will be rewarded under the proposed scheme. If there was a widespread belief that they would be better off, then we would be getting that feedback. We are not. We are getting precisely the opposite. Maybe that is because our solicitor members

[26] No payment scheme will ever be perfect. One based on hours alone risks overpaying the slow, whilst a regime of simple fixed fees risks overpaying the indolent. As the Constitutional Affairs Select Committee Third Report recognised, what is required is a system that "adequately captures the amount of work a legal aid supplier has to undertake to provide high quality advice and representation. For most kinds of legal aid work, such a system will require appropriate graduation."

[27] Indeed, this is self-evidently true of experienced barristers who, in a manifestation of market forces at work, undertake the cases selected for them by their instructing solicitors.

[28] And would do so if the case escaped the fixed non-advocacy fee regime.

[29] See para 2.10 and Annex G, para 5.37, of its consultation paper.

are generally experienced and dedicated advocates who will undertake advocacy at all levels. Maybe it is also because our solicitor members are neither gullible nor superficial and are well-skilled at questioning and analysing evidence. They are rightly sceptical of any figures that come out of the LSC. They know that fee comparisons set against the artificial, deflated baseline produced by the fixed non-advocacy fee regime (with its inadequate remuneration of hearing preparation) are meaningless, as are future predictions reliant upon the misplaced assumption that the Bar will produce the same supply of advocacy despite their much reduced rates. The preliminary analyses undertaken of the "impact assessments" sent to individual firms, received on 20th March 2009, show them to be flawed, inaccurate and disingenuously compiled. And our solicitor members can also see through the LSC's approach, which amounts to little more than taking millions out of more complex cases and hearings, putting them into less complex cases and hearings, and saying to solicitors, "you do more of that stuff, be happy". Our solicitor members aspire to doing more than just simple advocacy and know that the family justice system cannot function without the proper payment of those who do.

80. Secondly, even on the face of the consultation paper, the LSC's statistics are unreliable. At paragraph 6.119, figures are provided as to the length of hearings. We put to one side Professor Masson's research, as it did not in any event look at High Court cases, and just focus on the LSC's own studies. On one LSC measure, its Care Proceedings File Review, the figures indicate that only 0.6% of hearings exceed three days in duration. On the other LSC measure, closed case data, 8% of hearings are indicated as exceeding three days in duration. That is a huge statistical discrepancy that can only undermine the integrity of the calculations made by the LSC and the conclusions that flow from them.

81. Thirdly, and while it was utterly right that the response deadline for this consultation was extended to "cleanse" what on its face was manifestly flawed data, that does not excuse that flawed data being used in the first place, especially when so much was built upon it.

82. After all, it is not as though serious concerns about Legal Services Commission data have not been raised before.

83. The 2006 Review of the Child Care Proceedings System in England and Wales noted that the management data "presented to justify major system change" was drawn from a variety of sources, including the LSC, and that flaws in this data "rendered it unreliable as a basis upon which to take radical decisions", the report highlighting the need for "a system of collection of reliable data to inform decision-making".

84. The Third Report of the Constitutional Affairs Select Committee in 2007 commented:

> "Where the LSC embarks upon the creation of a comprehensive system of fixed and graduated fee schemes intended to provide a sustainable basis for the future of the legal aid market, fair to both the suppliers and the tax payer, it can only do so meaningfully on the basis of adequate knowledge of the reasons for variations in case costs between firms, areas of the country and within each category of legal aid. This knowledge presupposes collection of the right data and of statistical research. It appears that the LSC has inadequate information on which to base its proposed fixed and graduated fee schemes.
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> "Equally, there is very little reliable statistical information about the economic situation of the legal aid supplier base on which valid predictions of the impact of changes to remuneration or procurement arrangements could be based. The Government does not have all the information required to assess the true impact on legal aid suppliers of the reform proposals, especially of the new fee schemes on the legal aid market. It cannot know if, and how, legal aid suppliers in different regions and categories of the law will be able to absorb the planned rate cuts, especially in London and other urban areas, if it does not have sufficient detailed information about the economic situation of legal aid suppliers by region and contract category. Furthermore, the evidence it does have points to significant problems in forcing radical change on the profession.
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> "We appreciate that, as Sir Michael Bichard, the Chairman of the LSC, pointed out to us, it is extremely difficult to draw conclusions about how the firms are going to respond to a very different set of circumstances. In the light of this uncertainty and the general lack of data, the DCA/LSC's intention of a nationwide imposition of fixed fees followed rapidly by competitive tendering across the entire legal aid system is a breathtaking risk. It puts a great deal of faith in economic argument in the teeth of LSC commissioned evidence which casts doubt on the capacity of supplier to respond."

85. Having transparently reliable data is fundamental to a consultation of this kind. And the LSC should do now what it should have done from the outset—to involve practitioners, who are well used to reading and understanding files, in the integral task of producing clear and reliable statistical data.

A dose of reality—Re J (Care Proceedings: Injuries)

86. Enough about statistics. For, as children lawyers, we believe that fundamentally children's cases should not be about statistics but about people. A child is not an "output" but a living human being entitled to a decent quality of life and to decisions about their future being made properly, fairly and on an informed basis.

87. We could have filled out our consultation response with thousands of real life examples of the quality of our work. Given that the loudest message that we have had from our members is that "the LSC doesn't understand what we do", perhaps we should have done.

88. But, for present purposes, we provide details of just one case that took place during the currency of this consultation. We have selected it because it is exactly the kind of case, especially in this new era of family court openness, in which the media and public at large are likely to have a particular interest, and because, if the system is to succeed, then it has to cater for all kinds of case, however complex and knife-edge. In our view, it sums up all that is good about the family justice system and those who work within it, and exposes all that is wrong with the Family Advocacy Scheme that the LSC proposes.

89. *Re J (Care Proceedings: Injuries)*[30] concluded in January 2009[31] in the Birmingham High Court before Mrs Justice Hogg, one of the most senior judges within the Family Division. It was a care case and at its heart lay the allegation that a young father had caused non-accidentally three skull fractures to his two month old daughter, his explanation of dropping the baby being considered by the experts in their reports highly unlikely to explain all the injuries sustained. Everything else about him and his partner was positive. The parenting and social work assessments of them were glowing and there was nothing within the circumstantial evidence that pointed towards abuse. This was the threshold hearing. If the local authority did not establish abuse, then its application would at that stage fail and the child would go home. If it did, then the case would proceed to the disposal stage, with further assessments and hearings to consider whether the child could nevertheless still grow up within her family of birth or whether other options, such as stranger adoption, would have to be taken instead. The stakes could not be higher.

90. The outcome of this case was that the judge, on the totality of the evidence, made a clear finding that a "dreadful accident" had caused the child's skull fractures, exonerated both parents, found the threshold criteria not proved and sent this little girl home.

91. That simple exposition, though, does not begin to tell the story of how it came to be that justice was done and with such speed and efficiency.

92. For that, we reproduce the last few paragraphs of the judgment of Mrs Justice Hogg, whose words should be compulsory reading for those in and outside the LSC who would seek to shape the family justice system and construct a viable advocacy scheme within it:

> "Finally, I add a few comments.
>
> "In this case I had the advantage of the involvement of experienced Counsel, Solicitors and Guardian. All helped to achieve the smooth running of this hearing, and an early conclusion.
>
> "This was a complex case concerning a very young child involving complicated issues of fact and medical evidence. From the date of issue of the proceedings until the conclusion of the fact-finding hearing only 18 weeks elapsed.
>
> "I held the Case Management Conference on 30 October 2008. At that time a five day fact-finding hearing had been fixed in March 2009 before a different Judge. By good fortune a four day window in January 2009 in my list had recently become available. It was agreed by all that I should take the case in January, thereby ensuring a significantly earlier decision for this very young child with the additional benefit of judicial continuity.
>
> "I could not have contemplated forcing a five day hearing into a four day slot without the co-operation of the legal teams, and the knowledge that Counsel were experienced in care work. As it was, I required detailed skeleton arguments in advance and subsequently written submissions to which Counsel could, and did, speak.
>
> "The evidence with full cross-examination was contained and focused, and concluded on time. By the end of the third day of the hearing I had heard the evidence and submissions, which enabled me to prepare and give Judgment on the fourth day.
>
> "The use of experienced Advocates in complex care proceedings is essential. All parties are entitled to high quality legal representation, particularly parents where there is a serious challenge to the medical experts' evidence, or other complicated issue of fact. This case is a prime example. Counsel remained committed to the agreed timetable, focused on the relevant issues, and in so doing assisted the Court.
>
> "As a consequence an early decision was reached and the costs of the litigation borne by the rate payers and taxpayer reduced. It also had the happy consequence that the child, only seven months old, was returned to her parents, and she and the family suffered less disruption than might otherwise have occurred. Had my Judgment been different the case would have proceeded to a final disposal hearing and the decision relative to the child's future would have been made earlier than planned with the original timetable.

[30] [2009] (FLR forthcoming). Summarised on Family Law Newswatch and at [2009] Fam Law 276.
[31] Full judgment was handed down on 27 February 2009.

> "I recognise it is not always possible to achieve an early hearing as was possible in this instance. There are clear and obvious advantages in doing so. I am most grateful to Counsel and their instructing Solicitors for their assistance."

93. For the advocate representing the father, the parent clearly in the frame for having injured his daughter, this four day hearing represented a job which, including preparation before and during trial as well as time at court, took 66 hours to complete. The case was encompassed within four level-arch files, and pre-trial preparation included not just the reading and assimilation of the 1,200 pages within them but also the preparation of a 24 page skeleton argument setting out the father's case. The policy makers at the LSC have been shown the files and have seen the paperwork produced. In light of it, the 29 hours engaged in pre-trial preparation is readily understandable. Indeed, it is hard to imagine how the job of pre-trial preparation could have been properly undertaken in any less time or this hearing completed more efficiently.

94. As the LSC seems so keen to embrace market concepts, the market value of the 66 hours work expended on this hearing by the father's advocate (at a fairly standard private client rate of £150 per hour) is £9,900.

95. This was not a High Cost case. Many involving these kinds of allegations are not, and it is a fallacy to believe that most complex cases are. The amount payable under the Family Graduated Fee Scheme, under which that advocate is currently remunerated, is £4,875.25, which works out at a rate of £73.87 per hour (before deduction of expenses and tax). Had the hearing been done on solicitors' hourly rates, the rate would have been broadly the same.[32]

96. Were the hearing to be undertaken under the LSC's proposed scheme, the total amount payable to the father's advocate would be £1,909, working out at rate of £28.92 per hour gross,[33] and entailing a reduction of over 60% on the existing fee.

97. The LSC's scheme has a specified pre-hearing preparation element. Under it, the 29 hours of pre-trial preparation would be paid at the rate of £8.93 per hour gross.

98. The amounts payable under the LSC scheme speak for themselves and in turn speak volumes about the inequity and unsustainability of a scheme that could produce them.

Decent rates for dedicated professionals?

99. Upon the recent cuts to the Family Graduated Fee Scheme, Lord Bach commented:

> "These changes are part of the Government's drive to ensure that public funds are focused on the most vulnerable. Legal aid for child protection cases must always come first."

100. In his letter to The Times of 10 March 2009, he added that "child protection is our absolute priority".

101. Jack Straw, in his speech at the London School of Economics on 3 March 2009, said this:

> "I think it is entirely proper that lawyers are paid decent rates; indeed it is essential to justice that high quality representation is preserved."

102. We respectfully agree with all those comments, but are bound to add the following in respect of certain other aspects of the Lord Chancellor's speech that pertain to this consultation and about which our members have been keen to speak.

103. As children lawyers, we have no expectation that we should receive rewards comparable to those in private practice. We cannot speak for other fields of law, but, when a publicly funded children lawyer goes to court, they are on average expecting to earn significantly less than they would, were the case privately paying. The aspiration is not to comparable pay, but to a level of pay that is not so divorced from the market reality that practitioners cannot afford to work in and be attracted to the publicly funded children law field. As the Lord Chancellor's Advisory Committee commented in its report to accompany the introduction in 2003 of the PLO's predecessor, the Protocol for Judicial Case Management in Public Law Children Act Cases:

> "Publicly funded remuneration for the legal profession must reflect the fact that public law Children Act cases require the full input and co-operation of experienced, specialist practitioners…. Underpayment of the practitioners who do this work will inevitably lead to a shortage of such specialist lawyers (and accordingly in the future to a shortage of specialist judges, both part and full time) as the brightest and best turn to better remunerated fields of practice."

104. It follows that we do not in any way see ourselves "ordained by the Almighty to be paid from the public purse higher than any other profession". It may make cheap tabloid headlines to highlight the very highest of earners, but the average earnings of the children lawyer are a very different matter. In effect we do what GPs and NHS consultants do, but in a different field with different problems. We are no more "dependent" on the State and the taxpayer than they are, and our average earnings are certainly lower than theirs.

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[32] The case would have escaped the fixed fee scheme, meaning that hearing preparation would have been fully remunerated.
[33] Before allowance is made for the expenses associated with practice and for the deduction of income tax.

105. It is not the fault of children lawyers, nor of the children and families that they represent, that criminal legal aid, by far the major contributor to the overall increase in legal aid, has risen so markedly. And we recall with some irony that, at the start of this reform process, there was even government talk of redistributing some of the savings in criminal legal aid into the civil and family field.

106. Finally the Lord Chancellor, having referred to bankers' salaries, expresses the view that there needs to be a debate about how much lawyers should be able to draw from the taxpayer. We have no difficulty whatsoever with that. In fact, we welcome it. Our only conditions about the terms of that debate are these:

— Firstly, that it should take place within context. For we are more than happy to showcase our work and the value that we give: to provide examples of the children whose lives have been immeasurably bettered by our dedication and professionalism—those who have been saved from the most terrible forms of abuse, those who have been rightfully returned home, those whose parents have been exonerated of the most serious allegations, and those who, notwithstanding their dreadful early life experiences, now have a chance of a decent future precisely because so much care was taken to ensure that their care plan was got right. The Lord Chancellor wants to speak of us in the same breath as bankers. Well, unlike Sir Fred Goodwin, we have something substantial, worthwhile and, in most cases, long-lasting to show for the public money being spent on us. And we have no doubt that on that issue a properly informed "court of public opinion" would find in our favour.

— Secondly, that the debate should be conducted on sound fact not soundbite,[34] escaping the generality to descend to the detail.

107. An advocacy scheme has been put forward by the LSC, with the blessing of the government. It is only right that in any such debate it is subjected to detailed scrutiny, with the true impact of it revealed and tested. We have already raised some questions in the context of our earlier examples.[35] In light of the comments of the Lord Chancellor and of Lord Bach and of the recent *Re J* case highlighted above, may we start this debate by asking them both and those in the LSC the following further questions:

1. Given especially that it involved among other things the cross-examination of medical experts of national renown, what level of experience and expertise do they believe is required to represent a party in this kind of case?
2. What advocate offering "high quality representation" do they believe would be prepared to take on the burden and responsibility of a case like this at a rate that is less than a fifth of their private client charge-out rate? Indeed, does £28.92 per hour gross constitute a "decent rate" for such an advocate?
3. The Public Law Outline stresses the importance and advantages of the proper preparation of cases. Can it ever be right in any children's case, let alone in a complex one taking place in the High Court, to reward the pre-trial preparation of a case at a rate, before tax and other deductions, of less than £9 per hour? Can that in any way be described as "a decent rate"?
4. What client would be content in a case of this importance to trust an advocate prepared to work for such derisory levels of pay?
5. The Lord Chancellor correctly sees "high quality representation" as being "essential" to the preservation of justice. Were this scheme already in place, do they believe that justice would have been done in this case? Do they actually believe that the father would have secured any representation, let alone "high quality representation"?
6. Comparisons with other occupations clearly appear to be the vogue. In which case, if this scheme does go ahead, would they be prepared to tell it as the figures reveal it to be—that in actual fact this government values the advocacy skills required in complex and serious child protection cases at a rate slightly above that payable to a supermarket employee stacking shelves but significantly below what a plumber might charge to unblock a toilet?

108. We await the answers, as we dare say would the public at large.

The ALC Proposed Advocacy Scheme

109. In a paper produced for the LSC in August 2008[36] the ALC indicated its preparedness "to work constructively and co-operatively to put together a fair unified advocacy scheme for solicitors and barristers that ensures the best interests of the individual and the public at large by rewarding experience, expertise and complexity in a way that is transparent and controllable".

110. Although that offer was not then taken up, the LSC has now been presented with the ALC's advocacy scheme detailed below and has indicated that it will be modelling it to assess its viability.[37]

111. We welcome that step. It comes not a moment too soon.

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[34] It was with some disappointment that we noted the assertion within Lord Bach's letter of 10 March 2009 that "over the past five years fees paid to barristers increased by 134 per cent", when the consultation paper (at para 2.9) suggests the increase to be 32%. We were equally disappointed to note the spin put on the recent cuts to the remuneration of care cases under the Family Graduated Fee Scheme. In our book, if you take £6.4 million out and put £4.4 million back in within the same category, that represents a cut of £2 million not an input of an "extra £4.4 million".

[35] See para 57 above.

[36] Advocacy Fees—Preliminary Thoughts of the ALC.

[37] At a meeting between the ALC and the LSC Family Policy makers that took place on 20 February 2009.

Providing a Viable Option

112. From the outset of our involvement in the pre-consultation process, the ALC has recognised that it is not enough simply to decry whatever the LSC proposes, but to assist constructively in the creation of a viable unified advocacy scheme.

113. In its September 2008 response to the LSC's *Consultation on Reforming the Legal Aid Family Barrister Fee Scheme*,[38] the ALC made clear its position. It was not suggesting that the Family Graduated Fee Scheme (FGFS)[39] cannot work, nor indeed that, with appropriate revision, guidance and monitoring, it could not work very effectively for both solicitors and barristers. But the ALC was very clear that, if the decision was being made to move away from the existing payment schemes for solicitors and barristers, then a viable alternative scheme could be created which was far more consistent with the principle of equality of pay for equality of service (when properly defined), and with the provisions of section 25 of the Access to Justice Act 1999, than the model being worked on by the LSC.

114. In constructing our own scheme, the ALC has sought to be realistic. Whatever its more general views about the under-funding of the family justice system, it recognises that the pot to be divided is limited. As children lawyers, our motivation and dedication in any event comes from the real value of what we do. But ultimately we have to earn a living and pay the bills, and we cannot practise unless it is viable to do so. We are proud of our hard work and professionalism, but we rightly take objection when we feel that such is being taken for granted or when it is assumed in ignorance that such can be delivered without impact on the quality and efficiency of justice by those less qualified than ourselves.

115. All we ask is a fair reward—a "decent rate"—for what we do, in light of its demands, importance and complexities, and in light of our own experience and expertise.

116. We have fully taken on board the LSC's desire for a clear, predictable, controllable fee structure. What we have done is to marry that up with an understanding of front-line practice so as to give true vent to the concept of equality of pay for equality of work by distributing the budget in a more sensible and proportionate way. We believe the structure of our scheme to be infinitely more fair, practice-reflective and sustainable than that designed by the LSC,[40] and believe that most practitioners and most judiciary (who are key to any advocacy scheme working) would recognise that too.

117. There are two versions to our scheme.

118. The first includes figures that represent what we consider to be the minimum acceptable amounts for the work involved, having regard to:

- the amount of work (in preparation and at court) entailed;
- what is payable now on hourly rates and under the FGFS;
- what the market value of those undertaking the work is, and
- accordingly what practitioners might reasonably be prepared to work for.

119. In selecting those figures, we have to a degree been influenced by the numbers within the LSC scheme, going higher or lower than its figures as appropriate. In the event of the LSC figures proving inaccurate, we reserve the right to argue for higher rates.

120. The second version is in equation form so as to make clear the balance within the scheme between different types of hearing and to assist the modelling of it.

121. We believe that it is a scheme that can work on two levels. If simple is what is wanted, then we believe this to be the most credible and practice-reflective form of simple. Alternatively, the structure can be built upon or amended if the view is taken that there should be further complexity uplifts/variations within the scheme.

The details of the scheme

122. The proposed rates exclude VAT. We note that the worked examples within the LSC's consultation paper include VAT (and at a rate higher than by then prevailing), thereby making the figures superficially appear more "generous". The amounts referable to VAT are not retained by the practitioner, so it is, in our view, simply disingenuous to present figures inclusive of VAT.

123. The proposed fees are for hearings in care cases only, but extrapolations can be made from them in relation to other forms of children's proceedings.[41]

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[38] Available at www.alc.org.uk.

[39] We note that the foreword to the consultation paper suggests that the move away from the FGFS was "instigated in direct response to stakeholders, including members of the profession and judiciary, who have told us that the current payment scheme for barristers is too complicated". We are bound to record that this was not what we were told by the LSC's Head of Family Policy in a meeting that we had with the LSC on 12 September 2008. We were then told that extending the FGFS to solicitors would have been the easiest option administratively, but had been rejected on the basis that it would cost £50 million to do so.

[40] The structure of the ALC's scheme is broadly based on that used in care cases by many barristers' chambers with their local authority clients.

[41] In our view, the rates for care cases and other public children law work should be the same (as is the case under the Family Graduated Fee Scheme).

124. The rates are inclusive of hearing preparation and apply equally to solicitor advocates and to barristers, it being recognised that, to achieve this and ensure a transparently level playing-field, an adjustment may need to be made to the fixed non-advocacy fee for solicitors to exclude that element said to be referable to hearing preparation (as distinct from other preparation work on the case).

125. The rates assume no distinction between the party represented. Whether or not the LSC sticks to its current position of not having different fees for different parties, as an Association committed to ensuring access to justice for children, we would resist any scheme that sought to undervalue the representation of children.

126. The rates are also predicated upon a 20% uplift on the Family Proceedings Court fee for County Court work and a 40% uplift on the Family Proceedings Court fee for High Court work (as opposed to the LSC's scheme which is predicated upon a position of financial parity as between the FPC and County Court, with a 33% uplift for the High Court).

127. We have given long and very careful thought to the issue of differentiating fees between each tier of first instance court, upon which this consultation specifically seeks guidance.

128. Nothing that follows is meant in any way to devalue the quality of advocacy that takes place in the FPC. The work undertaken there is important, involves clients every bit as needy and demanding as in other courts, is (in our experience) undertaken very well (especially by Panel solicitors whose expertise is critical to that process), now more frequently takes place before professional judges and can entail final hearings of up to five days involving expert witnesses.

129. Remuneration is an issue which, from the practitioner perspective, is inevitably influenced to some degree by self-interest. Which is why the ALC has sought to take a principled stance, consistent with our overall position:

— that value for money lies in complexity, experience and expertise being appropriately rewarded;

— that, for the family justice system to function, there needs to be a supply of quality advocates operating at all tiers of court; and

— that advocates with the desire and dedication to do so should be encouraged to be advocates at all levels.

130. In suggesting the differentials that we do, we have simply sought to strike the right balance in a practice-reflective way. But, as the consultation paper queries why there should be a differential between the FPC and County Court, we do set out in detail here why we believe that it is right that there is.

131. The LSC's consultation paper properly draws attention to the new Allocation and Transfer of Proceedings Order 2008.

132. That order provides, at paragraph 15, for the transfer of proceedings from the FPC to the County Court in the following circumstances:

(a) the transfer will significantly accelerate the determination of the proceedings;

(b) there is a real possibility of difficulty in resolving conflicts in the evidence of witnesses;

(c) there is a real possibility of a conflict in the evidence of two or more experts;

(d) there is a novel or difficult point of law;

(e) there are proceedings concerning the child in another jurisdiction or there are international law issues;

(f) there is a real possibility that enforcement proceedings may be necessary and the method of enforcement or the likely penalty is beyond the powers of a magistrates' court;

(g) there is a real possibility that a guardian ad litem will be appointed under rule 9.5 of the Family Proceedings Rules 1991;

(h) there is a real possibility that a party to proceedings is a person lacking capacity within the meaning of the Mental Capacity Act 2005 to conduct the proceedings; or

(i) there is another good reason for the proceedings to be transferred.

133. The order provides, at paragraph 18, for the transfer of proceedings from the County Court to the High Court in the following circumstances:

(a) the proceedings are exceptionally complex;

(b) the outcome of the proceedings is important to the public in general; or

(c) there is another substantial reason for the proceedings to be transferred.

134. A number of points fall to be made in light of the above:

(1) The decision as to allocation and transfer is a judicial decision, made according to clear and binding criteria, unlike issuing in a situation where there is a choice of court, which self-evidently is a

practitioner decision. Thus the reference (at paragraph 6.132 of the consultation paper) to the former policy of fee harmonisation "to ensure that there was no incentive to issue in one court over another" is frankly irrelevant and immaterial.

(2) The foreword to the LSC's consultation paper asserts: "We are still proposing extra payments for objective measures of complexity. For example, higher fees will apply where a case is heard in the High Court." Putting to one side transfer to the County Court on the grounds of "significant acceleration of the determination of proceedings" (which is rarely ever going to occur) and the catch-all nature of the last ground (essentially replicated for High Court transfer), all the grounds for transfer to the County Court:

  (a) involve the existence of some factor of complexity;

  (b) involve complexity which is clearly defined and therefore can be "objectively measured";

  (c) involve criteria which entail far more so than the criteria for High Court transfer "objective measures of complexity".

(3) The new Allocation Order, in our view, reflects the reality of practice, which in general shows the advocacy burden in the County Court to be greater than in the FPC in the same way that in general the advocacy burden in the High Court is greater than in the County Court. In saying that, we do not seek to undervalue the advocacy burden in the FPC, but to recognise in particular the following matters:

  (a) that appearing in the County Court always involves appearing before a professional judge—on the whole a more challenging and demanding experience than appearing before lay magistrates;

  (b) that the Bundles Practice Direction, with its extra paperwork burdens, directly applies to the County Court but is specifically excluded from the FPC;

  (c) that, for reasons identified by the Allocation Order criteria, the legal and factual nature of the work in the County Court is on the whole more complex, which inevitably places a greater burden on the advocate, which tends to be mirrored by a higher expectation of service from the tribunal concerned;

  (d) that the County Court regularly now deals with cases which, at the time of the introduction of the FGFS[42] in 2001, were being routinely heard in the High Court.

(4) The LSC consultation paper (at paragraph 6.135) asserts: "Different fees payable for different courts may undermine the implementation of the order." Given the existence and content of paragraph 15 of the Order (inserted as part of the Order's overall objective), we consider that to be a groundless assertion. On the contrary, it would, in our view, be manifestly undermining of the Order not to recognise the impact in practice of the paragraph 15 criteria.

(5) The LSC consultation paper (at paragraph 6.135) continues: "Our view is that any difference in cases heard in the different courts is dealt with by having different fees for different types of hearing." We simply do not understand that assertion. On the whole, a three day final hearing in the FPC tends to be less of a burden on the advocate than a three day final hearing in the County Court for precisely the reasons set out above.

135. As we have already outlined, our concern is to ensure, for the benefit of the client and the tribunal, that competent advocacy is available at all levels of court. We believe that our proposal supports that objective and gets the balance right as between the three tiers of first instance court.

136. Within our scheme, a distinction has been drawn between interim hearings that are case management hearings and those that are (or are listed to be) contested on evidence. The vast majority of the former will be listed for no more than an hour and will from listing time to conclusion complete within half a day. The latter can sometimes last several days, can be determinative of the proceedings as a whole and, in terms of preparation (NB: the applicability of the Bundles Practice Direction) and conduct, are more akin to final hearings and have therefore being bracketed with them. Not to recognise the latter kind of hearing in this way, in our view, would be wrong in principle, would leave parents and children unrepresented or inadequately represented within them and would entail the worst kind of false saving in practice. This distinction also gets around the *Re L*[43] fact-finding hearing problem. According to the President's recently revised Practice Direction on Domestic Violence,[44] these are now to be seen as part of the final hearing, yet, under the LSC's current proposed scheme, are to be paid as an interim hearing.

137. The ALC has always said that there should be greater remuneration for the Case Management Conference and Issues Resolution Hearing to reflect their critical importance within the PLO scheme and the amount of work involved in them. The First Appointment is different, as the PLO imposes no paperwork

[42] Under the FGFS there is a 33% uplift for work undertaken in the High Court.
[43] Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) [2000] 2 FLR 334.
[44] Practice Direction: Residence and Contact Orders: Domestic Violence and Harm, revised on 14 January 2009.

requirement relating to its preparation. Paying these key hearings properly should make them more likely to be effective and successful, which ought to impact positively on the need for and therefore the number of further interim hearings.

138. Finally, the ALC scheme properly recognises the effect on the advocacy burden of the listing and length of hearings, acknowledging in particular:

— the importance and (for the advocate) the impact of the upfront preparation of hearings, including and perhaps especially contested hearings;

— in the context of the LSC's statistics indicating the prevalence of one day final hearings, the difference in practice between at one extreme a final hearing that was always destined to be short and undemanding and at the other extreme one that might have been expected to last for several days, which would inevitably have involved considerable preparation, but which unexpectedly settled on the first day.

ALC Suggested Rates for Care Hearings[45]

Interim Case Management Hearings[46]

Hearing	*FPC*	*CC*	*HC*
Case Management Conference/Issues Resolution Hearing[47]	400	480	560
Interim case management hearings other than FA/CMC/IRH listed for 1 hour or less and taking half a day or less[48]	200	240	280
First Appointment and other interim case management hearings not falling within the above two categories[49]	300	360	420

Final Hearings and Interim Hearings listed for or involving contested evidence[50]

Hearing	*FPC*	*CC*	*HC*
Hearing listed for 1 hour or less and taking half a day or less[51]	200	240	280
Hearing listed for half a day or less (but more than 1 hour) and taking half a day or less[52]	300	360	420
Hearing listed for half a day or less and taking more than half a day (but not more than 1 day)[53]	400	480	560
Daily hearing fee (applicable to all cases listed for at least 1 day and payable for each day of the hearing)[54]	400	480	560
Daily preparation fee (applicable to all cases listed for at least 1 day and payable for each day that the hearing is listed or continues)[55]	200	240	280

[45] See paras 116–135 above.
[46] See para 136 above.
[47] See para 137 above.
[48] The most straightforward uncontested interim hearing and, the FA/CMC/IRH apart, the most common. Taking half a day or less means that the hearing concludes within $2\frac{1}{2}$ hours of the time that it is listed.
[49] A relatively straightforward uncontested interim hearing, but involving in the event more time than the most straightforward. Distinguishing interim case management hearings in this practice-reflective way is, in the ALC's view, infinitely preferable to the LSC's tapered approach, which is inevitably more random.
[50] Where in the following footnotes reference is made to final hearings, that is to be read as referring equally to interim hearings listed for involving or contested evidence (for the reasons set out in para 136 above).
[51] The most straightforward kind of final hearing. Relatively small amount of preparation, no or minimal expectation of evidence, no stress, with no great impact upon the ability of the advocate to undertake other fee-related activity during that working day.
[52] Still a fairly straightforward final hearing. Not a huge amount of preparation, some expectation of limited evidence, not very stressful, not a huge impact upon the ability of the advocate to undertake other fee-related activity during that working day.
[53] Still a fairly straightforward final hearing. Not a huge amount of preparation, some expectation of limited evidence, not very stressful, but it does end up having quite an impact upon the ability of the advocate to undertake other fee-related activity during that working day.
[54] The daily hearing fee has to be seen together with the daily preparation fee.
[55] This is the key complexity variable, which recognises what advocates know in practice—the impact of the upfront preparation of contested hearings. Some examples (in the County Court as the medium figure for ease): (a) hearing listed for and taking one day £720; (b) hearing listed for five days, but settles on first day £1,680; (c) hearing listed for four days, but taking five days £3,600. Those figures broadly reflect a rate of £60 for each hour actually expended on the case (in preparation and at court).

ALC Rates for Care Hearings—Equation

Interim Case Management Hearings

Hearing	*FPC*	*CC*	*HC*
Case Management Conference/Issues Resolution Hearing	2A	2.4A	2.8A
Interim case management hearings other than FA/CMC/ IRH listed for 1 hour or less and taking half a day or less	A	1.2A	1.4A
First Appointment and other interim case management hearings not falling within the above two categories	1.5A	1.8A	2.1A

Final Hearings and Interim Hearings listed for or involving contested evidence

Hearing	*FPC*	*CC*	*HC*
Hearing listed for 1 hour or less and taking half a day or less	A	1.2A	1.4A
Hearing listed for half a day or less (but more than one hour) and taking half a day or less	1.5A	1.8A	2.1A
Hearing listed for half a day or less and taking more than half a day (but not more than 1 day)	2A	2.4A	2.8A
Daily hearing fee (applicable to all cases listed for at least 1 day and payable for each day of the hearing)	2A	2.4A	2.8A
Daily preparation fee (applicable to all cases listed for at least 1 day and payable for each day that the hearing is listed or continues)	A	1.2A	1.4A

Conclusion

139. This is not just a consultation about the fees of family lawyers. Its ramifications extend way beyond that, and the consequences of the proposals that it makes can only be disastrous for the family justice system as a whole.

140. Were the government's proposals to be implemented, we have not the slightest doubt that parents facing serious allegations and at risk of losing their children to adoption will be unrepresented or, at best, inadequately represented. The same fate will befall the children themselves. That is not doom-mongering. It is a statement of the obvious consequences of proposals calculated to drive experience and expertise out of the system. Under the government's scheme, there is no incentive for the experienced advocate to continue to undertake publicly funded family work and no incentive for any new practitioner wanting to build a career within that area.

141. At this time, of all times, the government should be extremely wary of trusting to untried and untested economic models in the teeth of overwhelming practitioner evidence that its model is irrational, flawed and utterly unworkable.

142. If this government is serious about child protection, then it cannot proceed with these proposals. At the very least, it needs to undertake a fundamental rethink and to engage in a sensible, fair and constructive dialogue with those whose daily practice and concern are children and their families. The children and parents who have the misfortune of being involved in these cases deserve nothing less.

March 2009

Supplementary written evidence from Association of Lawyers for Children

Thank you for arranging time for the session yesterday, which was very helpful, and we are extremely grateful to you.

There are a couple of matters that we thought the members of the Committee would find useful to know about, which we did not have time to raise in the time available:–

As our session on 16 June was coming to a close I was aware, from at least one of the members of the Committee, that there was interest in knowing what the position of the Legal Services Commission would be if there was a delay in the timetable.

1. At a Law Society meeting of civil practitioner groups on the 20 May, (which comprises a broad range of civil practitioners) there was "no head of steam" amongst practitioners in general either to press for a new contract, or to finalise new payment regime(s). The overwhelming desire was to be clear that LSC have a plan B to keep things going past March 2010.

2. It has been recognised for some time that the timetable was unrealistic and we have seen an exchange of correspondence between the Law Society and the LSC dated the 29 May 2009 which confirms that contingency plans are in place if the April 2010 deadlines are missed and that there is insufficient time to complete a bid round exercise for new contracts for April 2010. The contingency would be a delay to the bid rounds and the rollover of existing contracts for a period, which would depend upon the circumstances.

3. As the Committee knows, the ALC has put forward an alternative advocacy scheme for care cases. It appears at pages 35–38 of our main consultation response and is explained at paras 109–138. The scheme distinguishes complexity in a straightforward manner by listing and length of hearing and by tier of court, and it covers advocacy and hearing preparation for solicitors as well as barristers. The Committee may be interested to know that the LSC has now modelled it and that at full stated value it comes within their budget, with only a 10% adjustment in the solicitor non-advocacy representation fee necessary to fund the solicitor hearing preparation element. If, for whatever reason, a revised, extended Family Graduated Fee Scheme is not viable, we believe that the ALC scheme (designed for care cases but which can easily be extended to other areas of family law) is the obvious next best option. In the event of any delay in the implementation of a unified advocacy scheme, the one change that should and can easily be made now would be to make the 10% adjustment to the solicitor non-advocacy representation fee that would fund solicitor-hearing preparation. At a stroke, that would remove currently the biggest inequity in payment, which, we are bound to say, is no fault of the Bar but every fault of the LSC's chosen methodology in 2007.

4. I enclose a copy email (*not printed*) from one of our members that clearly reflects Practioners views on the Ernst & Young survey. I have his permission to forward it to you.

Caroline Little
Co-Chair

17 June 2009

Written evidence submitted by Lord Bach, Ministry of Justice

FAMILY LEGAL AID FUNDING FROM 2010

I am writing further to the Justice Committee's request for a memorandum on the proposals set out in the joint Ministry of Justice/Legal Services Commission (LSC) consultation *Family Legal Aid Funding from 2010,* specifically in relation to the funding of guardians and independent social work in cases involving the separate representation of children.

Background

Before responding to the specific issues you raise, it may be helpful to set out the context and rationale for the consultation proposals.

Spending on family legal aid has increased dramatically in the last seven years. It has increased in actual terms by 46% from £399 million in 2001–02 to £582 million in 2007–08. Although this increase is partly explained by increases in the overall volume of cases funded, rising case costs is also a factor. For example, in private law children cases the volume of applications decreased by 7.7% between 2004–05 and 2007–08. But increases in case costs were substantial; the average cost of each case increased by 14%.

These cost increases are unsustainable within a limited budget. Pressure on the legal aid budget is likely to increase in the current economic climate as more people require advice on housing, debt, welfare benefits and family breakdown. If we do not control rising costs then we will be forced to cut services to clients, either through cutting the scope of the services that are funded, or by reducing the financial eligibility for services.

The consultation proposals aim to contain inflationary costs and maintain legal aid expenditure at 2007–08 levels. This will be done through the introduction of two standard fee schemes and changes to the scope of funding. The Private Family Law Representation Scheme proposes standard fees for private family law proceedings. The Family Advocacy Scheme proposes that the same fees are paid for advocacy regardless of the advocate undertaking the work. Historically, barristers have generally been paid higher rates (under the Family Graduated Fee Scheme) than employed or self-employed solicitors paid on hourly rates for the same work. Finally, the consultation also proposes changes to the scope of funding in relation to certain disbursements, which are the proposals with which both the National Youth Advocacy Service (NYAS) and the Justice Committee are concerned.

The proposals build on the work undertaken by the Ministry of Justice and the Legal Services Commission (LSC) to encourage a greater use of mediation to resolve family disputes. The consultation proposes reducing the number of exemptions from the requirement to consider mediation before a legal aid certificate will be granted. Previous amendments to the use of exemptions saw the proportion of family disputes going to mediation increase by 2% and the number of agreements reached through mediation increase by 1.6%.

The LSC and the MoJ continue to promote and increase awareness of the availability and benefits of mediation through the Community Legal Advice (CLA) website, the CLA helpline and the MoJ funded Family Mediation Helpline. The LSC mediation strategy—*Publicly Funded Family Mediation: A Way Forward* was published in August 2008. Following this, the LSC recently announced the award of training grants to the value of £100k to train new mediators. The LSC is also working with the Children and Family Court Advisory and Support Service (Cafcass), Her Majesty's Courts Service and the judiciary to pilot the use of mediation at court.

Family Funding Scope Changes

There has been a significant rise in the cost of disbursements in family cases in the last seven years from £37.5 million in 01/02 to £75.4 million in 07/08, an increase of over 100%. These costs now constitute 14% of the family budget, up from 9%.

Disbursement costs in legally aided cases, like solicitor and barrister costs, must be subject to control. The pressures on the legal aid budget are such that no element of legal aid expenditure can go without scrutiny.

The LSC estimate that experts' costs constitute two thirds of disbursement costs in family work, based on an internal review they have undertaken on experts' costs. For this purpose the definition of experts includes those providing independent social work expertise.

A key part of our approach to controlling experts' costs was set out in the LSC strategy for family legal aid—*Making Legal Rights a Reality for Children and Families* published in March 2007. This stated that the LSC would ensure that legal aid resources are not diverted to finance activities outside the LSC's proper remit, which is to provide legal advice and representation. In order to control this, the LSC has consulted on and implemented various changes to the funding of disbursements, namely:

- In October 2007, removing residential assessments from the scope of funding as this is work that is not seen as a priority for legal aid;
- In September 2008, the LSC consulted on removing funding for supervised contact centres, thereby further clarifying that it is not within the scope of the legal aid budget to meet costs in relation to treatment, therapy, training; and
- educative or rehabilitative work with children or families who are involved in family proceedings,

The contact centre proposals followed discussions with Cafcass and the Department for Children, Schools and Families (DCSF) when it was agreed that this work should more properly be the responsibility of the DCFS/Cafcass. This view was also accepted by the Family Justice Council. The implementation of those proposals was delayed to allow affected services and Cafcass to consider their contracting arrangements for 2009–10.

Cafcass and NYAS/Other Solicitor Guardians

Cafcass' functions, as set out in the Criminal Justice and Court Services Act 2000, in relation to children who are involved in family court proceedings, are to:

- Safeguard and promote the welfare of the child.
- Give advice to the court about any application made to it in such proceedings.
- Make provision for children to be represented in such proceedings.
- Provide information, advice and support for children and their families.

Cafcass is legally obliged, under rule 9.5(1)(a) of the Family Proceedings Rules 1991, to provide a guardian in cases where the court makes an appointment. There are, however, cases in which Cafcass is unable to provide a guardian within a timescale that is regarded as acceptable by the court (the situation is different in Wales as Cafcass Cymru has always been able to allocate a guardian without delay).

The courts can appoint non-Cafcass guardians for a variety of reasons, including but not limited to delay, who may be the Official Solicitor or "some other proper person" (which may include NYAS). Where NYAS is appointed, this arrangement should operate under the terms of a protocol that was agreed between Cafcass and NYAS in December 2005. This arrangement is consistent with the President's April 2004 Practice Direction, which governs the circumstances in which Rule 9.5 appointments are to be made.

The number of Rule 9.5 cases has increased substantially with marked regional variations, including in the levels of use of non-Cafcass guardians and both Rule 9.5 appointments of Cafcass and Rule 9.5 cases funded by the LSC have been increasing steadily. Latest LSC figures show that in comparison to the same period last year, the number of Rule 9.5 cases is up by 27.7%, while the rate of appointments of Cafcass in 2008–09 is 40% higher than in 2007–08.

The current consultation proposals do not affect the funding of the legal representation of children in Rule 9.5 cases and there is no suggestion that this would not continue. The LSC would also fund the necessary expert work, such as a psychiatric assessment, if it were outside the remit of an appropriately competent Cafcass guardian. However, the appointment of non-Cafcass guardians and funding of independent social work expertise to carry out the functions of a guardian ad litem cannot be regarded as specialist legal advice or representation and is therefore outside the remit of the services that the LSC is statutorily required to fund.

The LSC had a number of discussions with Cafcass and the DCSF in developing these proposals. Cafcass and the LSC have shared data to ensure that we all have a complete picture of the number of these cases. This has enabled the development of a shared view about how these cases should be dealt with.

Cafcass' Workload and Performance

The recent surge in levels of care applications have resulted in renewed pressure on Cafcass resources since the proposals were initially discussed. The proposals would not be implemented without further consideration of Cafcass resources and their ability to undertake this work. However, it was never intended that this work should fall to the limited Community Legal Service (CLS) Fund which was set up under the Access to Justice Act 1999 to provide specialist legal advice.

The LSC believe that Cafcass is better placed and a more appropriate public body to provide the guardian ad litem in rule 9.5 cases. The LSC does not contract directly for the provision of independent social workers and therefore lacks control over their use and cost and has no measure or control of quality. Cafcass have quality standards and a clear management and commissioning structure in relation to this work, which can be used to assure the quality and appropriateness of work undertaken. Cafcass has no power to commission independent social workers or other types of expert in rule 9.5(1)(c) cases where the court has appointed "some other proper person" as a guardian ad litem.

NYAS currently have a contract with the LSC for legal representation of children who are the subject of Rule 9.5 appointments and funding for this is still available.

Currently around 10% of divorcing and separating parents make family court applications relating to future arrangements for their children. These are likely to be the most intractable cases, in which one or both parents have chosen the courts, or "officialdom", to resolve their difficulty. Cafcass is independent of the courts and has been set up with the purpose of supporting children and families though what can be a difficult and stressful process.

Consultation with Other Organisations

As well as the current public consultation, the LSC has continued a close dialogue with contracted providers and those paid directly by the LSC, through regular meetings with stakeholder groups through the LSC's Family Representative Body Group and its Family Stakeholder Group. Membership of both these groups include representatives from the Law Society, Resolution, the Family Law Bar Association, the Legal Aid Practitioners Group, the DCSF, Cafcass and Cafcass Cymru.

The LSC has also met separately with NYAS to discuss their concerns in detail. In addition, the LSC is meeting with the National Association of Guardians ad Litem and Reporting Officers (NAGALRO) and independent social workers have attended some of the consultation events that the LSC has been running across the country.

I can confirm that the LSC has been in touch with the Office for the Third Sector (OTS) for their views and the OTS has confirmed that they will be responding to the consultation in due course.

As I have made clear to NYAS directly, and to the many MPs who have written to my department on their behalf, the LSC will be carefully considering all responses to the consultation and will continue to meet with Cafcass and others while the evaluation of the consultation takes place. Although this consultation was due to close on 18 March, the deadline has now been extended, at the request of stakeholders, until 3 April. I would encourage all organisations to continue their dialogue with the LSC, as well as responding formally to the consultation to ensure that their views are fully considered.

I am copying this response to Delyth Morgan.

Parliamentary Under-Secretary of State
Ministry of Justice

23 March 2009

Written evidence submitted by the Family Law Bar Association

JUSTICE COMMITTEE

FORMAL HEARING ON 16 JUNE 2009

OBSERVATIONS BY THE BAR COUNCIL AND FAMILY LAW BAR ASSOCIATION

These observations invite the Justice Committee to ask the Ministry of Justice to postpone any further steps in relation to the implementation of proposals for advocacy payments which have been made by the Ministry of Justice (MoJ) and the Legal Services Commission (LSC), until there has been a proper assessment of the impact of the proposals; an investigation of that impact by the Justice Committee; and the opportunity for all interested stakeholders to consider the revised proposals which are prepared in the light of the impact assessment, through an open and transparent consultation process which follows the usual procedures. What is proposed by the MoJ and the LSC amounts to a breathtaking risk with the most

vulnerable in society at a time when there is heightened public concern regarding child protection. The Bar Council and the FLBA would welcome it if the Committee felt able to undertake the investigation which, for reasons set out below, they believe the public interest demands.

Family Law Bar Association ("FLBA")

1. The FLBA, which has been in existence for over 25 years, has over 2,300 members (39% men/61% women). It is a national organisation and represents the interests of specialist family barristers. The FLBA has an experienced fee team with members who have been involved in fee negotiations with the Government (Ministry of Justice and LSC) for over 10 years. Most of the FLBA membership are in court every day, sometimes more than once a day. They are at the sharp end of the family justice system.

Current and Proposed Fee Schemes

2. The overwhelming majority of work carried out by the family barrister can be categorised as follows:

(i) The financial consequences of divorce or separation ("ancillary relief" or "finance cases").

(ii) Private individuals' disputes concerning family life, in particular the care of children ("private law").

(iii) State intervention in the care of children ("public law").

3. The existing payment regime for family barristers who conduct publicly funded work is called the Family Graduated Fee Scheme ("FGFS") and has been in existence since 2001. Essentially it pays a base fee for a hearing (i.e. £130 for an interim care hearing lasting up to 2.5 hours). There are uplifts to reward the complexity of the case (i.e. size of bundle, length of hearing, seriousness of allegations made). When introduced the FGFS was meant to bring about cost savings of about 5%. In fact the FLBA demonstrated the reductions to be 13% and as a result the Government agreed to put 8% back in to the scheme in 2005. So in reality the levels of payment have not been increased since 2001, not even cost of living increases.

4. A Consultation Paper was published in June 2008 which proposed a 13% cut in FGFS payments. The decision was announced by the Ministry of Justice on 12 February 2009. It removed £6.5 million per annum from fees paid to barristers: £2 million from public law cases (involving the most serious allegations of child abuse); £2.9 million from private law cases (nearly half of which conducted by the family Bar contain allegations of serious abuse) and £1.6 million in finance cases (which will impact on women seeking financial support for themselves and dependent children from husbands who seek to hide their true wealth). Contrary to the claim made by the Parliamentary Under-Secretary of State at the Ministry of the Justice, Lord Bach, £4 million was not put into child protection—£6 million was taken out.

5. A further Consultation Paper was published in December 2008 by the Ministry of Justice and the LSC proposing fixed fees for advocacy. This will result in further average cuts across the board of between 20–30%, and as high as 50% or more in many cases, particularly the more complex cases. What is proposed is a fixed advocacy fee for interim hearings (whether they last five minutes or five days, ie domestic abuse £149/private law £198/care £307) and final hearings (whether they last five minutes or two days (i.e. domestic abuse £225/private law £378/care £718). It is a system that over-rewards the simple hearings and under-rewards the more complex hearings. The Consultation was scheduled to close on 18 March 2009. It has now been extended to 3 April 2009 owing to serious concerns about the corruption of the underlying data.

6. Only days before the consultation period was due to expire, it was disclosed that the LSC had engaged Ernst & Young, as Lord Bach described it in a letter of 2 April 2009 to the Chairman of the Bar, "to ensure that client access is protected and in order to gain a fuller economic understanding of the market for family advocacy." In particular, Ernst & Young were instructed to assess the risk of a reduction in the supply of self-employed advocates due to the proposed cut in fee rates. Although the Minister said that stakeholders were informed of this work "as a courtesy and as part of their continuous and transparent dialogue with providers on the consultation proposals", the LSC did not consider that stakeholders needed the information to be produced in the Ernst & Young report in order to respond to the consultation. In his letter, the Minister said that the Ernst & Young work was not fundamental to the scheme—yet he conceded that it would be relevant in any final impact assessment of the effects of the proposed scheme. The same concession had been made, in a letter of 30 April 2009 from Lord Bach to the Chairman of the FLBA, Lucy Theis QC, when he said "… you will appreciate that this research will be *especially relevant* [emphasis supplied] in any impact assessment of the effects of the proposed scheme."

7. Without putting it too strongly, it seems to us extraordinary that the LSC should commission Ernst & Young to conduct research, the results of which we understand are expected to be published after the closure of consultation in late June, when the Minister has acknowledged that the findings will be "especially relevant" to the particular issue of public policy development, without giving stakeholders a proper opportunity to consider a full Impact Assessment. Such an approach suggests to us that the avowed commitment of the Ministry of Justice and the LSC to consult on the impact of their proposals on stakeholders (including the family Bar) is essentially hollow. We urge the Ministry of Justice and LSC to publish revised proposals, drafted in the light of the Impact Assessment, which can then be considered by all interested stakeholders through an open and transparent consultation process. Fairness dictates this.

8. The main concern about the LSC's advocacy proposals is that they grossly over-reward simple cases and under-reward the more complex cases. The fees are flat and there is no variation to reflect the complexity (or relative simplicity) of a case (other than an uplift if the case is in the High Court). For example, an advocate could attend the local county court and conduct three 5-minute directions hearings in private law cases and be paid nearly £600. Yet if there was a five day fact finding hearing (where the court determines disputed evidence regarding allegations of physical/emotional/sexual abuse of a child) before deciding what orders should be made in the interests of the child, the advocate will be paid £198 (or less than £40 per day). It should be remembered that all these figures are before any deductions are made for chambers' expenses (usually 20–25% of gross fees) and tax.

9. Such a scheme will produce a two-tier legal system, which is manifestly unfair. Legal aid rates are often less than half those paid in the (private) market. As a result, a two-tier legal system will be created in terms of quality and there will be an inequality of arms in cases involving children and money. In care cases a Local Authority will be able to instruct an advocate with the expertise and experience the case demands. That option will not be available to the legally aided parent(s) or child. This is grossly unfair in circumstances where often the Local Authority seek what has been described as the most draconian order any court can make, namely the permanent separation of a child from his or her natural family. In finance cases, invariably the wife, with dependent children, will be on legal aid and may not be able to find a sufficiently experienced advocate to take on her case against the husband who seeks to hide his assets. If she is not successful, she will almost certainly have to rely on the State for long term financial support for herself and her children.

10. There is real cause for concern about the accuracy of the data upon which these proposals are made. Extensive corruption and mis-classification have been revealed. The time for the consultation response was extended at the request of the Bar Council and the FLBA (supported by many of the solicitor organisations) to enable efforts to be made by the LSC to clean the data. Confidence in the data is critical, not only to test the accuracy of the alleged increase in spend on these cases but also to assess the impact of the proposed advocacy scheme. The LSC calculate that 86% of self-employed advocates, undertaking 83% of the cases, would face a decrease in income. Subject to having confidence in the underlying data, the Bar Council and the FLBA are not seeking any further money, but they do oppose any further cuts. They seek to devise a revised graduated fee scheme for advocacy which properly rewards the complexity of the case.

11. The assertions made in both consultation papers (June 2008 and December 2008) that there has been a significant rise in the cost of the FGFS relied on data that was flawed and poorly interpreted. Following the identification and correction of these discrepancies—a process initiated by and assisted by FLBA—it transpires that spending under the FGFS has not risen substantially. The revised figures as set out in a letter of 26 May 2009 from the Ministry of Justice are: 2005, £88.5 million; 2006, £90.4 million; 2007, £89.9 million. Concerns remain regarding the entire evidential basis on which the LSC relies. Analysts continue to work on these issues but at present the evidence cannot reject the view that the FGFS has done precisely what it was devised to do, namely to control costs and seek to retain those who specialise in family advocacy doing the work. Both those objectives are now going to be put at serious risk by the current proposals.

12. It needs to be recognised that the complexity of family cases has grown in the last few years owing to a number of factors: the increase in statutory and regulatory changes introduced, the controversies over accurate medical diagnosis, and the increasing fragmentation of family life. The way to deal with this is not to starve such cases of funds for effective representation, but to ensure that the scheme properly rewards those advocates in the more complex cases.

Survey Conducted by FLBA

13. On account of the extent of concerns regarding the first cuts proposed in June 2008, the FLBA, supported by the Bar Council, decided to commission a survey of the family Bar, conducted by Dr Debora Price at the King's College Institute for the Study of Public Policy. The survey was conducted over one week in October 2008. This highly comprehensive study generated a high response rate from the family Bar. Over 1,600 family barristers took part. 113 sets of chambers provided information at chambers level and over 5,000 units of work were included. It is the most detailed survey of its kind. The report's conclusions and key findings have been circulated to members of the Justice Committee. They demonstrate beyond any doubt that those at the family Bar are a highly specialist profession and that it is a myth that the publicly funded family Bar is full of "fat cats". The work is very demanding and the potential consequences for the client are grave. There is a disproportionate number of women, in particular BME women, who have a high dependence on publicly funded family work. This survey highlighted that, in the event of cuts, then anticipated to be around 13%, over 80% of the family Bar planned to change their practices and cease undertaking publicly funded family work. The cuts now proposed are much higher and the exodus from this work is therefore likely to accelerate.

14. The current fixed fee proposals, if implemented, will inevitably have a disproportionate impact on women barristers, in particular BME women, who have a high dependence on publicly funded family work. The proposals will reverse all the progress made to encourage diversity at the Bar and in the Judiciary. The first woman member of the Judicial Committee of the House of Lords (Baroness Hale of Richmond) was a family barrister; and the first woman President of the Family Division (Baroness Butler-Sloss) was a family

barrister. Female Judges drawn from the family Bar have made a significant contribution to the fact that the Judiciary has become more diverse. 38% of judges of the High Court's Family Division are women, a much higher proportion than any other division. That continued contribution is being put at risk.

Deep Level of Concern by the Bar Council and FLBA

15. There is deep concern amongst the profession about the adverse impact of the current proposals to pay fixed fees. 550 FLBA members participated in a meeting on Saturday, 7 March 2009. 300 attended in person in London and were joined by 250 via 12 video links around the country. The meeting unanimously approved a motion that:

> "The public interest demands that family legal aid is funded at a level which ensures quality advocacy for all clients; further cuts to the fund will put families (particularly vulnerable families) and children at grave risk."

That meeting has been supported by media activity which has highlighted the FLBA and the Bar Council's concerns. This includes the publication of a dossier of "case studies" (see Annex 1: *Access to Family Justice: Access Denied?*) which sets out the day-to-day experiences of those at the family Bar and the way in which their work in the public interest will be affected should the proposals be implemented. Members of the FLBA have also sought meetings with their constituency MPs on a regional basis, and this contact is ongoing. A full media round-up, including press releases issued and media coverage gained, has been attached separately: see Annexes 2 and 3.

16. The Bar Council and the FLBA have also contributed to a parliamentary meeting on 12 May 2009 which explored the impact which the proposals would have on vulnerable children and families. This meeting, which was co-chaired by the Rt Hon Baroness Butler-Sloss GBE and by Baroness Walmsley, allowed concerned parliamentarians to discuss the issues with family barristers and family solicitors, as well as representatives from the LSC. A second meeting has been arranged to take place at Westminster on 7 July 2009 to explore the issues in more detail. It will be co-chaired by Lord Thomas of Gresford QC and by Baroness Butler-Sloss GBE. Barbara Esam, the Head of Legal at the NSPCC (which shares our concerns about the effects on vulnerable children of the LSC's proposals), will also be speaking at the meeting. The meeting will allow a broad cross-section of parliamentarians and third parties to consider the different ways in which the LSC's proposals will affect some of the most vulnerable members of society, in particular children.

17. There has been consistent concern about this issue from a cross-section of parliamentarians, in both the House of Commons and the House of Lords, which has prompted a series of Parliamentary Questions, both Oral and Written. A report of these PQs (and Answers) appears at Annex 4.

18. The Bar Council and the FLBA believe the LSC has fundamentally misunderstood the market for advocacy services. Their current consultation proposals are underpinned by transferring a significant amount of the advocacy work from the self-employed advocate (mainly the family Bar) to the employed advocate (mainly employed solicitors). To that end they propose to transfer £23.9 million from the current budget that pays self-employed advocates' fees to the budget that pays for employed advocates. This is done on the basis of "anecdotal evidence" that a number of self-employed advocates had been employed by [solicitor] firms. The LSC have admitted they have no record of this "anecdotal evidence". In letters to the FLBA the LSC say:

> "This is a statement made on the basis of anecdotal evidence. We have not carried out any specific research into this area." (LSC letter to FLBA, 25 February 2009)

> "We do not keep a written record of anecdotal conversations that we have had, but these are themes that come up time and time again in conversations with solicitors and I therefore consider it to be reasonable for us to use this information as supporting background to the consultation proposals." (LSC letter to FLBA, 3 March 2009)

19. We believe there are two quite distinct markets. The first covers higher volume court appearances of relatively short duration, from five minutes up to about one hour and covers matters like directions and other non-contentious matters. The second market covers the lower volume longer cases usually of a more contentious nature where there is, more often than not, oral evidence and disputed expert evidence or significant issues of law.

20. Solicitor advocates almost invariably conduct the first category and barristers invariably conduct the second category, although there is some crossover in the middle.

21. This is the pattern that has existed over very many years in both the privately funded and publicly funded advocacy market. It has not changed, notwithstanding the fact that solicitors have had rights of advocacy for many years in family cases. This division of advocacy is in fact replicated in the private commercial legal market.

22. The underlying reason is very simple. Barristers provide a specialist service for the more complex case and do that efficiently because of barristers' lower overheads, as compared with solicitors' costs. Solicitors are experts in conducting the less complex but higher volume work, but they have a higher cost structure.

Consequences of the LSC Proposals

23. What are the consequences of the LSC's current proposals, with a dramatic reduction in the rates of pay for the complex cases and an increase in the rates for less complex cases? First, the number of experienced barristers who provide these advocacy services in the barrister market will dramatically decrease. This is supported by the evidence of the King's College Survey: over 80% stated they would move away from this work.

24. When asked about their intentions, faced with cuts in publicly funded fees of 13%, over 80% of respondents said they were going to move away from publicly funded work. The cuts now proposed are at least 20–30%; the exodus will be much greater. For those practitioners still willing to do the work, this means that predominantly they will stop doing ancillary relief and private law children work. However barristers have indicated that, in the event of cuts, they also will stop doing public law work. For example, 40% of barristers over 16 years' call to the Bar intend to stop totally or reduce greatly the amount of legally aided public law final hearings that they undertake. These barristers are not going to become employed solicitors. They will leave the Bar or transfer their specialist advocacy skills to different areas of work within the Bar. As already noted (in paragraph 14, above), this exodus will have a knock-on effect in terms of the diversity of the Judiciary. This is of particular concern in the light of the Government's commitment to increase diversity on the Bench and flies in the teeth of the work of the Judicial Appointments Commission.

25. Secondly, solicitors will not be able to hire these barristers as employed advocates because the profile of solicitors, according to the LSC Consultation Paper, is that 86 % of solicitors' firms have fewer than four partners. As a result:

(i) They would be unable to afford to take on the cost of an employed advocate.

(ii) They would not have sufficient advocacy work to occupy a full-time advocate.

(iii) It would not be viable for them to take on a relatively expensive barrister to conduct the employed advocacy work in the more complex cases at rates that have been severely cut.

(iv) The solicitor would not undertake the more complex work as it is not profitable, they do not have the necessary skills and expertise and there is no financial incentive for them to undertake this more complex and time-consuming work.

26. Members of the Justice Committee will recall that the Government has a statutory duty, under section 25 of the Access to Justice Act 1999, when considering any remuneration order, to have regard to "(a) the need to secure the provision of services by a sufficient number of competent persons or bodies".

27. Our analysis makes it clear that the changes proposed will result in a real risk that there will be an insufficient number of competent practitioners or bodies to undertake this work.

28. This is already happening. The Chairman of the FLBA (Lucy Theis QC) attended a conference on 21–22 March 2009 organised by Resolution (the organisation of specialist family solicitors). An experienced family solicitor informed one of the workshops of a very recent care case where she had been unable to find a barrister to take on the case, despite ringing six sets of chambers. There were barristers available in those sets, but the fee was not financially viable for them at legal aid rates.

Flaws in Current Consultation Paper

29. The current Consultation Paper was published on 17 December 2008. Paragraph 1.2 of the Consultation Paper reads as follows:

> "…[W]e actively seek evidence from stakeholders to validate and/or challenge our existing evidence. The evidence used to develop these proposals is contained in Annexes B, C, D and E of this document."

30. It was therefore with some surprise that we learned, for the first time, of the LSC's intention to commission "economic research" posing the most fundamental questions regarding the publicly funded family advocacy market. The research objectives we have been sent by the LSC are as follows:

(Document supplied by LSC to FLBA on 3 March 2009):

Family Advocacy Economic Research 2009
Timeline for contract award

We have targeted to commence the contract on 2 March 2009 and therefore anticipate the following milestones:

Invitation to Quote Issued	23 January 2009
Questions on ITQ to be submitted by (12:00 noon)	6 February 2009
Answers to ITQ questions sent to all by (12:00 noon)	10 February 2009
Quote responses due by (12:00 noon)	12 February 2009
Presentations (if required)	23–25 February 2009
Contract Award	27 February 2009
Resource Mobilisation	2–6 March 2009
Research commencement date	9 March 2009

The findings of the research will be utilized alongside consultation responses to inform the final policy on family advocacy remuneration.

OBJECTIVES OF THE RESEARCH

The specific areas to be covered in the research are listed below.

1. An assessment of the market segmentation of family advocacy services
   - This will inform us of the shape of the market and set the context for the further analysis.
2. An assessment of the current levels of supply of family advocacy services, and whether or not there is excess supply
   - This will determine the level of supply of family advocacy services, and inform as to its sufficiency in terms of providing adequate levels of access for clients.
   - In terms of supply, and ensuring adequate access, consideration should be given to regional variations, the level of experience of advocates and any quality assurance measures.
3. An assessment of the price elasticity of supply for family advocacy services
   - This will enable an assessment of the risk of a drop in supply due to the proposed cut in rates for self-employed advocates, and a rise in rates for in-house advocates.
   - Consideration should again be given to regional variations, and the different levels of advocates.
4. An assessment of the current rates of utilisation of self-employed and in-house family advocates
   - With the context of supply within the market determined, this will give further understanding of working patterns and the availability of work for self-employed advocates.
   - Consideration should be given to the work, other than family advocacy, that advocates do.
5. An assessment of the optimum annual earnings of a fully utilised self-employed barrister under the proposed FAS payment rates:
   - This will allow full understanding of the impact of the proposed fees on the optimum earnings of self-employed advocates.
   - The impact of inefficiency in the system e.g. cancelled hearings, over-running hearings, waiting time etc, should be considered when addressing this point.
6. An assessment of the extent that different types of advocate compete for the same family advocacy work:
   - This will be in part derived from an understanding of why solicitors instruct self-employed advocates. It will also to some extent explain whether it is possible for a self-employed advocate to be fully utilised with the levels of competition that exist within the market.

31. We find this very surprising for a number of reasons:

- The research is being undertaken extremely late in the day. It started just nine days before the Consultation responses were due on 18 March 2009.
- The proposed research goes to the core of the scheme. The questions asked raise fundamental issues about how the family advocacy market operates:
  - "inform [the LSC] of the shape of the [family advocacy] market".
  - "determine the level of supply [of family advocacy]"
  - assess "the risk of a drop in supply due to the proposed cut in rates for self-employed advocates, and a rise in rates for in-house advocates"
- It is deplorable that the FLBA were told for the first time on 20 March 2009, by email from the LSC, that such research was being undertaken, with an interim report to be provided in June 2009 and a final report in August 2009 at the same time as the final policy on family advocacy remuneration would be announced.

  (Extract from Email from LSC on 20 March 2009):
  "The final report will be written by Ernst & Young and will be designed to address each of the objectives set out in the note of the research circulated previously. The findings of the research will be utilized alongside consultation responses to inform the final policy on family advocacy remuneration. Initial findings are expected in June. The final report will be formally published as part of the LSC's consultation responses. Based on the current timeline set out in the consultation document this is due to be published in August this year."

This has subsequently been modified to the final report being in June—the most recent letter noting that it is "*currently scheduled for the end of June"* (Letter of 26 May 2009 from Carolyn Regan, LSC Chief Executive, to Desmond Browne QC, Chairman of the Bar).

32. The FLBA have asked the LSC for all relevant documentation and data that has been provided to Ernst & Young.

33. The FLBA and the Bar Council have commissioned our own research from the economists Oxera on this critical aspect. However, it is most regrettable that, owing to the timing proposed by the LSC, we will be denied the opportunity to respond to the Government's own research before the LSC intend to announce their final policy.

34. The approach and timing of this research flies in the face of what is set out in paragraph 1.2 of the Consultation Paper, namely that the LSC actively seek evidence from stakeholders *"to validate and/or challenge"* their existing evidence. That opportunity is going to be denied to each stakeholder, in particular the FLBA whose members will be most adversely affected by any change.

35. The LSC's approach directly contravenes the *Cabinet Office Code of Conduct on Consultations* (July 2008) which states: "Formal consultation should take place at a stage when there is scope to influence the policy outcome."

36. What is proposed has potentially very serious consequences in the complex cases involving serious issues of child protection. It is procedurally flawed, irrational and puts the protection of the most vulnerable in society at very great risk.

37. At a time of heightened public concern in the light of cases like *Baby P*, the Laming report and a number of serious case reviews, it is critical, before any further steps are taken, that there is proper evidence available as to the true impact of what is proposed; and that those most closely affected are given a proper opportunity to challenge or validate any evidence relied upon by the Government.

38. Cases like *Baby P* are but the tip of an iceberg. The King's College survey revealed that allegations of child abuse were made in 62% of family cases involving barristers. According to OFSTED, 210 cases of children dying from abuse or neglect were reported to local authorities in the 16 months between April 2007 and August 2008; 21 of those 210 were babies. This chilling statistic equates to three children each and every week dying as a result of abuse or neglect. In private law cases (i.e. those not formally involving the State but similar to the *Baby P* situation) there were allegations of serious abuse in 45% of cases involving barrister representation during the survey week.

39. It is vital that the Bar Council, the FLBA and other interested stakeholders are given a full and proper opportunity to respond to the economic research, and to consider the revised proposals which will be drafted once the Impact Assessment is published. This must be done by a full and transparent consultation process, before the Government reaches a conclusion on its policy.

What the Bar Council and the FLBA invite the Justice Committee to do

40. There has been a manifest failure by the Ministry of Justice and the LSC to assess properly the impact of these proposals. What is proposed is no more than a leap into the dark, based on "anecdotal" information. There is no evidence of any understanding of economics, or how the suggested change in fee rates and structure will impact on the supply of advocacy. What is proposed amounts to a breathtaking risk with the most vulnerable in society, at a time when there is heightened public concern regarding child protection.

41. The consequences of getting this wrong are potentially enormous:

(i) The most vulnerable (adults and children) in society will go without proper legal advice and representation.

(ii) There is a risk they will remain in situations where they are exposed to (increasing) risk of harm.

(iii) There will be an increase in unrepresented parties in cases which, in turn, will increase the length of cases and the costs (usually publicly funded) of the other parties.

(iv) It will increase the risk of the court not having relevant information and evidence put before it.

(v) It will increase the risk of the courts not making the correct decision and of miscarriages of justice.

(vi) There will be unnecessary appeals with the increased costs burden of the appeals and any subsequent re-hearing.

(vii) It will increase the burden on other areas of public spending as more and more people become dependent on social and mental health services.

(viii) There will be an inequality of arms as between privately funded and legally aided parties.

42. As Lord Laming concluded in the context of his recent report, *The Protection of Children in England: A Progress Report* (March 2009), one case in which a child is put at risk is one case too many.

43. Accordingly, we urge the Justice Committee to ask the Ministry of Justice to postpone any further steps to implement these proposals until there has been a proper assessment of their impact and an investigation of their impact by this Committee. The Bar Council and the FLBA would welcome it if the Committee felt able to undertake that investigation. We urge the Committee to call for a full consultation on any new proposals drafted following the completed impact assessments.

Desmond Browne QC
Chairman, Bar Council

Lucy Theis QC
Chairman, FLBA

11 June 2009

Annex 1

ACCESS TO FAMILY JUSTICE: ACCESS DENIED ?

CASE STUDIES COMPILED BY THE FAMILY LAW BAR ASSOCIATION AND THE BAR COUNCIL

The Family Law Bar Association represents the interests of over 2,300 barristers practising in England and Wales. The Bar Council is the governing body of the Bar of England and Wales, representing 15,000 barristers in self-employed and employed practice.

Barristers enable people to uphold their legal rights. Family barristers provide specialist advisory and advocacy services, often acting on behalf of the most vulnerable members of society including families and children involved in family breakdown, child abuse and domestic violence.

The Legal Services Commission (LSC), which runs the legal aid scheme in England and Wales, is proposing cuts of between 20%–30% (in complex cases up to 50%) in the funding of family cases. There is no doubt that this will cause hardship and threaten the administration of justice.

The following case studies demonstrate some of the problems with the family justice system today and the risks of further damaging effects on the justice system if the LSC's proposed cuts are implemented. Research shows the profile of children and parents who are subject to care proceedings (involving Local Authorities) as suffering from combinations of ill health and socio-economic difficulties, coupled with personal vulnerability factors which demonstrate that the vast majority of families, subject to statutory interventions, are struggling on the lowest rung of the ladder.[56] They are least able to withstand the effects of what is being proposed.

The case studies summarised below provide striking examples of the problems which families and children, as well as barristers representing them, increasingly face in the family justice system today.

For more information on any of the case studies, or to obtain additional examples of difficulty and hardship, please contact at the Bar Council Press Office on 0207 067 0330.

Advice Deserts—Justice Denied

Case One:

A member of the FLBA represented a mother in private law proceedings at the Hitchin County Court. His instructing solicitors were based in Norwich. After the hearing he spoke to his client and asked her why she had chosen solicitors over in Norwich when she resided in Hertfordshire, approximately 90 miles away. She told him that there were only two firms in the local area that undertook legal aid family work. One had already been instructed by the father and, because of a conflict (a legal reason why they could not act) the other firm could not represent her. She told him that each time she rang other firms, she was told they either:

(a) could not see her in the time frame she required (she was the respondent in the proceedings and had been served with an application, and therefore had an urgent court date); or

(b) they were not taking on new legal aid clients—i.e. they were already working at capacity. Each firm then provided the contact details of another firm for her to try and so on. She went on to say that having tried a few firms, this firm was the first one that she found who were willing to assist, and they were based in Norwich.

[56] Research Review—Child Care proceedings under the Children Act 1989, Julia Brophy (University of Oxford) May 2006 (Commissioned by the DCA) p 17

No Representation—no Voice

Case Two:

These case studies were supplied to a member of the FLBA by a solicitor in the Kent region. They highlight problems with access to appropriately qualified representation in care proceedings.

A mother was notified on about 13 December 2008 that a local authority would seek an order removing her nine year-old son at a hearing on 17 December 2008. She tried two or three solicitors who informed her that they no longer undertook legal aid family cases. She found one who would but who could not offer her an appointment until 13 January 2009. It was only a matter of chance that the court listed the second hearing in the case after her appointment with her solicitors, and that nothing disastrous happened to her child.

The same solicitor was approached in the first week in March 2009 to represent parents in care proceedings in the third week of March (at the time of writing) but they would have had to wait for an appointment. The parents felt unable to wait and so were forced to go to non-specialist solicitors who did not have any expertise in child care work.

Specialist Representation—Making the Difference

Case Three

A barrister has given the following example of where specialist advocacy really did make a difference.

> *"I have contacted two solicitors who represented parents in one care case (I appeared for the father). The parents had inexperienced representation in a Non-Accidental Injury case (i.e., baby shaking etc) and the appropriate experts had not been instructed for the listed fact-finding hearing. The parents were unhappy and instructed new solicitors and counsel. We managed to get the fact-finding hearing adjourned. Additional experts were instructed, new fractures were found (organic cause, i.e. not inflicted), the case was transferred to the High Court and the baby was returned to the parents when they were exonerated following the experts' evidence. Had they not obtained experienced representation, findings against the parents would have undoubtedly been made and given the number of fractures of different ages there would have been a real risk that the baby would have been removed permanently from them and quite possibly adopted."*

What the Real Effects of the Cuts would be—the True Impact Assessment

Case Four

A barrister explains what the effect of the cuts in fees would be on a case he had undertaken:

> "I am a barrister practising exclusively at the family bar. I was instructed to represent a mother in a case listed in the County Court with a time estimate of five days. The applications were for care orders in relation to all four of her children and for placement orders (with a view to adoption) for the youngest two who were both under three years old.
>
> There were in excess of 1,500 pages of evidence. My preparation time was 22 hours prior to the hearing, most of which was done on the preceding weekend (working eight hours on the Saturday and 10 hours on the Sunday). On the second day of my cross-examination of the social worker in the case, the Judge indicated that I had undermined the local authority's case and that they should review their care plan, with a view to the children being returned to their mother. The children were returned within five days and the case was adjourned to monitor the mother's progress which I am pleased to say, at this stage, is going very well.
>
> Under the proposed fee regime I could not economically have undertaken this case. I was specifically briefed to conduct the final hearing as a specialist family barrister. My instructing solicitor had appeared on the previous directions hearings and I received the papers only a week before the hearing.
>
> As I understand it, in view of the fact that the case was stopped on the second day, I would only be entitled to the basic £523 brief fee plus the standard preparation fee of £195. It is inconceivable that anybody could be expected to undertake this sort of work for this sort of fee with no account being taken for the complexity of the case. There were approximately five lever arch files of papers which necessitated me cross-examining the social worker by way of cross-referencing papers from one bundle to another. I do not believe that a more junior member of the bar would have been able to have successfully undertaken this exercise with sufficient expertise. I am quite sure that other members of the bar of my seniority could not justify undertaking this sort of case under the new fee proposals. As a former solicitor who regularly conducted this sort of case, I can assure you, that I wouldn't have done so either when practising as a solicitor—I was simply not at that stage of sufficient experience to do it.
>
> It would not be cost effective for a senior solicitor to undertake this sort of case for the fees proposed, bearing in mind they would not be paid the same preparation fee as the bar in any event.

This is a typical example of a case where two children are likely to be brought up within their natural family with contact with their extended relatives because the fees scheme now is just about sufficient to fund effective representation in their case. The enormous cost savings, not to mention the social consequences of keeping the family together, are obvious. Under the proposed regime, without proper representation these children would be likely to be adopted with almost certainly no contact to their natural family. This is not an isolated example.

In this case the child itself was represented by a guardian and a lawyer which you might hope would guard against this sort of potential of miscarriage of justice. In fact the children's guardian and her legal representative were supporting the local authority in this case.

This decision is not being appealed by the local authority or the guardian. It is an example of a success within the current system which could easily have been a miscarriage under the new one."

Loss of Representation—Loss of Family Life?

Case Five

"I was instructed last year to represent an intervenor (a person who is not a parent but against whom the local authority sought serious findings) in care proceedings listed for five days in a region where there is only one set of chambers doing family work. There were five parties. The local authority, represented by counsel of more than 16 years call, was seeking a whole raft of findings about my client's behaviour with a view to demonstrating overall that he 'represents a risk of harm to any child in his care'. The allegations included serious physical and sexual assault, including of a minor, and gun violence. The local authority was seeking this finding because the mother in that case was expecting his child. My client is 20 years old, has mental health problems, and was abused as a child. After a contested hearing the findings that were made consisted of those aspects of the father's behaviour which he had felt able to admit following advice, and did not include any findings of sexual assault, including of a minor, or allegations involving gun violence, and the actual risks he presented at the time of the proceedings were defined sufficiently narrowly by the Judge for the local authority to agree to conducting a pre-birth assessment in respect of the unborn child.

In February this year I was asked to represent him again on a contested Interim Court Order in respect of the newly arrived baby, then still in hospital. The local authority proposed immediate removal. An inadequate pre-birth assessment had been carried out, and the guardian supported our application for a residential assessment. The mother had suffered the death of a child previously and would not have been able to engage properly with a community-based assessment if this child were removed occasioning further bereavement. After a two day contested hearing an order was made for residential assessment, the cost to be borne by the local authority. The assessment is progressing well.

The points arising out of this case which demonstrate the harm of the fees proposals are:

(i) Equality of arms was essential given the seniority of local authority barrister and the serious consequences of the local authority's position;

(ii) A contested hearing resulted in the family being able to remain together;

(iii) Failure at either of these contested hearings would not only have resulted in this child being removed, but would have impacted on the ability of these two very young and vulnerable parents to parent any child. There is clearly a long term cost benefit to the public purse from parents like these being assisted and supported to parent their children themselves.

(iv) Given the volume of papers and complexity of issues the contested hearing over two days would be so poorly remunerated under the fees proposals as to make it highly unlikely that experienced counsel would deal with it. The father's mental health difficulties alone would have made this a difficult case for any inexperienced lawyer.

(v) Given that this hearing took place in a court centre where there is only one set of local chambers doing this kind of work, it was virtually impossible for all counsel to be local at short notice. My return fare to this centre was £50 per day. If my travel costs were not met I would be doing this case for less than minimum wage under the proposals.

(vi) The father's fragile mental health required a lot of support. My instructing solicitor was fantastic and spent hours with him taking instructions for his statement, even collecting him from home to bring him to court. Without this support he would not have been likely to have engaged in the court process in the way that he did or have engaged with his mental health team after the first hearing. The solicitor simply could not economically provide that support under the new fees proposals."

PROTECTING THE MOST VULNERABLE

Case Six

"I was instructed to represent a 17 year old mother of a 16 month old child who was facing a removal and adoption care plan. She had a horrific family history of which she was essentially a victim, but had had the good fortune to have a very experienced solicitor who secured her a place for residential assessment and treatment. She flourished there and they recommended a gradual move into independent living via a supported mother and baby foster placement. There were a few hiccups which the experts considered to be predictable. The local authority however lost its nerve and changed the care plan to removal and adoption. By making many and persistent requests for detailed disclosure and a careful analysis thereof it was revealed to be a badly flawed decision-making process. There were judicial review points, human rights arguments, and the whole process was very complicated, not least because an issue of credibility arose which placed our client's word against that of one of the local authority employees.

I spent best part of two days constructing a detailed opening document which prompted a complete volte face from the local authority at court on the first day of the ten day final hearing. Having considered our arguments, the local authority reverted to an independent living care plan. Mother and baby are now living together in their own rented accommodation and doing well.

I have little doubt that the fact she was able to access very senior and specialist counsel and a very competent and highly experienced specialist solicitor made all the difference."

A FLEXIBLE PROFESSION—WORKING IN THE PUBLIC INTEREST

Case Seven

"A case I was involved in last week saw a colleague attend the Family Proceedings Court on the Wednesday to oppose an Interim Care Order with a plan for removal of a 16 month old baby from his mother who herself was aged 18 and had learning difficulties. The evidence was clear that there was a strong attachment between mother and child but it was a neglect case. The local authority was clear that it felt that the mother had been sufficiently assessed before the proceedings, so this was a vital stage in the case. There was no guardian appointed and the solicitor for the child supported the removal. The papers had been served very late in the day so the District Judge adjourned the hearing to the Thursday to allow the mother to be taken through the papers, which amounted to about 250 pages at that point—no mean feat for a learning-disabled client. My colleague was unable to represent the mother the following day and I was sent the papers that evening and also received a further 150 pages from the local authority at about 5pm that evening. I worked on the case well past 1am. It was clear to me that removal at this stage would have had an enormous impact on the way this case proceeded. We attended Court on the Thursday and again I had to take this young mother through the new documentation. The Court was unable to start hearing the matter until late in the afternoon that day. We returned on the Friday (Day three of an interim hearing). The Court refused my application for an adjournment to allow this mother a proper chance to present her case (on the basis that the local authority had already entered into a written agreement for her father to remain living in the home with her and the child) and indicated that they felt the local authority had 'very serious concerns'. Following cross-examination of the social worker and evidence from the maternal grandfather the local authority changed its interim care plan on the basis that they accepted that they could not succeed in their application at this stage.

My understanding is that under the new proposals I would effectively not get paid at all for my two-day involvement and extensive preparation as interim hearings will only be paid for the first day. Both I and my colleague are experienced barristers of 20+ years call. Counsel for the Local Authority was also experienced and very firm in the stance she was taking in respect of the removal application.

I know that I would not be prepared to have undertaken all the work and time for even the full one day fee being proposed under the new scheme. In these vital stages of a case the mother would either be represented by very junior counsel or not represented at all by the second day. Who would have taken it on at that stage for nothing or half an interim fee?"

BARRISTERS CEASING TO UNDERTAKE PUBLICLY FUNDED WORK—EXPERTS LOST

Case Eight

"I am already making arrangements to get out of publicly funded family law work as I do not think I will be able to make ends meet if fees are cut in the way that is proposed by the LSC and the Ministry of Justice.

I recently acted for a maternal aunt in care proceedings.

Both the local authority and the guardian had their mind set on a two year old child who was the subject of proceedings for adoption.

I was only instructed at the final hearing. I applied for disclosure of documents on day one and on several subsequent days. I was able to establish that the Local Authority had earlier committed themselves to a thorough assessment of my client and not followed that assessment through. I was able to establish there was an undisclosed positive assessment of my client.

The final hearing lasted eight days. I worked every waking hour throughout the course of the final hearing. I prepared detailed written submissions and conducted several hours of legal research.

The Judge made a final residence order to my client.

As far as I am aware the child is living within her family home and doing well. The child lives with her two elder cousins who she considers to be her sisters.

I do not think it will be possible to find advocates who will devote the hours that are needed to successfully put cases on behalf of parents and family members if the proposed changes are implemented.

I am nine years call. I went into publicly funded work having turned down opportunities to work for city law firms. I do not expect to own a luxurious home, but I also do not expect to struggle to pay the mortgage on an average family home; I am constantly exhausted from travelling and working long hours."

Making a Difference—for all the Family

Case Nine

"I recently concluded a care case of great complexity in the Family Proceeding Court. I represented the mother, a victim of serious domestic abuse in proceedings where two boys (7 and 5) were to be placed for adoption with foster carers who had been looking after the boys for nearly a year before the final hearing. This was the second set of Public Law proceedings for these boys who had been placed with their mother under supervision orders two years previously. Mother and father resumed their relationship and consequently the local authority pursued Care Orders for adoption. I was instructed just prior to the final hearing. The documents were voluminous as I had to consider not just these proceedings but the previous proceedings also.

I was immediately struck by the glaring omissions in the case; the inordinate delay; and the view of seeking closed adoption in these circumstances. On the first day I met with the mother for the first time; it was very difficult. She was distraught, had mental health problems (although presented quite well in these circumstances) but was utterly daunted by the proceedings and the possibility that she may never see her boys again. I had no up to date evidence to put before the Court about her or her situation and with the guardian supporting the local authority had no option but to try, notwithstanding the delay it would cause (in these circumstances it had little effect) to instruct an independent social worker to assess the situation, including contact and after half a day of legal argument opposed by all we succeeded in instructing our expert. The report was extremely thorough and although it did not recommend the return of the boys to us (the mother was already advised that there was a very slim chance of this) it did recommend face to face contact twice a year for half a day of activities and regular indirect contact.

Whilst to those not in the profession this may not seem a big deal, being there at the final hearing is a completely different story. The local authority and guardian, faced with an excellent assessment and report, acceded to contact for the mother. The mother conceded the care and placement orders. She had been advised at the first date that this was likely; but the critical point here was she was spared the agony of character assassination over three days; she was allowed to let the boys go with her blessing (and recorded that on the order); she will now see her boys throughout their minority and will give and receive gifts and cards on significant dates. The boys will know that their mother did not abandon them, had her own difficulties, but was still there for them and fought for the right to go on seeing them. What value to the mother, aunty, and maternal grandmother who were in Court when this order was made? Priceless. They came out of Court thanking us all, genuinely happy in these circumstances that this result was achieved and for the cathartic experience of the independent assessment which had helped mother feel a thorough job had at last been done and had helped her to come to her own conclusions.

I am left pondering what would have happened if the fees that are proposed had been in place when I was instructed. I doubt my clerks would even have put it before me. Based on the huge amount of hours that went into preparation and the time spent in court no doubt I would have been clerked to be elsewhere doing private ancillary relief instead—clerks have to pay a mortgage too! A junior would have undertaken the work and I doubt would have had the experience to deal with the case in this way. Could anyone not say that having experienced counsel was to the benefit of all in a vast number of ways; most of all the mother and boys?

> Would I do this work on the fees proposed if my Clerks gave me the choice? No. The work is extremely stressful, it involves many hours of preparation, usually at weekends, and I cannot run a practice doing such important work on a threadbare basis. It would involve corner cutting just to try and ensure my practice stayed afloat. In Chambers we operate a tiered rental/expenses system; the more senior the more you pay-quite rightly, to protect the juniors to ensure they survive and we can recruit quality barristers who will want to stay. How then do I survive against colleagues who practise purely commercial work and can afford the higher tier payments on their private fees whilst I am on the proposed family fees? I cannot. The conclusion is obvious, I too will only take private work and will move into other areas of law or possibly leave the Bar altogether.
>
> I wonder what the mother of those two boys would have made of that?"

Preventing Miscarriages—Keeping Families Together

Case Ten

An example of effective representation making an enormous difference to a family who otherwise faced losing their child to adoption:

> "I represented a heroin addict mother. Her two eldest children had been removed and placed with a paternal aunt, who was managing well, particularly after being rehoused. The local authority supported by the guardian claimed that the new baby should not be placed with her siblings but should be removed for adoption. By the time of the trial this was said to be on the grounds that the baby had particular health and developmental needs. The guardian had instructed an independent expert who supported this view. Both the solicitor advocate for the aunt and counsel for mother (me) and for the father opposed what appeared to be the insurmountable obstacle of unanimous professional opinion. By reference to the lengthy medical records, independent medical research and careful attention to the lengthy contact notes it was possible for us (as a team!) to demonstrate (1) that the baby's health needs were either in the past or were no more significant than that of large numbers of the ordinary population (2) that her alleged developmental need for 'quiet/calm' was belied by her responses to her siblings and other family members during busy contact sessions (and was more a function of the foster carer's neurosis than the baby's needs). The professionals' opinions were demonstrated to be effectively circular in that they relied on one another's flawed analyses rather than stepping back and looking for themselves at the available evidence."

This was a case in which, if the proposed fees were introduced, there is a substantial danger that neither the medical records nor the contact notes would (could!) have been read let alone carefully examined. The case would have appeared completely hopeless (if sad). The professionals had already failed to examine source evidence themselves in any detail but had relied upon one another's views. The advocates, by going back to the basic source material turned this case around for a very deserving aunt and a child who now has the advantage of growing up with her two siblings and maintaining ongoing contact with her unreliable but loving parents. I still have the aunt's thank you card (I didn't even represent her!).

Supporting the Judges—Doing Justice in the Family Justice System

Case Eleven

> "I have today sent you a copy of a decision of HHJ Bellamy sitting as a High Court Judge in Coventry City Council v JA, care proceedings that ended in January of this year. The outcome was that the father, who had been an illegal immigrant, obtained a residence order in respect of his two year old daughter, the Home Office having at a late stage in the proceedings indicated that if the judge was minded to make a residence order it would grant the father indefinite leave to remain so as to give effect to the court's decision in respect of the child's welfare.
>
> During the course of proceedings which commenced with the birth of the child, we had the following contested hearings: (1) whether the father could lawfully participate in a section 38(6) residential assessment given his immigration status at that time; (2) whether the section 38(6) residential assessment should continue or the child should be removed before its conclusion; (3) whether a community based assessment should follow the section 38(6) residential assessment; (4) whether the local authority could lawfully and if so should provide accommodation and support services to the father given his immigration status so as to enable the community based assessment to take place; and (5) following the community based assessment whether the local authority should provide accommodation and support services to the father until his immigration position was regularised by the Home Office. The local authority position at all stages up until (5) was that the child should be placed for adoption, the consequence of which would have been that the father would have been deported. The father did not acquire the cautious support of the children's guardian until stage (3).
>
> The nature of the proceedings required the family lawyers to litigate both immigration law and administrative law/human rights issues. In the later stages of the proceedings the local authority specifically instructed counsel from the administrative law bar in place of previous family law counsel.

As paragraph 10 of the Judgment makes clear, but for the availability of experienced representation, the outcome for the father and child may have been very different."

The Judge said:

"10. The other issue that I want to raise today relates to the Legal Services Commission's ongoing consultation with respect to changes to public funding. I simply want to make the point that in this case there has been highly competent legal representation in respect of all parties at all times in this case but I do want to make the point that but for the high quality representation that the father had had, the outcome may have been very different. That again is, I think, a point that is worthy of judicial note."

Annex 2

SELECTED PRESS RELEASES [not printed]

Vulnerable women and children bear brunt of cuts in family justice system: http://www.barcouncil.org.uk/new/pressarchive/671.html

Bar Council endorses concerns contained in Lord Lamming's Report: http://www.barcouncil.org.uk/news/pressarchive/679.html

NSPCC supports Bar Council's calls to defend legal aid for vulnerable children and families: http://www.barcouncil.org.uk/news/pressarchive/681.html

Revealed: The human cost of proposed cuts to family legal aid dossier of case studies submitted to Ministers: http://www.barcouncil.org.uk/news/pressarchive/696.html

Parliament puts spotlight on impact of family legal aid cuts on vulnerable children: http://www.barcouncil.org.uk/news/pressarchive/706.html

Annex 3

MEDIA COVERAGE

SPRING 2009

Summary

— The Times, 6 March 2009 (Frances Gibb)

Women and children "at risk as family courts reach breaking point"

— Evening Standard, 6 March 2009 (Martin Bentham)

More than 300 barristers gather to protest over cuts to the family legal aid budget

— Law Society Gazette, 6 March 2009 (Catherine Baksi)

Legal aid cuts "drive barristers away from family work"

— BBC Radio four, *Today Programme,* 7 March 2009

— The Guardian, 10 March 2009 (Afua Hirsch)

Vulnerable children are victims of legal funding cuts, experts say

— Letter to The Times from Lord Bach, 10 March 2009

— The Times, 12 March 2009 (Frances Gibb)

Plans for more cuts to legal aid to put families "at risk"

— Letter to The Times from Frank Feehan; letter to The Times from Lucy Theis QC, 13 March 2009

— Birmingham Post, 18 March 2009 (Tom Scotney)

Cuts in family legal aid budgets will put vulnerable children in the West Midlands at risk

— Bylined article in The Times, 25 March 2009 (Anthony Hayden QC)

Family courts: the poor and most vulnerable are paying dearly

— The Times, 15 April 2009 (Frances Gibb)

"Families risk losing children" under £6.5 million legal aid cuts

— The Times, 15 April 2009 (Frances Gibb)

Barrister Belle Turner says she can't work at new legal aid rates

Annex 4

PARLIAMENTARY QUESTIONS OF RELEVANCE

SPRING 2009

Mr Henry Bellingham MP (Conservative)

Mr. Bellingham, 6 May: To ask the Secretary of State for Children, Schools and Families what discussions he has had with the Secretary of State for Justice on the effect on child protection of proposed reductions in funding for legally-aided family cases. [271506]

Beverley Hughes: The Government are fully committed to safeguarding vulnerable children and I am clear that it is important we secure the right level of support for these children within the family justice system. Officials from the Department, the Legal Services Commission (LSC), the Ministry of Justice (MOJ) and the Children and Family Court Advisory and Support Service (CAFCASS) have already had discussions about how to achieve this. Further discussions are planned in the light of the consultation responses, following the MOJ/LSC consultation on Family Legal Aid Funding 2010.

Mr. Bellingham, 11 May: To ask the Secretary of State for Children, Schools and Families what assessment he has made of the effect of reductions in the family legal aid budget on the Government's ability to safeguard and promote the welfare of children and young people. [271458]

Mr. Malik: I have been asked to reply. The consultation, "Family Legal Aid Funding from 2010", was published by my Department and the Legal Services Commission on 17 December 2008. The consultation paper was accompanied by a detailed impact assessment which considered the impact of the changes on lawyers and the public.

The consultation proposed that in future the provision of guardians ad litem for children separately represented in family proceedings would be solely the responsibility of the Children and Family Court Advisory Support Service (CAFCASS), and could no longer be considered a legal aid disbursement. This is because these are not legal expenses. The proposal was put forward following discussions with CAFCASS, who confirmed that subject to suitable resources being available they agreed with the point in principle. The consultation responses are now being analysed since the close of the consultation on 3 April. We will have further discussions with the Legal Services Commission, the Department for Children, Schools and Families, and CAFCASS, in the light of the evaluation, to agree a response to the consultation.

Mr. Bellingham, 12 May: To ask the Secretary of State for Justice if he will take steps to encourage local authorities to issue children protection proceedings. [273665]

Beverley Hughes I have been asked to reply.

Local authorities have a clear statutory duty under section 47 of the Children Act 1989 to investigate where they have reasonable cause to suspect that a child is suffering or likely to suffer significant harm. And where as a result of that investigation they conclude they should take action to safeguard and promote the child's welfare by for example applying for a care order, they must take that action. It is for individual authorities to decide when to initiate care proceedings under section 31 of Children Act 1989 when a child is at risk in their own home.

Mr. Bellingham, 12 May: To ask the Secretary of State for Justice how many child protection cases were heard by the family court in *(a)* 2005, *(b)* 2006, *(c)* 2007 and *(d)* 2008. [273676]

Bridget Prentice: The following table shows the number of care, supervision and emergency protection order applications made to the family courts in England and Wales during the specified years.

Number of (a) care applications (b) supervision applications and (c) emergency protection order applications in the England and Wales family courts, 2005–08

Application type	*2005*	*2006*	*2007*	*2008*[1]
Care applications	13,498	13,421	13,717	12,089
Supervision applications	897	938	1,069	624
Emergency protection order applications	2,736	1,676	1,459	1,722

[1] Provisional

Notes:

1. 2005–07 data cover all tiers of court, and are as published in the annual Ministry of Justice reports "Judicial and Court Statistics".
2. 2008 data exclude applications made to the High Court (which typically account for around 3%. of all child protection applications) and should be treated as provisional. Final figures will be published in "Judicial and Court Statistics 2008" later in the year.
3. Figures relate to the number of children subject to each application. On this basis, an application relating to two children will be counted twice.
4. Figures for Family Proceedings Courts prior to April 2007 are likely to be an undercount. A new method of data collection was introduced in April 2007 which has improved the

coverage and completeness of data. Any comparison with figures prior to April 2007 may be affected by the improved data recording.

Source:

HM Courts Service case management systems

An application will not necessarily result in a full court hearing in every case, as the application can be withdrawn or the proceedings otherwise discontinued before this stage is reached. It should also be noted that an application of one type can result in an order of a different type being made by the court.

Mr. Bellingham, 21 May: To ask the Secretary of State for Justice (1) what impact assessment his Department undertook before taking the decision to reduce the family legal aid budget; and what the outcomes of that assessment were; [273675]

(2) what assessment he has made of the effects on the Department for Children, Schools and Families' long-term expenditure commitments of his Department's decision to reduce the budget for family legal aid; [273663]

(3) what discussions he had with Treasury Ministers before the decision was taken to reduce the family legal aid budget. [273666]

Bridget Prentice: We have not reduced the family legal aid budget. The cost of family legal aid increased by 46% from £399 million in 2001–02 to £582 million in 2007–08, while the number of funding certificates fell by 11%, from 129,000 to 115,000 over the same period. We clearly stated our intention to make reforms to family fees in "*Legal Aid Reform: The Way Ahead*", published in November 2006, following Lord Carter's review of legal aid procurement. The "*Way Ahead*" proposals were subject to Cabinet committee clearance and were integral to MOJ's spending review settlement.

My noble Friend, Lord Bach, announced changes to the Family Graduated Fee Scheme for barristers in February, following a 30% rise in costs in just five years. The consultation response included a full impact assessment. More recently, the consultation, "*Family Legal Aid Funding from 2010*", published by my Department and the Legal Services Commission, closed on 3 April 2009. The Legal Services Commission is currently analysing the responses. The consultation covers two payment schemes, the "Private Family Law Representation Scheme", and the "Family Advocacy Scheme", which will cover representation by solicitors and counsel in independent practice. This consultation document included a draft impact assessment.

Our aim is to help as many people as possible within existing resources. In both cases the impact assessments have demonstrated that failing to address the significant increases in fees paid in recent years could risk leading to reductions in services for clients.

Mr Bellingham, 3 June: To ask the Secretary of State for Justice what assessment he has made of the effect on levels of local government expenditure of his decision to reduce the budget for family legal aid. [274732]

Bridget Prentice: I refer the hon. Gentleman to the answer I gave him on 20 May 2009, *Official Report*, columns 1445–1446W. We have not reduced the family legal aid budget. The consultation document, "*Family Legal Aid Funding from 2010*", published by my Department and the Legal Services Commission, set out proposals aimed at maintaining legal aid expenditure at 2007–08 levels. The LSC and MOJ have discussed these proposals with a wide range of stakeholders, including the Local Government Association. The LSC has also received responses from a number of councils, which are being considered along with all the other responses received. We do not believe that these proposals would have a material impact on local government expenditure, and a full impact assessment will be published alongside the final proposals.

Mr. Bellingham, 10 June: To ask the Secretary of State for Justice how much his Department has paid Ernst and Young to carry out research into family advocacy services in the last 12 months; and if he will make a statement. [278481]

Bridget Prentice: The Legal Services Commission (LSC) commissioned the research by Ernst and Young on the family advocacy market to provide additional data for the impact assessment on the effect of our proposed new legal aid payment arrangements for advocacy work from 2010. Following a public tendering exercise the LSC agreed to pay Ernst and Young £65,035 (inclusive of VAT) for this research. The LSC has continued discussions with stakeholders, since the consultation on "*Family legal aid funding from 2010*" closed and has agreed to share the outcome of the Ernst and Young research with a number of stakeholders representing legal service providers when it becomes available in the next few weeks.

The Lord Carlile of Berriew QC (Liberal Democrat)

Lord Carlile of Berriew, 6 May: To ask Her Majesty's Government whether they have proposals to secure the continued representation by solicitors and counsel in independent practice, paid from public funds, of persons involved in family law disputes.[HL3117]

The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bach): The consultation *Family Legal Aid Funding from 2010,* published by the Ministry of Justice and the Legal Services Commission, closed on 3 April 2009. The Legal Service Commission is currently analysing the responses. The consultation covers two payment schemes, the private family law representation scheme and the family advocacy scheme, which will cover representation by solicitors and counsel in independent practice.

Lord Carlile of Berriew, 11 May: To ask Her Majesty's Government what were the average net earnings after VAT and expenses of family law practitioners dependent upon publicly funded work in each of the past three years.[HL3116]

To ask Her Majesty's Government what are the anticipated total costs of legal representation in family law cases supported by public funds in the current financial year; and what were the figures for the past three years.[HL3118]

The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bach): I will write to the noble Lord and place a copy in the Library of the House.

The Lord Pannick QC (Crossbench)

18 May 2009 : Columns 1201–2

Lord Pannick, 18 May: To ask Her Majesty's Government whether they will maintain the rates of legal aid payments in family law cases.

Lord Pannick: My Lords, I beg leave to ask the Question standing in my name on the Order Paper. In doing so I declare an interest as a practising barrister, although not one practising family law.

The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bach): My Lords, my department and the Legal Services Commission have consulted on new fees for family legal aid cases for 2010. These proposals are still being developed, and discussions continue with barristers and solicitors. For the first time, the fees will fairly reward both barristers and solicitors with the same fees for the same work. Family legal aid costs have risen unsustainably from £399 million per year to £582 million per year in the past six years. We need to control these costs in order to protect services for vulnerable clients.

Lord Pannick: My Lords, I thank the Minister. However, will he confirm that the ministry is proposing to introduce fixed advocacy fees for categories of family law cases, irrespective of their complexity? This will mean a reduction on average of 20% to 30% of the payment in public funding for substantive hearings in complex cases. Is the Minister aware of the very substantial concern among judges and practitioners about the implications for children and for parents because the hearings to resolve these complex and important cases—many involving the permanent separation of parents and their children—will now be argued, if these proposals are adopted, by reason of the funding position on one side by inexperienced advocates, resulting in a much greater risk of a miscarriage of justice?

Lord Bach: My Lords, we value very much the commitment of all lawyers who work in the interests of the most vulnerable members of society who become involved in family legal proceedings. That work, which is of course paid for from the public purse, is never likely to be as financially rewarding as that for private clients, but it provides an important public service. The Legal Services Commission has received a number of very constructive and helpful responses throughout this consultation. No decisions have been made and we will be considering those responses as we develop our final proposals. It is likely that the final scheme will have more graduation and complexity, and the legal Services Commission is working with stakeholders to develop amendments to it.

Baroness Butler-Sloss: My Lords, I welcome the Minister's comment about more graduation. However, is he aware that more than 60% of legally aided barristers are women and/or BME, and that the effect of the current changes would be disproportionate on this group of people and have the real danger of leading to a reduction in diversity at the Bar?

Lord Bach: My Lords, we know that a large number of those working in this field are women, and many are BME too. We have an independent Bar, and it is clerks in independent chambers who decide who will do what work. It is not for the Government, I am afraid, to say that women should do less family work than other pieces of work, and the same goes for BME barristers. This is important work that should be done by both men and women. The figures for earnings for barristers in this field are as follows: family barristers earn on average £44,000 a year from family legal aid work, but of course are able to increase their earnings by working for privately paying clients. In fact, research by the Family Law Bar Association shows in a recent report that the average family law barrister has a gross median annual income of £93,000.

Lord Clinton-Davis: My Lords, have not all, I repeat all, legal aid cases fallen disastrously over recent years? At present, no one but the poorest is able to go to law, to litigate. What are the Government going to do about this situation?

Lord Bach: My Lords, we spend £2 billion per year on legal aid, which is a large amount by any standards. It is arguable that, at £1.2 billion, we spend too much on criminal legal aid. It is not arguable and absolutely clear that, at £200 million a year, we do not spend enough on social welfare law. That is the kind of law that we have to develop, particularly at a time of economic difficulty.

Lord Lester of Herne Hill: My Lords, is the Minister aware that, in the opinion of the Family Law Bar Association, at a time of heightened concern over child protection, the current proposals for cutting family legal aid funding from 2010 will put the most vulnerable in our society at increased risk not only of not having suitable representation, but of having no representation at all? Will the Minister ensure that the Family Law Bar Association is given a fair opportunity to respond to the Ernst & Young report when it is published before final decisions are taken?

Lord Bach: My Lords, these proposals do not represent cuts to the legal aid budget, but are designed to reduce increasing case costs. The proposed fees are based on 2007–08 figures with reapportionments across all advocacy cases so that the same costs are payable regardless of who undertakes the work. The House should know that solicitors do the majority of family work, including, these days, some of the most complex and difficult cases of all.

The Lord Lester of Herne Hill QC (Liberal Democrat)

Lord Lester of Herne Hill, 25 March: To ask Her Majesty's Government what cuts have been made in the family legal aid budgets as regards (a) public law cases where children are alleged to be at risk of significant harm and may be permanently separated from their birth family; (b) private law cases involving decisions about where children should live and with whom they should have contact; and (c) financial cases where mothers and children seek financial support from fathers who seek to hide or minimise their needs. [HL1563]

The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bach): On 12 February 2009 the Government announced changes to the family graduated fee scheme for barristers (*Official Report*, col. *WS116*). In the past five years legal aid payments to family barristers have increased unsustainably by more than 30% from £74 million to almost £100 million annually with no commensurate increase in case load. Our changes reduce payments to family barristers by £6.5 million annually, and help us to avoid reducing services to the public in order to meet the rising cost of barristers' fees.

Assuming the same volume and type of cases using counsel in the future as in 2007–08, our changes will mean the following net reductions in future expenditure on barristers' fees: (a) public law care proceedings work by 4.2% (£2 million per annum), (b) private law children cases by 9.3% (£2.9 million), (c) ancillary relief cases by 16% (£1.6 million) but from an unsustainably high base. It is incumbent on all those paid by the taxpayer to ensure that taxes are spent as effectively and efficiently as possible. However, if in future volumes increase, or cases are longer or more complex, more will be spent. We are not reducing the legal advice and assistance provided to children and families in family cases.

Lord Lester of Herne Hill, 2 June: To ask Her Majesty's Government whether they will ensure that the Family Law Bar Association has an opportunity to respond to the report by Ernst and Young into the family advocacy market before decisions are made about proposed fee schemes for family law practitioners. [HL3847]

The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bach): The Legal Services Commission (LSC) has said it will share the outcome of the research by Ernst & Young on the family advocacy market with stakeholders, including the Family Law Bar Association (FLBA), when it becomes available in the next few weeks. The report should not go to the fundamental structure of the final schemes, which are now being determined after the closure of the consultation "*Family Legal Aid Funding from 2010*" on 3 April. The FLBA has already submitted a response to that consultation. Rather the report will provide additional data for the impact assessment of the effects of the proposed scheme. The FLBA is represented on a stakeholder working group set up by the LSC which has continued discussions, since the consultation closed, on the final structure of the scheme.

Supplementary written evidence submitted by the Family Law Bar Association
(Copy of a letter sent to the Ministry of Justice)

Family Graduated Fee Scheme—Legal Aid Regulation Amendments

I am writing in response to your letter dated 26 May regarding the consultation to implement changes to the Family Graduated Fee Scheme ("FGFS") for barristers. I have attached the FLBA response to that consultation however, for the reasons set out below, we are inviting you to re-consider the decision to bring in these changes.

Background

Your account of the background is not accepted. There was very clear evidence of a reduction in appropriate representation in many areas after the introduction if the FGFS in 2001, in particular in ancillary relief cases. This was accepted at the time. The 8% put back into the FGFS scheme in 2005 was done to restore the miscalculations by the government of the impact of the FGFS in 2001, and was taken to try and stem the flow of expertise from this work. A significant number of practitioners, who had ceased undertaking publicly funded work as a result of the changes in 2001, did not return to this work.

Reforming the Legal Aid Family Barrister Fee Scheme Consultation

It is perhaps helpful to remind those who read this letter of the basis of the June and December consultation exercises. They were driven by the stated need to control expenditure on family legal aid. In the June 2008 consultation paper it was stated that spend on the FGFS had risen to £98m. A number of statements have been made regarding that alleged increase in FGFS cases, with claims being made ranging from 32% (para 2.9 December Consultation), 134% (letter Lord Bach to the Times 10.3.09), 30% (Carolyn Regan to the Justice Select Committee 16 June 2009) and now in your letter 39% or 28%.

These claims are not only incorrect but they mislead the profession and the public in the following ways:

1. They fail to acknowledge the fact that, due to the Governments own miscalculation in 2001, 8% had to be put back into the scheme in 2005. This is despite a specific request for this to be acknowledged at a meeting at the MoJ on 12 May 2009 attended by the FLBA and the ALC when they asked for this to confirmed in writing. This request was repeated in subsequent emails and has simply been ignored.
2. They fail to acknowledge the increase in the volume, which you have variously stated to be 36% (Lord Bach to Lucy Theis QC 11 March 2009), 11% (Lord Bach to Lucy Theis QC 12 February 2009) and 7.6% (letter dated 26 May 2009)
3. They fail to acknowledge the increasing complexity of cases.
4. They fail to acknowledge that the proposals in June 2008 were to reform the FGFS but we now know that the data relied upon in that consultation paper, and upon which that policy was based, was corrupted and contained cases to the value of c£10m that were not FGFS cases, and never had been.
5. That it has only been as a result of the efforts of the Bar in looking at the FGFS data (often in the teeth of opposition by the LSC who repeatedly state they are satisfied with the data) that it is now considered to be nearly "clean". However, there remain significant difficulties; most recently (on 16 June 2009) the discovery of about 3% of claims which may have been "double counted" by the LSC.
6. As a consequence of the suggestions made on behalf of the Bar the LSC data entry and classification systems have been greatly improved. For example, there is now national guidance on data entry to prevent regional variations on how data was entered and classified.
7. The reference to closed case data is of no assistance at all and it is disingenuous to use it in "head line grabbing form" as any new fee system takes time to stabilise and what you see are the short cases coming through first followed over time by the longer more complex cases.

The result of these matters is as follows:

1. As your table sets out, the spend on FGFS has in fact remained constant in the last three years (2005–06 £88.5m; 2006–07 £90.4m and 2007–08 £89.8m).
2. The most recent FGFS spend is not, as previously asserted, £98m but £89.8m, and due to the double counting referred to above will be lower.
3. In fact when you look at the last five years, in the context of the increase in volume of cases, the FGFS has generally performed well and that a relatively small number of issues that require attention could be attended to without the need to impose swingeing cuts.
4. It is therefore difficult to see how you can maintain that *"in the last five years expenditure on the FGFS has increased unsustainably"*. To the extent it has increased we can rationally and sensibly analyse that and fine-tune accordingly.

The June consultation proposed cuts of £14m from FGF cases (for example see para 5.3).

The decision announced on 12 February 2009 purported to make fixed sum cuts of £6.5m each year for the next two years to FGFS cases. It is now known that the FGFS spend, from which those cuts were calculated to be made is, at least, 10% lower.

As a result:

— The necessity for these cuts to the FGFS, let alone of the size proposed, is seriously called into question as the underlying evidence of the FGFS spend is not what it was said to be.
The calculations of the revised fees that have been undertaken have taken place on data that ~~has~~ had to be significantly revised and, as a result, the figures will need to be re-assessed in the light of the FGFS data revisions that have taken place, including the difficulties revealed on 16 June 2009.

— The impact of these cuts fixed sum cuts is going to be proportionately far greater than had previously been assessed at the time the decision was made.

— The impact of the disproportionate cuts in ancillary relief cases has not been assessed and, in fact, is not even mentioned in your letter.

— Any impact assessment undertaken regarding the effect of these cuts is flawed as it was based on erroneous information.

There is already clear evidence of an exodus from this work by those with expertise. In the Kings College report more than 80% said they planned to reduce or cease undertaking publicly funded work and this is already being evidenced from those who undertake this work on the ground. If in fact the impact of these changes is going to be far greater, due to the cuts being proportionately higher than had been previously calculated, because of the flaws in your own data, fairness dictates that this will need to be looked at again.

The FLBA, like other practitioner organisations, have always endeavoured to work constructively with the Ministry of Justice and the Legal Services Commission in making sure that fee regimes for this important area of work provide cost control and retain, as far as possible, the expertise that is so important in this area of work and the public interest clearly demands. This, of course, is covered by the duty imposed by s 25(3) of the Access to Justice Act 1999. As you will know over the past few months there have been frequent meetings and regular email dialogue, which the FLBA have fully engaged in.

However, what angers and frustrates the profession is the repeated "misuse" of data and the failure to acknowledge the valuable work that experienced advocates do and the real savings their expertise brings to the family justice system. This attitude, as much as anything, is what is making it very difficult for those who have to take the lead in these matters, to try and encourage their members to continue to undertake this work let alone try to encourage talented new entrants to enter this area ofwork.

For the reasons outlined above we invite you to re-consider the decision to bring in these changes. The evidential rationale for proposing them, namely the increase in the FGFS spend, is fundamentally flawed.

Such is our concern about this matter we have copied this letter to Lord Bach, Sir Bill Callaghan and Rt. Hon. Sir Alan Beith.

Lucy Theis QC
Chairman

23 June 2009

Annex

Response by Family Law Bar Association to Consultation on Amendments to Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001

FUNDING ORDER

1. We have outlined our position in the accompanying letter regarding the revised figures; in short they need to be re-considered in principle and in detail in the light of the re-classification of the FGFS data.

2. In relation to the proposal in paragraph I (3) that *"This Order applies in respect of work carried out by counsel under instructions received on or after [ ] July 2009, where the certificate was granted on or after 28 February 2005."* We consider this will lead to confusion and unfairness.

3. We give an example:

> A barrister agrees to take on a private law case involving children in which the father seeks an order for contact. Before the court can decide the issue it must determine at a preliminary hearing whether (as the mother contends) the father has been violent towards her in the presence of the children or whether (as the father contends) such unfound allegations are to alienate him from his children. It would not be unusual to have a "split hearing" in such a case, with general welfare enquiries taking place in the interim depending on the finding of facts made. Continuity of judiciary and counsel of course remain important. There remains uncertainty as to whether the barrister may accept instructions to deal with the first part of the hearing, but thereafter decline to accept the second part, if the hearings straddle the date of implementation.

4. The position may be more acute in ancillary relief cases, as a result of the removal of SIPs. In a case which under the existing regime (if the circumstances of the 3rd case permitted it i.e. attract SIPs for assets under the control of a party, analysis of accounts and conduct) the payment for the [mal hearing would be £731.25 but if, for whatever reason, the hearing was adjourned until after the implementation date the same hearing would only attract a fee of £325 due to the removal of the SIPs. Counsel may then decline to undertake the case as the fee would not be a proper professional fee for the work being undertaken, the fee having reduced by around 55%.

5. To our knowledge no fee scheme has ever been introduced in this way, for precisely the reasons we have outlined and illustrated above. To do so enters into previously unchartered professional waters in terms of professional obligations.

6. The only way to avoid this uncertainty, both for the profession and their professional and lay client, is for the scheme to come in, as to our knowledge every other fee scheme has done in the past, in relation to certificates issued after the commencement date.

SIPs Form

7. In the revised SIPs Form the box in the right hand com entitled "listing type" should be changed to "hearing type" and F2 should be added to part in brackets so it reads (F2/F3/F5).

Special Preparation Form

8. We have no observations on the *"Written Evidence of Basis for Special Preparation Fee"* and consider that this measure should be introduced irrespective of any re-consideration of the proposed interim FGFS changes as it relates to process rather than substance.

23 June 2009

Written evidence submitted by Rt Hon Sir Mark Potter, President of the Family Division (response to the Family Legal Aid Consultation)

1. The efficient and just operation of the family courts depends on solicitors and barristers being prepared to undertake family work. They cannot be expected to undertake this work without proper and adequate remuneration.

2. Detailed papers have been submitted by the Family Law Bar Association, the Association of Lawyers for Children, NYAS and others, commenting on the proposals, with worked examples of the actual effect on fees if the proposals are to be carried into effect.

3. Representations by the professions at to the effect of the proposals, and the willingness of solicitors and barristers undertake this work, should be taken seriously.

4. The judiciary support both the thrust and the detail of the Response of the Family Justice Council.

5. The judiciary do not otherwise seek to comment on the detail of the fees system proposed. However, they have the following general observations:

(i) The scheme proposed is too "flat".

(ii) The scheme rewards the simple, short case at the same level as the long, complex case.

(iii) It is inevitable that if the scheme proceeds representatives will:

1. either not take on complex cases at all, or

11. skimp on preparation.

(iv) The worked examples demonstrate the anomalies inherent in the proposals.

6. The family judiciary is in no doubt that:

(i) Individual solicitors and solicitors firms of quality and experience are abandoning publicly funded family work, and the rate of this process will increase if the proposals are carried into effect;

(ii) Many members of the Bar have already either cut down on or abandoned publicly funded work in favour of privately paying work, and this too is likely to increase;

(iii) Members of the Bar who can command privately paying work tend to be the more experienced, and their loss to this area of work will reduce a valuable pool of expertise.

(iv) The less experienced and competent the representative, whether advocate or solicitor, the less efficiently is the case managed.

(v) Lack of representation will lead to more and more litigants appearing in person. In general, litigants in person present the court with more difficulty in resolving, the case whether by negotiation or otherwise, than those in which there is representation. They increase rather than reduce court time, causing increased delays across the system.

(vi) Loss of experienced and committed advocates will undermine the Public Law Outline. The Public Law Outline is, as I said on its implementation, "dependent on the cooperation and expertise of the dedicated specialist lawyers who will operate it".

7. Representatives will inevitably take those cases which offer the greatest reward for the smallest amount of work conducted over the shortest possible period, thus allowing them to move on to the next simple case.

8. The proposal to pay for interim hearings at a lower rate than final hearings fail to reflect the reality of what is frequently involved. The Public Law Outline, the Adoption and Children Act 2002, and fact finding hearings in domestic violence cases amongst others, require advocates and solicitors preparing the case to prepare the case early, and fully. Interim court hearings particularly fact finding hearings, can often be longer and more complex than final hearings and their outcome can be determinative or near determinative of the final hearing.

9. Cases lasting more than 10 days, or below the High Costs funding limits, are often as complex as "High Cost Cases".

10. If cases are to be presented effectively, advocates (whether barristers or solicitor advocates) need time to prepare: reading documents, producing practice direction and other documents, analysing the case so as to present arguments and evidence effectively.

11. Inadequate representation (often created by inadequate preparation) leads to miscarriages of justice, further pressure on the courts, and increased expenditure in public funds, when cases are taken on appeal, or decisions sought to be re–opened.

12. Rule 9(5) Guardians: Separate representation and NYAS: We strongly deprecate the proposal to withdraw funding from rule 9(5) Guardians other than those appointed through CAFCASS. We do not accept the practice contained in paragraph 8.24 of the Consultation.

(i) Cases where a Guardian other than a CAFCASS Guardian is to be appointed are small in number. Judges appoint non–CAFCASS Guardians only on exceptional and specific grounds: usually because the role of CAFCASS cannot continue for one or another exceptional reason and often at the request of CAFCASS. Sometimes CAFCASS simply does not have the resources.

(ii) NYAS provides an expert and invaluable service in a small number of cases. Tribute has rightly been paid to the NYAS service in the Court of Appeal and by first instance judges. I understand that its overall budget is only 1.5 million pounds per annum.

(iii) There are other exceptional cases where a non–CAFCASS Guardian is appointed other than through NYAS: sometimes a solicitor, sometimes another individual.

(iv) To deprive the court of the facility to appoint such Guardians through lack of funding would be an exceptionally retrograde step.

Conclusion

13. Complexity of the case, and experience in representation, must be reflected in the fees payable if the family justice system is not to suffer and suffer profoundly. We support a scheme for enhanced or additional payment in the more complex cases.

14. The judiciary note that the Family Law Bar Association has proposed a reworked system of additional payments. The role of the judiciary in authorising SIPS and bolt on payments has not been easy where the criteria are not easily judged objectively.

15. If the judiciary are to continue to have a role in approving or authorising such payments:

(i) such criteria must be objectively verifiable: the judge should not berequired to conduct what is in effect an informal taxation;

(ii) the criteria must be closely defined.

Rt Hon Sir Mark Potter

2009

Written evidence submitted by the Family Justice Council
(copy of response to Family Legal Aid Consultation (extract))

1. The Family Justice Council ("FJC") was established in 2004. It is an Advisory Non Departmental Public Body ("NDPB") whose purpose is to promote better and quicker outcomes for the families and children who use the family justice system. The Council promotes an inter-disciplinary approach to the needs of family justice, bringing together experts from the worlds of the law, health and social care to support and advise Government and the family courts. It is chaired by the President of the Family Division, Sir Mark Potter.

2. Specifically, its terms of reference are:

(a) to promote an inter-disciplinary approach to family justice;

(b) to monitor how effectively the system delivers the service the Government and the public need; and,

(c) advise on reforms necessary for continuous improvement.

3. It is specifically charged with:

(a) Promoting improved inter-disciplinary working across the family justice system through discussion and co-ordination between all agencies;

(b) identifying and disseminating best practice throughout the family justice system by facilitating an exchange of information between local family justice councils and the national Council, and by identifying priorities for, and encouraging the conduct of, research;

(c) providing guidance and direction to achieve consistency of practice throughout the family justice system and submitting proposals for new practice directions where appropriate; and

(d) providing advice and making recommendations to government on changes to legislation, practice and procedure, which will improve the workings of the family justice system.

SUMMARY OF RESPONSE:

4. This is the FJC's response to the Consultation Paper: Family Legal Aid Funding from 2010: A Consultation: Representation, Advocacy and Expert's Fees, which was issued in December 2008 ("the Consultation paper").

5. The FJC takes seriously the warnings from the legal profession that if the proposals of the Consultation Paper are implemented, many members of the legal profession will give up publicly funded work.

6. In our view such an outcome will have an extremely damaging effect on the family justice system as a whole in the following ways:

(a) Significant (further) delays in the court process—caused by

i. less experienced advocates undertaking more complex work;

ii. longer (less focused) hearings,

iii. more hearings (less skilled case management),

iv. higher incidence of litigants in person;

v. greater likelihood of appeals where cases become de-railed because of inadequate representation at first instance.

(a) More litigants will find themselves unrepresented in family cases;

(b) A greater risk that the outcomes for children will not be as robust or evidentially secure if advocates undertaking this work lack sufficient experience to identify, collate and examine often highly complex, and often voluminous, evidence;

(c) There is likely to be an inequality of arms between publicly funded litigants and privately funded litigants, with corresponding article 6 implications;

(d) The proposals contemplate legal business structures which are likely to reduce the public's access to a suitably qualified and experienced family lawyer; this thereby reduces public access to justice itself.

7. The proposals, if implemented, would represent ill-considered administration of public funds. The family justice system will struggle to withstand the destructive consequences of the proposed fee regime.

THE CONSULTATION PAPER

8. The authors of the Consultation paper invite agreement from the respondents that the proposals set out within it are "balanced" and supportive of "the values that underpin legal aid—improved client access, quality services and value for money for taxpayers" (foreword page 2).

9. The FJC is unable to agree that the proposals set out in this Consultation paper achieve that balance in a number of important respects.

10. Indeed the FJC wishes to express its concern about the lack of *true* balance in the Consultation paper; the FJC recognises the wish of the LSC to achieve cost-control and maintain a predictable economy within the funding of legal services, but the tone of the Consultation Paper, and the proposals within it, reflect a depressing indifference to the value of quality legal representation and advocacy for those who use the family justice system—from broken marriages, and broken families, and with broken lives.

11. The Consultation paper proposals, we regret to say, are ill-thought through and too budget-driven.

12. The FJC therefore invites the LSC and the MoJ to stand back and review the pursuit of budgetary goals but with a keener and more conscientious regard to the wider implications for the promotion of family justice.

13. The FJC observes that one of the Consultation Criteria (section 11) is "Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained".

14. The FJC questions whether this principle is being conscientiously observed at present. This is the third major consultation on funding of legal services for family courts in nine months.

15. The Consultation criteria (see Section 11) further includes the following:

> "Formal consultation should take place at a stage when there is scope to influence the policy outcome"; and
>
> "Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals".

16. The FJC is concerned that—in view of the fact that (a) the data on which the consultation is based is acknowledged not to be totally reliable, and (b) separate research is being commissioned upon which neither the FJC nor other stakeholders are likely to be able to comment, that the Consultation criteria are not being faithfully observed.

The Context for the Consultation Paper Proposals:

17. An appropriately funded legal aid system is vital for the delivery of family justice. The LSC and MoJ should not under-estimate the central role played by the legal profession, be they barristers or solicitors, in achieving and promoting the delivery of justice for those experiencing family breakdown. This is just as relevant in the private law sphere as the public law sphere:

(a) In private law cases, there is only one thing worse for children than family breakdown, and that is badly managed family breakdown. The consequent cost to the State of poorly managed family breakdown (delayed and unduly lengthy court hearings, unduly modest financial award foisting the wife/mother into the benefits regime) is a true fiscal cost, as it is an emotional one for the parties concerned. For children, it is worse: behind every contact dispute is mismanaged parental separation. One or other of the parties feels aggrieved at the financial or other effects of the separation, war breaks out, the children get caught in the crossfire. Both sides blame the other.[57]

(b) In public law cases, children deserve swift, robust, evidence-based decision-making, corresponding with the sound principles of the Public Law Outline ("PLO"). In launching the PLO, the President of the Family Division, indicated his reliance on the "customary dedication" of legal practitioners (see "Foreword to the PLO"—April 2008). There is now a significant doubt about the continued engagement of those "dedicated" practitioners in this vital work. It would be a double tragedy for those children whose families have failed them (by neglect or abuse) to be caught up in a justice system which fails them further.

18. The FJC has many concerns about the functioning of the Family Justice system. The system needs to be properly remunerated otherwise its current blights—delay, unrepresented litigants, the suppression of expertise—will only be exacerbated. The FJC is concerned that the family justice system is overstretched to the point of breakdown; the proposals in this consultation paper are not likely to do other than to make matters worse.

19. The FJC is concerned about the impact on the legal profession (the solicitors and the self-employed advocates at the Bar) of the proposals; it believes that the public funding regime proposed—for Family Advocacy as much as for private family law representation—fails to reward cases according to their complexity. The burden on the solicitors' profession is exacerbated by the requirement (under the contracts) to do 100 matter starts over a full range of work. These budget-driven proposals individually, and certainly cumulatively, have serious knock-on effects for the public; senior practitioners in both branches of the profession will be disincentivised from undertaking the more complex publicly funded family work; it will be undertaken by less experienced practitioners. The consequent delays in the court process, not to mention the potential disadvantage to the client, are obvious to see.

20. For these reasons, it is the view of the FJC that it is essential that legal services, including advocacy services, are properly remunerated so that the public receive proper representation by suitably qualified practitioners.

21. We are concerned that these proposals give little/no attention to these wider issues.

22. The FJC is dismayed to learn of the considerable concerns surrounding the integrity of the data which underpins the consultation. It is to that important issue that we turn next.

Data/Statistics:

23. The FJC is disappointed that, as an Advisory NDPB charged, *inter alia*, with advising the Government on family justice issues, the problems with the data underpinning the Consultation were not brought to its attention directly, rather than indirectly through individual members of the Council and its Committees.

24. In light of the data problems, which it is understood remain unresolved, we feel obliged to treat with caution a number of the important assertions made in the Consultation paper which are based on the LSC's data. This is very regrettable.

25. For instance, the FJC are concerned as to the accuracy of the assertion that: "Since 2001, the estimated (net cash) cost of family legal aid has almost doubled, increasing far in excess of any increase in cases." (page 2: Foreword). Is this an accurate statistic? Is it right that "all the fees in this paper have been calculated to be cost-neutral, based on our current expenditure, and to reflect the cost of cases as they are being carried out now." (para.2.28). Can this be verified from the data?

26. When the authors write that "payments made under the Family Graduated Fee Scheme have risen by 32% in the last five years" (para.2.9) has any account been taken in that figure of the Government's re-investment of 8% into the scheme itself once it realized that the original formula had taken too much away from the practicing family Bar? There is no mention of this in the Consultation paper. If the 8% has been included in this 32% figure, should this have been made clear to the reader? Has any explicit account been taken of the fact that it is recognised that there has been an increase in the number of cases in that period?

[57] Ref Coleridge J. Resolution Conference: April 2008.

27. Some of the raw data has been provided to independent organizations responding separately (we understand that this includes the Law Society and the FLBA). The FJC has not seen it. We are nonetheless concerned to learn, from reports received from solicitors and barristers who have undertaken comparative figures analyses of sample cases, that the actual picture presented in the consultation paper is wrong.

28. It is for example asserted in the Consultation paper that generally solicitors will be "better off" under the new FAS (see for example what is said at para.5.16 of Annex G: "… we expect a majority of solicitor offices to benefit financially under the scheme, with a minimum of 42% of providers in all regions expected to increase their income. Overall, 56% of solicitors, responsible for 63% of cases, are expected to increase their income. In all regions, the providers who would benefit financially undertake the majority of cases": and see also para.5.20). In fact we have learned that the solicitors who had undertaken comparative analysis have discovered that they will not be better off, they will be worse off, and significantly so under the new regime. The only "actual" statistic involved in the analysis undertaken by the LSC seems to be the "claimed profit costs" figure. All other figures are based on assumptions and estimates which appear to be highly inaccurate and have distorted the outcome in favour of the Legal Services Commission's case that solicitors will be a lot better off under the new scheme.

29. The LSC itself acknowledges that, so far as the Bar is concerned, it is going to suffer losses. It is said (para.5.21 of Annex G): " … a significant majority of self-employed advocates' are expected to see a decrease in their income in all regions. Overall, 86% of self-employed advocates, working on 83% of cases, are expected to decrease their income, with a minimum of 77% in each region". And at para.5.22: "the majority of cases undertaken by counsel would see a reduction in the fees paid, though for over 60% of cases this would be between £1–£100. At the same time the majority of cases undertaken by solicitors would see an increase in the fees paid".

30. There are questions over whether these data are accurate. But assuming for a moment that these figures are correct (and we are concerned to believe that the figures are worse than this, given the information which we have received in relation to the solicitors), it is surely inevitable that experienced members of the Bar are going to stop doing the publicly funded work.

31. The more experienced the practitioner, the greater the "gap" in the professional market, and the more acute the problem for the numerous vulnerable members of our community who desperately needs an experienced advocates.

32. We are further concerned about the apparently inter-changeable use of "closed cases" and 'bills paid' in the consultation. Our understanding is that this refers to two different types of data. Surely this should be made clear on the face of the consultation response, otherwise a misleading impression may be (indeed, we suggest, is) given.

33. We feel compelled to raise these issues, because, as an advisory NDPB we feel that we should highlight deficiencies in the presentation of data on which the stakeholders and other interested parties to the proper administration of family justice, will have been reporting.[58] We are very concerned about the damaging effect on the delivery of family justice.

The Legal Profession and its Role in the Achievement of Family Justice

34. Representatives of the legal profession—the Solicitors and the Bar—are appointed by the Secretary of State to sit on the national FJC. They are part of a much wider team of professionals and represented disciplines on the Council who all have an ardent interest in the administration of family justice. With this cross-section of interested stakeholders, the FJC believes that it is in a strong position to comment on the significance of the proposals made in the Consultation, and specifically on the value of effective legal representation in the delivery (and achievement) of family justice as a whole.

35. Courts depend on efficient, well-prepared, lawyers to assist in the delivery of family justice. The skills which both branches of the profession—solicitors and barristers—bring to their work are manifold. Lawyers do not just possess skills in court-room advocacy (though that is vital—see below); their professional lives require much much more from them than that; they need to be able to demonstrate (among other skills):

(a) Humanity in dealing with the client; many clients visit their solicitor and barrister emotionally distraught from the consequences of matrimonial breakdown;

(b) Clarity in the taking of detailed instructions on (often) highly emotive issues, and in formulating the case on the basis of those instructions;

(c) Focus in interpreting those instructions, distilling the key points from the weak points;

(d) Speed in assimilating information ;

(e) Ability to learn swiftly fields of medicine, accountancy, pathology (for instance) in order competently to understand expert evidence, and then challenge it;

(f) Efficiency in marshalling considerable volumes of documentary material;

[58] We note that the "LSC's Family Policy team has been engaging with the Family Representative Body and Stakeholder Groups that includes representatives" from a large cross-section of the family justice community (para.3.20). There was no independent reference to engagement with the Family Justice Council, and wonder why…

(g) Flexibility in negotiations;

(h) Abilities to counsel their clients.

36. Advocacy is not just about standing and speaking. Hours and hours are invested in the preparation of the arguments, in the crafting of the case; in marshalling the arguments in an efficient way, in researching the most helpful precedent case-law, in preparing detailed written arguments both before and that the conclusion of the cases.

37. The good advocate saves court time, promotes clarity of judicial investigation, and assists in the resolution of cases fairly and with the minimum of delay.

38. These skills are gained by experience. Experience counts.

39. The family justice system needs to be funded in such a way that legally trained young people are attracted to the work, are prepared to (and can afford to) undertake the work, can continue to do the work for a number of years so that they garner the relevant experience to undertake the more complex work; and then are appropriately/sufficiently rewarded that they are indeed prepared to perform the complex work.

40. The FJC fears that the current re-working of the publicly funded regime is likely to deter the aspiring practitioner from entering the publicly funded field; once in the field, the practitioner is likely to feel, in the current climate (and the Kings College Survey referred to below confirms this) that there is little incentive in remaining within it. It will be crystal clear to the competent advocate that there will be no proper reward for undertaking the more complex family work. The proposals of the Consultation paper overpay the less complex work to the detriment of the proper funding of more complex work; such a scheme is destined to appeal only to those interested in (and able to conduct) the less complex cases.

41. As for complexity, the FJC wishes to dispel any suspicion (which the Consultation paper—and its proposals inherently hint at) that this is invented, or lawyer driven. The claim of complexity is not a ruse or peg on which to hang a false claim for enhanced remuneration. We highlight some of the reasons why we believe that cases are more complex now than previously:

(a) Litigants in family litigation come from wider and more diverse communities; cultural and linguistic norms need to be acknowledged understood and worked with; this takes time—both in the preparation of cases (assessments in particular) but often in the hearings themselves (English being a second language for many);

(b) There are generally more litigants in family (public law) proceedings; with the changes to the Parental Responsibility law, more fathers are automatically parties;

(c) There is an increased willingness on the part of the Courts more closely to scrutinise the practice of social work teams, and an expectation of high standards of service within the social work domain;

(d) There is a greater acknowledgement of the width of range of circumstances in which children suffer emotional harm; the explicit incorporation of the witnessing of domestic violence in the definition of significant harm is illustrative of this;

(e) Courts have a developing understanding, and a need for yet further knowledge and experience, of complex medical issues which form a central evidence of many non-accidental injury cases. Medical opinion on many types of alleged non-accidental trauma (previously believed to be "classic" and immutable) is ever-changing: the surprisingly high incidence of "innocent" subdural bleeding at birth is a phenomenon which was until recently relatively unknown, the multiple causes of brain injury in infants are the subject of increasing expert review, and the genetic significances of bone density and associated vulnerability to fracture—to name but three);

(f) The impact of the Human Rights Act 1998, and the incorporation of the ECHR into domestic legislation; the family courts have been astute to recognise the valuable Article 6 and Article 8 rights of families, and of children, in the context of disputes;

(g) The growing recognition of the need to engage with children in proceedings; there is (proper) judicial recognition of the increasing autonomy of young teenagers, and an increasing willingness to allow their representation, either directly, or pursuant to the tandem model, in private law proceedings. The recognition of direct involvement by children in family law proceedings corresponds with this jurisdiction's expectation of discharging its obligations under International Treaties;

(h) The higher incidence of cross-jurisdictional disputes—both in children and money cases; some of these cases require evidence from competing foreign jurisdictions;

(i) There has been an increase in the volume of relevant case-law, Practice Directions and legislation and rules; cases often involve linked issues of housing, immigration and criminal law. There is a heavy expectation that counsel will be conversant with these linked fields—and failure to be so, will invariably sound in wasted costs;[59]

(j) There is a heavy obligation to prepare detailed paperwork for most cases. Practice Directions place a heavy onus on all parties; and

[59] See Munby J. in Re M and N [2008] EWHC 2281 (Fam)).

(k) The profile of the litigants in public law proceedings is invariably complex: lives ravaged by drug and alcohol misuse, vulnerable adults with mental health issues, personality disorders and/or learning difficulties are commonplace characteristics of the parents who face public law proceedings.

42. In relation to that last category (para 41(k) above), we wish to remind the LSC and MoJ that in her review of child care proceedings under the Children Act 1989 in 2006, Julia Brophy (University of Oxford) observed that because of a combination of ill health and socio economic difficulties (coupled with personal vulnerability factors) the vast majority of families subject to statutory interventions are "struggling on the lowest rung of the ladder"; it is those families who most desperately need quality legal representation when an incident or combination of factors arise (coupled often with a breakdown of co-operation and trust between the parents and professionals) which results in statutory intervention. It is those families who, we fear, will be left without the necessary representation under the proposed fee regime.

43. The issues set out in para 41 need to be considered, and we suggest accepted, by the LSC and MoJ in the context of understanding "increased complexity". These issues need to be factored in to the funding regime, so that where cases carry some or all of these factors, the advocate is remunerated commensurately.

44. Under the "flat" Family Advocacy scheme proposed, this will not happen.

45. Proposals for the reduction in fees are unlikely to be accepted by the profession, or acceptable to the family justice community as a whole, when the actual work and the stresses associated with delivering it appropriately are increasing on all concerned.

Private Family Law Representation Scheme (PFLRS)

46. The Consultation Paper proposes standard fees for most private law aspects of the budget and standard advocacy fees for both public and private law. Whilst it must be accepted that the LSC need to control spending, it would be unfortunate if the proposals result in a reduction in the quality of service provided to those who are the most vulnerable in society. It is difficult to see how this will be avoided given the proposals which, effectively, will mean a reduction of fees in all areas of family law but most in the area of private law children work.

47. It is worrying that the needs of children within private law proceedings attract the lowest standard rates overall particularly given the vulnerability of children caught up in domestic violence and parental disputes. There is a disincentive for proper consideration to be given to ensure that children are safe. Whilst the standard fee may cover the average residence/contact dispute it does not cover those cases that come under the President's Direction of May 2008. The impact of this practice direction coupled with the Children and Adoption Act 2006—namely the introduction of new powers related to the enforcement of contact orders, have not been taken into account when looking at the structure or funding of private law children cases.

48. This is particularly worrying when it is acknowledged that private law cases are often being on the cusp of public law with separate representation of the child.

49. In "Everybody's Business", the FJC brought to the attention of the judiciary and the wider legal community the importance of fact-finding hearings in child contact cases where there are allegations of domestic violence. The FJC concerns led to the President of the Family Division issuing a Practice Direction encouraging the use of fact finding hearings in such cases to establish the veracity of the allegations as the basis for the children's (and carer's) protection. The LSC funding proposals now put in jeopardy this work by creating disincentives to effective fact-finding hearings.

50. A fact finding hearing by necessity is an interim hearing, the preparation for which involves not just the filing of statements but liaison with the police, hospitals and other public bodies. Whilst in some cases injunctive relief may already have been obtained in others it will be necessary to prepare a great deal of evidence in advance of an interim hearing.

51. The fact finding hearing may well take up to two days, in which case a fee of £198 (£154 + £44 County Court interim advocacy fee + preparation) is unlikely to attract any advocate to the role let alone one of experience. The fee equates to less than £20 per hour. This is alarming.

52. Consideration should be given to a specific fee for fact finding hearings and their preparation otherwise the incentive to ignore this very important practice direction will be too high, placing children and vulnerable adults at more risk.

53. The implementation of applications related to the enforcement of contact orders have been largely ignored in this fee structure. The introduction of the tapered fee after five hearings ignores that these types of cases may mean that there are a number of "quasi-enforcement" hearings for which the case worker will not receive additional payment (if the application to enforce is within three months of the final hearing) and the advocate will receive the lowest remuneration applicable for any other hearing despite these hearings often requiring the most skill.

54. Given that the escape is three times the standard fee the most difficult cases (implacable cases or those involving risk of harm) will be the most under-funded and, therefore, firms will either choose not to take them on or, perhaps more worryingly, the least experienced fee-earner will have the unenviable task of dealing with them.

55. The FJC understands the need for a fee "per hearing" rather than per day. However, the fact that most private law children cases conclude in one day is not a cogent argument for contending that the "exceptional fee provision" should only be applicable for day three and onwards. There is no equation with care proceedings, particularly as the advocacy rate for private law children cases is approximately 40% less than the advocacy rate for public law children cases. If 87% of private law children cases conclude in one day then the exceptional fee should apply for the 13% of cases where the case runs in to the second day. By their very nature, private law cases take less time than public law ones as there are usually fewer parties. There is an inbuilt incentive to push the funded parties into consent orders irrespective of the risk to the children and/or their parents. The gap between the standard fee and the "escape" is too wide. The current plan risks encouraging a "factory approach" to cases involving those who are often the most vulnerable people in society.

56. The FJC endorses effective hearings of the length necessary to secure this. Funding regimes should not be used to straight-jacket hearings; legislative clarity, judicial training and proper arrangements for listing should be supported to allow for efficient and effective hearings. Those who seek access to the family justice system should not be subjected to restricted hearings by the lack of funding.

57. Rule 9.5 representation; The rate for representing a child under Rule 9.5 is too low and it is unlikely that lawyers who have the necessary panel experience will take on the role. It is hard to see the justification for the lawyer representing a child under 9.5 to be paid 40% less than representing a child in public law proceedings. These cases are by their very nature (reflected usually by the Rule 9.5 appointment) complex and the role of the child's lawyer is often the most difficult; these, therefore, should be looked at separately or the fees aligned to the public law ones.

58. Forced Marriage: It is of serious concern that the LSC is contemplating that forced marriage cases should be dealt with at the same rate as a Domestic Violence injunction when even the most straight forward forced marriage cases involves many complex issues. Until the Act has been in force for a reasonable period, say two years, it should be excluded from the scheme.

59. NYAS: We take the opportunity to remind the LSC about what the FJC said in its Civil Bid Rounds response about the position of NYAS (see para.10 of that response):

> "The proposed new framework will also drive out organisations such as NYAS who have been committed to providing a service for children; it is not in their remit to provide a range of family legal services for adults. It provides specialist legal advice, support and services to vulnerable children. Its services are of high quality and great value and, consequently, the LSC should maintain a system which allows excellent organisations such as NYAS to continue their work".

60. ISWs; The proposal to cap ISW fees to £30 appears unfair when the other experts are not being capped. ISWs carry out a very valuable service in private law proceedings particularly in contact dispute cases. If they are no longer available (because the capped rates are too low) then there is a risk that the cases will continue to run on or other more expensive experts will be used.

61. ISWs are experts. They run their own businesses and have to cover their costs. They undertake a different role from that undertaken by CAFCASS practitioners. They operate entirely independently, providing autonomous skilled assessments which differ in type, variety and quality from CAFCASS work. ISWs bear all of the risk of independent experts in the service they provide to the courts, without any organisational support or structure. This is very different from work undertaken for CAFCASS, which now requires practitioners to work within a more prescribed framework and guidance.

62. ISWs provide courts with an expert and timely opinion often within more complex cases where an independent and balanced social work assessment is lacking. This service frequently allows courts to make better-informed and more timely decisions for children in more difficult cases. ISWs will stop doing work for courts if their fee rates are cut so drastically, and children will be more vulnerable to delay and to unfair or ill-informed decisions being made about their futures.

63. Experts: It is unclear why consideration should not be given to the capping of experts' fees (to say £150 per hour) now rather than waiting for the "change in policy" previously referred to. This would release the funds for a proper approach to fact finding. Since psychiatrists' fees are uncapped in civil cases (but not crime) it would seem sensible to "cap" all experts' fees.

64. Accreditation; It has to be deplored that the LSC has removed the incentive to specialise by removing any financial benefit to accreditation. Given these straightened times why would legal practices encourage their junior staff to improve their skills by seeking accreditation if there is no financial reward?

65. Impact on the Solicitor Practice/firm of the standard fee system; The FJC notes the wish for the fees structure to be as simple as possible in the interests of the effective administration of the scheme. This was also the hope when public law fees were standardised. However, reports from solicitors are that the administration of the scheme is anything but simple.

66. The FJC understands that computer software currently on the market is not able to cope with the complexities of running time-recording alongside standard fees and differing structures for advocacy. At least one market leader in legal case management software has indicated that it is not possible to create a system that can handle the complexity of the system as it currently exists. The standardisation of advocacy fees appears unlikely to assist. In order to qualify for a franchise the LSC insisted on computer software being installed as part of the management tools of a practice. They have now changed the system thus rendering the software as a predictor of fees/costs useless.

67. Whilst the FJC can see that the LSC may by the use of standard fees feel that it is better able to control spending, solicitors may well find that their cash flow projections will become less easy to plot. Time recording will become an ineffectual tool to determine profitability. This, together with the overall reduction of fees, will encourage firms to reduce the legal aid element of their practice.

68. The logic of the proposals is that the LSC is content for the cases it funds to be managed by paralegals under supervision, with either counsel or free lance advocates providing the advocacy. Only the most junior members of the legal profession will be able to provide legal services to LSC funded clients as it will become impossible for senior members of the profession to justify to their partners reduced profitability. (Only the most junior members of the Bar will be able to provide legal services to LSC funded clients as the "standard" fee-rate will deter the more senior practitioners from undertaking the work).

69. There is a continued disincentive to use in-house advocates even though all agree that there is an improved service if there is continuity. The consultation paper implies that the advocacy when done "in house" is not necessarily done by the case worker but by the firm's advocate in which case additional preparation will be required but not rewarded.

70. Many, if not all, so-called "free-lance" solicitor advocates are attached to a particular firm as a "consultant". If they do the advocacy for one of the fee-earners are they classed as "in-house" and, therefore, get no preparation fee? This is ill-thought-through.

Family Advocacy Scheme

71. Summary: The FJC is not able to support the creation of the Family Advocacy Scheme in the form proposed in the Consultation Paper.

72. While the FJC sees considerable merit in the proposal that solicitors and barristers should be remunerated in the same amount for the same work, the Consultation paper proposals do not achieve this.

73. It is reasonably obvious to us that no advocate—whether they be barrister or solicitor—is going to be willing to undertake the work when the structure of the scheme appears to be that the more complex the case, the less the advocate gets paid.

74. So flawed are the proposals, and such is the level of justified disquiet among BOTH branches of the profession (and others), that the FJC contemplates a serious and irreversible exodus of talented practitioners from the field of family law. This will have devastating consequences for the delivery of family justice.

75. Lawyers in the family justice system: There are considerable concerns about the state of family justice. Coleridge J. made his views well-known to the solicitors at the Resolution conference in April 2008. Ryder J. in a speech delivered for the 25th Anniversary of the Butterworths Family Law Service (July 2008) similarly referred to the fact that "there has rarely been more critical comment about the [family justice] system itself".

76. Ryder J. cited, by way of example, a number of stresses/demands on the system; they included (a) confronting the argument that secret justice is not justice at all. It is said to be partial and biased; (b) the lottery and expense of ancillary relief division; (c) the over zealous and the under resourced failures of child protection provisions and their and our obsession with snapshot justice; (d) the lack of voice for the child as a person in their own right; (e) the damage caused by adversarial dogfights between former partners in their residence and contact disputes concerning their children; (f) the lack of capacity in the courts to deal with an ever increasing volume of the most serious and complex cases in a timely fashion and as a consequence the downgrading of many legitimate medium risk and need cases as if we haven't got time for them.

77. These points are, in our view, all well-made.

78. It is our view that the proposals in this Consultation paper may well represent the "straw which breaks the camel's back".

79. In the context outlined by Ryder J. the LSC and MoJ should re-consider very carefully whether it is right to undermine those advocates who represent the most disadvantaged and vulnerable in our society at a time when they are most in need of effective representation.

80. Ryder J.'s views were re-inforced by Wall LJ in his speech to our Lancashire Local FJC a little over 12 months ago; in that speech, Wall LJ observed that without any, or any appropriate or adequate reciprocal recognition by government that the system has to be properly resourced, and those who work in it adequately remunerated, the system would collapse.

81. Wall LJ continued that the family justice system:

> "… is serviced by dedicated participants, none of whom is in it for the money. Sitting as I now do in the Court of Appeal, I see only too clearly the huge dichotomy between the well–paid privately funded lawyer in commercial litigation and those struggling to make a living doing publicly funded child care work. The simple fact of the matter is that publicly funded child care work will never be, and cannot ever be, financially self supporting. It will have to be funded by the State: indeed, the State, in my judgment, owes a clear duty to the disadvantaged children of inadequate parents to protect them from harm. That is a duty which the State must fund, and in my judgment it cannot look to the social work and legal professions to subsidise it. We have all done everything we can to make the system work. We have good practice coming at us from all directions. The PLO, the latest Practice Direction on experts, the Practice Direction on domestic violence, all of which I welcome, demonstrate how far we have come. The burden is now on the Government to support us. And that means providing the funding to enable us to operate the system efficiently. That in turn means paying lawyers a living decent wage and enabling courts, without undue anxiety, to take steps necessary for the protection of needy children, rather than being told that they cannot do that because there are no funds with which to do so" (emphasis added).

82. Wall LJ added (in the same speech to the Lancashire FJC) that:

> Our dedication, our goodwill, our passionate belief that our function is to address the best interests of vulnerable children and families is not being recognised by a government which, however much it pays lip service to the welfare of children, is frankly indifferent to disadvantaged children and young people who are the subject of proceedings, and simply refuses properly to fund the family justice system, relying instead on the fact that we have always got by in the face of government indifference, and will continue to do so."

83. He further added that

> …Government pays lip service to the special skills which need to be demonstrated by social workers, advocates, experts and judges required to operate care proceedings in the family justice system. But at the same time, it starves the system of the resources which are required to make it work, and, as I understand the matter, it proposes to pay fees to lawyers engaged in the work which are so low as to make it uneconomic for legal practitioners, particularly solicitors, to continue to do it.

84. The "harmonised" scheme—standard rates without graduation: The LSC proposes (para.6.5) a "new harmonised Family Advocacy Scheme under which all advocates will be paid the same for advocacy". It is said *(ibid)* that this is "a graduated scheme" which is based on a range of base fees for different categories of family work and the type of work undertaken.

85. In truth, the FJC sees little graduation in the scheme. It is a "flat" scheme and unashamedly so. The most graduation which is apparent is a different fee payable for interim and final hearings, with an uplift claimable for hearings in the High Court; a bolt-on is said to be claimable in care and supervision cases that resolve at the Issues Resolution Hearing. This 'graduation' will be insufficient to attract, or retain, experienced advocates into the work.

86. Lawyers leaving family work: The consequence, the FJC fears, will be a flight from the legal professions (employed and self-employed) on all sides. In its response to the "Civil Bid Rounds" Consultation, the FJC made plain its concern about the proposed changes in contracting, which it believed (as it made clear to the LSC in its response) were/are likely to drive out a number of experienced practitioners from legal aid work in some areas.

87. The FJC is already deeply concerned to receive reports from local FJCs which point to an exodus of experienced care lawyers from the field. The FJC draws attention to the age profile of those on the children panel being high, with a number of practitioners reaching retirement.

88. These dedicated professionals are not being replaced with a new generation.

89. The FJC considers that the Government and the LSC should ignore these concerns at their peril.

90. The FJC further raised its concerns about the risk of the proposals specifically driving out specialist children practitioners (para.6). We said this:

> "The LSC cannot assume that those who at present focus on children work will wish or be in a financial position to develop their practices to cover all the work which will be required. A number of firms have developed expertise in children work because of a commitment to work concerning the welfare of children even in circumstances when it is not economical to do that work. The undertakings given by solicitors on the children panel to be responsible themselves for the cases both in the office and at court are not consistent with the model being developed by the LSC of a number of junior members of staff being supervised by a more senior person. Care cases are of the utmost importance; the consequence can be the removal of a child from his or her family for ever, or leaving a child in an abusive family. The LSC must recognise the importance of maintaining access to lawyers who have the necessary skills and experience to cover these cases".

91. It is a concern that the LSC appears to attach little value to the independent referral family Bar; in the Consultation paper (per Para.2.23), it is said that

> "We recognise that barristers will still continue to undertake the most complex types of advocacy but these cases will tend to fall within the High Cost Case system, which will continue to be paid as they are now".

The number of cases which is represented by the High Cost Case System is extremely small.

92. The LSC reflects the fact that "Concern has been expressed that previous changes to the barristers' Family Graduated Fee Scheme led to a reduced availability and quality of advocates. There was no evidence as to the reduced availability of advocates." (para.2.24)

93. With respect, the FJC does not believe that this is right.

94. In 2004, a report from Frontier Economics was commissioned by the Department for Constitutional Affairs—*A market analysis of legal aided services provided by barristers* (March 2004); this report revealed that 37% of the solicitors surveyed reported that they had had experience of being unable to secure a barrister in order to undertake the family work; the implications were reported to be "a detriment to the advice received by the client" or "an unacceptable delay".

95. 54% of those solicitors seeking and failing to secure the services of a barrister reported that the lack of availability of barristers was because the barristers "had said that the fees [then paid] were unreasonable". This was properly a factor in the restoration of the fees to a level which was commensurate with the complexity of the work.

96. Moreover, in a report to the Bar in 2003, Professor Gwynn Davis described the situation as one in which the evidence showed that a sizeable proportion of the family law Bar was not prepared, following the introduction of graduated fees, to accept publicly funded work (or, would perhaps do so only with reluctance when no other work is available). Professor Gwynn Davis rightly pointed out that given that there are bound to be cases in which one party is legally aided and the other is not, this could well add to the inequalities that already exist. He concluded by commenting then that "This evidence of barristers' 'flight from family legal aid' is most marked in London and the South-East, but is a nationwide phenomenon".

97. The FLBA recently commissioned a survey which was undertaken by the Kings Institute for the Study of Public Policy at Kings College London (Dr Debora Price and Anne Laybourne: "The Work of the Family Bar" "A week-at-a-Glance Survey") ("the 2008 Kings College Survey").

98. The description of the work, and the stresses on the publicly-funded advocates, makes important reading. The FJC has seen the report and would wish to draw attention to some of the following "key findings":

(a) About 22% of barristers depend on family legal aid for between 60% and 80% of their turnover, and a further 14% of barristers depend on family legal aid for more than 80% of their turnover. Female Black and Minority Ethnic (BME) Barristers have disproportionately high dependence on legal aid, with 30% depending on legal aid for between 60% and 80% of their turnover, and a further 22% more than 80% of their turnover.

(b) Since the last legal aid changes (2003), substantial proportions of experienced family barristers have stopped doing some types of legal aid work. Half of barristers exited (28%) or substantially reduced (22%) legal aid ancillary relief work, with no corresponding increases by other barristers. While private ancillary relief work reflects the greatest changes, other legal aid work has also suffered with 9% ceasing to do private law children work, and 33% reducing this greatly. Practitioners exiting or substantially reducing legal aid work were predominantly experienced practitioners with an average of 18—20 years in practice. The same sort of changes were not evident in public law work.

(c) In the event of no changes to the legal aid system, a quarter of family barristers are intending to change the way that they practice—mostly to reduce their reliance on legal aid. However in the event of across the board cuts of around 12%—13%, over 80% of barristers indicated their intention to change their practices. These are predominantly senior practitioners. This is predominantly, for those practitioners who still do the work, to stop doing ancillary relief and private law children work, but barristers have indicated that in the event of cuts, they will stop doing public law work as well. For example, forty per cent of barristers over 16 years call intend to stop totally or reduce greatly the amount of legally aided public law final hearings that they undertake.

(d) On formal measures of 'emotional exhaustion' as a factor in occupational burnout, intensity feelings are very high for family barristers. The most emotionally exhausted are those 16—20 years' call, BME females, earning in the third quartile, doing 60%—80% legal aid work, who worked more than 58 hours in the previous week, and public law specialists.

(e) Ten percent (10%) of cases are paid at less than £30 hour gross;

(f) Allegations of child abuse were made in 62% of family cases involving barristers.

(g) Family barristers work long hours and suffer considerable disruption to their home life. They mostly earn a reasonable but not exceptional professional living. The work of the family bar is detailed and complex often requiring skill and experience. Legal aid rates in graduated fee cases now lag far behind private client rates, and below rates paid by local authorities. Senior practitioners have left legal aid work since 2001, particularly ancillary relief and private law children work, and many more are intending to do so if further cuts are implemented. There is evidence that this exit will now affect public law work as well.

(h) The work of the family bar includes complex client handling, grasping complex cases, and responsibility for outcomes that may have very serious consequences such as a child being returned to an abuser, or permanently removed from a home. In addition, detailed preparation of advocacy in the form of the preparation of cross examination of experts, legal research, research into expert disciplines, the establishing of complex timelines and chronologies and the analysis of accounts all remain independent predictors of complexity even after other factors such as the number of files in the court bundle, the length of the case, the court, and a number of other complicating features have been taken into account. Even understanding and accounting for this, a substantial degree of variation in case complexity, and the related time needed to prepare the case for hearing, remains.

99. We wish to make clear that we have no doubt that similar evidence would represent the experiences of solicitors too.

Standard Fees

100. There is a depressing priority given to the economic driver in the Consultation Paper, without due consideration given to the administration of family justice. Although it is proposed that "standard fees" would be designed "to be as simple as possible so that they are easier to administer" (foreword page 2), the FJC is concerned that the lack of graduation in the fees will lead

(a) to inequity within the system—with some practitioners being paid more for less work, and less for more work, and

(b) lack of incentive to practitioners to continue undertaking this vital work, leading to quality advocates leaving the profession. This has an obvious knock-on effect on clients.

101. With respect, to measure complexity by simply paying higher fees in the High Court (foreword page 2, and later at para.2.21[60]), misses the point by a wide margin. What percentage of family work is actually conducted in the High Court? A tiny fraction. In the recent survey of the Bar (referred to above), it was revealed that the percentage of cases which fall within the Very High Cost category is about 4%; yet (as mentioned above) 62% of all cases involved allegations of child abuse and 45% of private law cases involved allegations of serious abuse.

Equal Pay for Equal work

102. The Consultation is said to be based on the proposition that the LSC "should pay the same fee for the same family advocacy work, regardless of the type of advocate carrying out the work" (Foreword page 2); this would be acceptable provided that the more complex work is paid at an appropriate level and the more straightforward advocacy work is also paid commensurately.

103. What is counter-productive, indeed unfair, is if the standard fee were to be paid across the board irrespective of complexity. Regrettably this is the trademark of the current proposals.

104. Those proposals are likely to have the following effects:

(a) They will deter able practitioners from doing the complex work

(b) They will lead to an exodus from both branches of the profession;

(c) They will lead inexorably to a situation in which more junior/less experienced advocates would be undertaking the more complex work—this has serious knock-on effects for (a) the client (who may not be receiving the appropriate level of expertise) and (b) the Court system (this would be more likely to lead to longer hearings and more delayed as the inexperienced advocate grapples with the complex issues, and additional directions hearings are required because of lack of focused preparation which ordinarily comes with experience).

105. At para.5.34 of Annex G, it is said that: "There is no provision within the legal aid budget to remunerate all advocates at current self-employed FGFS rates. Our initial analysis shows that this would cost the fund an additional £49 million a year equating to a reduction of 160,000 instances of face-to-face civil legal advice each year. The impacts are also a result of the frequency of use of self-employed advocates." Why not?

106. We note that under the Family Advocacy Scheme simple hearings will be remunerated at twice their previous level of remuneration at the expense of remunerating the more complex hearings; it seems to us that it may be difficult for the LSC MoJ to justify this approach as a proper distribution of public funds.

[60] Para.2.21: "The scheme proposes higher fees for more complex cases where there is an objective identifiable factor such as higher fees for hearings that take place in the High Court and different fees for different types of hearings".

WHAT IMPACT?

107. The Consultation invites comments on the "impact" of the proposals. At para.2.3 we are invited to comment on "the impact that these proposals and the proposed changes to expert scope will have on clients and practitioners". We deal with these impacts in turn.

108. Family Advocacy scheme: Impact on the legal profession: It is noted that the Consultation purports (Annex G para.6.3) to address the "the impacts on solicitors and self employed advocates who practice at the Bar", and that the authors of the Consultation "are seeking to ensure that the proposals do not have greater impacts on the income of any particular provider group".

109. *Impact on the Bar and on solicitors:* There is a recognition that 85% of the self-employed Bar will experience a reduction in their fee-income under the new scheme. There will be a greater (adverse) impact on practitioners—solicitors and the Bar—in London than elsewhere in the country, and, significantly, an adverse impact on BME providers—both solicitors and the Bar—than on their white counter-parts. These adverse impacts cover both the Private Family Law Representation Scheme and the Family Advocacy Scheme.

110. *Impact on the BME/women practitioners:* It is obvious that the proposals are going to have a disproportionate impact on BME and women practitioners—both solicitors and the Bar. Specifically in relation to solicitors the FJC reminds the LSC and MoJ of its comments in its response to the Civil Bid Rounds Consultation, in which the FJC made the following comments (paragraph 5) (we set it out in full for ease of reference):

> "BME solicitors are much more likely to join firms undertaking legal aid work arising out of choice/recruitment practices and patterns or a mix of both. A reduction in the number of firms will be likely to reduce the numbers of BME practitioners. This will raise issues of diversity and choice of representation, since BME litigants frequently tend to instruct BME solicitors. These tend to be in smaller practices which would be less equipped to expand areas of practice. If they merge with larger firms there is a significant risk of loss/dilution of the specific service they will be able to offer BME clients. In addition BME practitioners are only now reaching the point where sufficient progress has been made for them to be better represented on bodies such as the children panel. The proposed changes will have a negative impact on this."

111. The proposals in the current Consultation Paper will (para.6.36 Annex G) will have a greater adverse effect on BME practitioners at the Bar than on their white colleagues. The reasons for the existing impact of publicly funded regime on BME practitioners are varied and complex; they arise in part out of historical issues of discrimination before BME women even reach the profession. Whatever the background circumstance, it is not in any way an appropriate or just response to simply implement proposals which serve to compound that disadvantage in this disproportionate way.

112. Very worrying (para.6.54) is the recognition that the proposals will have a greater impact on female self-employed advocates than on their male colleagues.

113. *BME cases and BME parties:* The FJC is concerned that, by reference to the Consultation exercise itself and its impact on the lawyers, the proposals have an adverse impact on BME cases/BME clients; we note what is said at para.6.27 that: "Our analysis of the Private Family Law Representation Scheme between cases involve white clients and those involving BME clients shows that 59% of cases involving BME clients and 65% involving white clients expected to experience an increase in remuneration." For FAS—Private there is a discrepancy in remuneration (adverse to the BME clients) per case of 6% between BME and white clients (slightly lower discrepancy in FAS—Public).

114. *Impact on recruitment to the Judiciary:* The judiciary is drawn from practising solicitors and barristers. It is vital that the judiciary represents the diversity of the communities it serves. The Family Division is at least able to boast a higher percentage of women appointments than any other division of the High Court; but the percentages are still too low. Appointments from BME backgrounds to all tiers of the judiciary are still disproportionately low. If BME legal practitioners are driven away from family work, the pool from which judicial appointments are drawn is correspondingly reduced. The potential for BME appointments wanes; this is not in the interests of the promotion of good family justice.

ACCESS TO JUSTICE

115. The Consultation Paper rightly refers to the Government's obligation under Section 25(3) of the Access to Justice Act 1999.

116. The statutory duty under Access to Justice Act 1999 is to secure that 'individuals have access to services that effectively meet their needs' [s 4]; this requires there to be available sufficient suitably qualified and experienced lawyers to undertake the more complex work. Access to justice is an ideological and not an economically driven commitment

Section 25(3) of the Access to Justice Act 1999 provides that

3. When making any remuneration order the Lord Chancellor shall have regard to—

   (a) the need to secure the provision of services of the description to which the order relates by a sufficient number of competent persons and bodies,

(b) the cost to public funds, and

(c) the need to secure value for money.

117. Lord Irvine introducing the second reading of the Access to Justice Bill in 1998: said this:

> "People value their legal rights highly. They feel deeply frustrated when they cannot secure them. A major component in deciding whether a State provides a decent quality of life for its citizens is the extent to which it secures for them access to justice".

118. Lord Carter emphasized (2006 Review of Legal Aid Procurement) that it is essential that clients have access to good quality legal advice, and confidence in the service they are given. A diverse and sustainable supplier base is essential for clients of diverse backgrounds to have confidence in their legal services.

119. We are concerned that the proposals in the Consultation paper dilute this important feature of the professional services offered by the Family Bar.

120. Indeed in family disputes before the Courts, it is perhaps more important than in other fields of litigation that the advocate "fits" the case. In those cases where important decisions are to be taken about the future upbringing of children (particularly where the families involved are from the most vulnerable in our society where there is a risk of permanent removal of children to substitute care), we believe that there is a strong case for absolute (or near-absolute) choice of advocate.

121. Surely the purpose of legal aid is to serve the public by enabling each of its members to have access to the kind of legal assistance that is essential for the understanding and assertion of our individual rights, obligation and freedoms under the law. Because of the awareness of "rights"—enshrined most conspicuously in the ECHR—and society's justified expectation in being able to access the courts to assert those rights and freedoms, there is a high obligation on the Government to ensure that this is achievable. Our "laws and freedoms will only be as strong as the protection that they afford to the most vulnerable members of our community".[61]

Experts

122. We note that it is said that "The cost of disbursements in closed cases, which is mostly accounted for by the instruction of experts, has increased by 58% since 2004–05." (para.2.9).

123. We would like to know why the Experts Committee of the FJC has not been directly consulted about this figure, or about the proposals.

Business Models/Economic Research

124. We note with interest what is said about Alternative Business Structures. This plainly raises interesting questions outwith the immediate scope of the current consultation. It is surely likely that partnerships involving the Family Bar will have the effect of reducing access to justice (particularly in the regions) as the pool of available advocates able to accept instructions will be reduced by the risk of conflicts of interest. This is not in the public interest.

125. The FJC have learned that, following the launch of the Consultation Paper in December 2008, the LSC has now (and recently) commissioned Ernst & Young to undertake significant market research into the market for family advocacy services. It is said that this has been commissioned in order to evaluate the impact of the proposals on practitioners; presumably this will be fundamental to any assessment of these proposals.

126. It is very surprising (to say the least) that this research was not commissioned *before* the Consultation proposals were made.

127. So—the FJC asks—what is the evidence base (from existing qualitative research) which supports the proposition set out in the Consultation paper? A number of assertions about business models underpin the consultation—but are they capable of being validated? Is it right that "solicitors are increasingly using in-house advocates to provide advocacy services"?. Is it right that "the market is already over-supplied with junior self-employed advocates, firms are taking on these professionals as employed advocates"? Our information tends to show that it is solicitors who are moving to the Bar. How many of the solicitors firms have "trained staff (i.e. dedicated advocates) available to provide a seamless service for clients." (para.2.10)? From its own experience, the FJC questions the validity of these assertions, and further wonders why, if this is reliably asserted, the LSC has commissioned (after the launch of this consultation process) the independent market research in order to collect, or establish the veracity of, the evidence.

128. The FJC reads with some dismay that:

> "The consolidation of legal service providers to achieve greater economies of scale, effectively using the latest developments in IT and the systemisation of more routine processes will enable legal aid services to benefit from these reforms. It is already predicted by legal commentators that, within five years, significant amounts of legal advice will be delivered online. This will bring real

[61] Opening of the Ontario Courts (2007), Chief Justice McMurty.

opportunities for innovative and creative firms, in terms of realising savings in overhead costs and achieving greater profit margins on fixed fees. It will also improve the services that they are able to offer clients" (para.2.12).

In the difficult and highly emotive field of family law, when personal contact between professional and client is so vital for a true understanding of the client's needs, it is depressing to read of the promotion of advice "on-line".

129. A worrying assumption appears also to have been made (ref the passage in the paragraph above) that the very people who most need advice will have access to (or indeed even be able to use) "on-line" facilities.

130. It is more depressing still to read of the "economies of scale" given the pressing need of the public to be able to have access to a choice of solicitors—a choice which will be denied them if legal services are offered on supermarket principles.

131. The Legal Services Act 2007 may spawn new legal business models. The Bar Standards Board has recently consulted on this within the Bar. The reality is that the Bar and the solicitors' profession do still need (and value) the current/existing business model; both branches of the profession recognise the value-added element which the other brings to the efficient administration of family justice. Both have worked well together in the past and propose to continue to do so.

Proposals

132. The FJC does not propose, nor does it see it as its role, to advocate a firm or detailed alternative proposal for the funding of legal services. It does wish, however, to suggest some pointers towards the creation of a more robust family advocacy scheme:

(a) First, any proposed scheme should be founded on (and clearly illustrated by) reliable and validated data; this is the only way in which the stakeholders in the family justice community are going to draw confidence from a scheme; (*there appears to be very little confidence in the reliability of the current data and the conclusions which are drawn from them*);

(b) Any family advocacy scheme can be built on the central tenet of equal pay for equal work; that is to say, as between barristers and solicitors, complex work is paid for as complex work whether it undertaken by solicitor or barrister; simpler work paid for as simpler work in a similar way; the fee must reflect the work; (*this is likely to be agreed in principle between the branches of the profession*);

(c) There should be inherent graduation built into any advocacy scheme to ensure that the more complex work is remunerated appropriately; (*this is rightly one of the fundamental objections to the current proposals*);

(d) Graduation can still be achieved (and contained) by a set of non-discretionary (i.e. objectively verifiable) principles; (*this assists in achieving cost-control for the Government, while facilitating appropriate reward for the more complex cases*).

(e) The scheme should be created in collaboration with the professions, so as to achieve a greater level of support from them; (*there is unprecedented "root and branch" opposition to the proposals from the professions and indeed from others in the family justice community; this opposition is in our view well-founded. In the circumstances, the views cannot safely be ignored. If a scheme is imposed on the professions which they validly object strongly, there is a real risk that they will cease doing the work and young aspirants to the legal profession will be deterred from joining; this is not in the interests of family justice*).

Conclusion

133. Many of the proposals set out in the "Family Justice in View" document (December 2008) are about to be implemented nationally; some are to be the subject of "pilot" testing

134. The principles underlying "transparent" justice in the family courts are of course laudable, and the FJC supports them. The specific proposals when implemented are undoubtedly going to place additional strains on the family justice system: the issues in family cases are not going to contract as a consequence of this initiative; indeed additional issues—around media access, reporting restrictions, jigsaw identification of children the subject of proceedings—may actually lead to greater complexity and delay in the progress of hearings, and in resolving family disputes.

135. Those are issues we may need to debate elsewhere.

136. But it may be prudent for the LSC and MoJ to ponder on the irony of inviting wider scrutiny of the family courts at the very point when its fees proposals are likely to have the effect of reducing the quality and availability of legal services to vulnerable families and children.

2009

Written evidence submitted by Rt Hon Beverley Hughes MP, Department for Children, Schools and Families

Thank you for your letter of 3 March about CAFCASS: implications of proposals for reform of family legal aid funding. In 2004, the CAFCASS service in the UK was separated into two separate organisations, with CAFCASS England being a central Government agency, and CAFCASS in Wales becoming within the remit of the Welsh Assembly.

The Government fully appreciates the work that the National Youth Advocacy Service does in working to achieve greater outcomes for vulnerable children and young people. The Children Act 1989 also supports this and makes the welfare of the child its paramount consideration. At this stage of the consultation process I do not feel it is appropriate to comment as I would not want to pre-empt the consultation. All responses to the consultation will be carefully considered before the Legal Services Commission (LSC) publishes their response.

Officials from the Department for Children, Schools and Families are working closely with the LSC to ensure the best outcome possible.

Minister of State for Children, Young People and Families and Minister for the North West

23 March 2009

Supplementary written evidence submitted by Lord Bach, Ministry of Justice

FAMILY LEGAL AID FUNDING FROM 2010

I am writing further to your letter of 1 April 2009, in relation to the joint Legal Services Commission (LSC) and Ministry of Justice (MoJ) consultation paper, *Family Legal Aid Funding from 2010*. In particular, the Committee asks for further advice on the research report by Ernst & Young, commissioned by the LSC to help inform the final impact assessment of this consultation, following concerns expressed about the research by the Family Law Bar Association (FLBA) and Association of Lawyers for Children (ALC).

The *Family Legal Aid Funding from 2010* consultation closed on 3 April following an extension of the original closing date of 18 March, which was granted following requests from representative bodies including the FLBA and ALC, to allow providers further time to set out their concerns.

You will recall that I replied to a letter of 3 March from the Justice Committee on this consultation, following concerns expressed by the National Youth Advocacy Service (NYAS) about the impact of the proposals on the funding of guardians and independent social work in cases involving the separate representation of children. In my response I set out the context and rationale for our proposals in detail, so I do not intend to repeat them here. However, the main aims of the consultation are to harmonise solicitors' and barristers' fees into a single fee scheme, the Family Advocacy Scheme, and to introduce a new Private Family Law Representation Scheme to replace hourly rates of payment to solicitors. The consultation proposals aim to contain inflationary costs and maintain legal aid expenditure at 2007–08 levels, while maintaining the same level of service to clients.

Background to the Ernst & Young Research

The LSC has commissioned the Ernst & Young research as part of their responsibility as a commissioning organisation, seeking to ensure that client access is protected and in order to gain a fuller economic understanding of the market for family advocacy. The LSC assure me that it was always their intention to commission this research, and to look at its findings in parallel with the consultation response provided by stakeholders. For information, I attach the text of the invitation to quote for the research issued by the LSC, which sets out the required remit in detail. In summary, the main issues to be assessed are as follows:

- An assessment of the market segmentation of family advocacy services.
- An assessment of the current levels of supply of family advocacy services, and whether or not there is excess supply.
- An assessment of the price elasticity of supply for family advocacy services.
- An assessment of the current rates of utilisation of self-employed and in-house family advocates.
- An assessment of the optimum annual earnings of a fully utilised self-employed barrister under the proposed FAS payment rates.
- An assessment of the extent that different types of advocate compete for the same family advocacy work.

As a courtesy, and as part of their continuous and transparent dialogue with providers on the consultation proposals, the LSC has informed stakeholders that they are carrying out this research, and as a further courtesy, the LSC has also agreed to share the final report produced with stakeholders when it is available.

The research is not considered to be fundamental to the structure of the final fee scheme, nor is it considered that stakeholders needed the information produced in this report to respond to the consultation. The consultation asks stakeholders to consider the proposed structure of the fee schemes and not the principle of harmonisation, which is already widely accepted. The research will, however, be relevant in any final impact assessment of the effects of the proposed scheme. We await the outcome of the research with interest, and I can assure the Committee that we will act as fairness dictates in relation to its findings.

Data Issues

You also refer to the concerns expressed by stakeholders regarding the data used to inform the proposals in the consultation (as at annexes B-E of the consultation [*not printed*]). Lucy Theis QC, Chairman of the Family Law Bar Association (FLBA), raised some concerns about data accuracy, on behalf of the FLBA and other representative bodies, including Resolution, the Association of Lawyers for Children (ALC) and the Legal Aid Practitioners Group (LAPG). The FLBA's concerns centred on:

(a) Data related to hearings undertaken by solicitors and collated as a part of the LSC Care Proceedings File Review ("FR2"), at annex E. The FLBA suggested that there were discrepancies between costs and recorded time, and inconsistencies over who had conducted hearings (solicitors or barristers). The FLBA also expressed concern about lack of consultation with practitioners about the methodology of the file review exercise.

(b) Data on the Family Graduated Fee Scheme (FGFS) for barristers, relating to data for closed cases and bills paid for 2007–08. The data was intended to provide details of all hearings undertaken under the FGFS by barristers, and associated payments for each hearing. The FLBA suggested that the FGFS data included other payments made to family barristers, including payments made under solicitor hourly rates for Family Proceedings Court appearances (not authorised to be paid under the FGFS), and payments to barristers under the FGFS in Very High Cost Cases.

In response to the FLBA's concerns, I understand that the LSC has met regularly with the FLBA's analyst and has resolved many of the data issues. With regards to the FGFS dataset, which concerns barrister payments, this did contain payments to barristers made under the maximum fee principle at solicitor rates. However, the fee scheme we are proposing covers this work, as well as normal FGFS work, so it was only right that those cases should be included in the calculations.

With regards to the File Review (FR2) data, which concerns solicitors' payments, the FLBA is concerned that the practitioners from whom the LSC requested files were not consulted prior to the commencement of the review on the analysis or interpretation of solicitors' files. However, the factors the LSC were looking to gather information on were shared with some practitioners. I understand that this input was sought on whether it was appropriate to look at these factors as potential drivers of complexity and/or cost drivers in cases. Where they had additional thoughts, these were incorporated into the FR2 exercise where information could be collected objectively by the file review team. All the data has now been shared with relevant stakeholders.

The LSC is continuing to work with the FLBA's analyst to resolve any remaining concerns that they may have with regards to the FR2 and FGFS data, as well as having discussions with the FLBA and other stakeholders about the structure of the new scheme. Whilst we are naturally concerned to ensure agreement can be reached as far as possible on any remaining data issues, I understand that none of the issues identified has been of sufficient statistical significance to materially impact on the proposals. The LSC is confident that the data is sufficiently robust to underpin the new fee scheme, and will write to stakeholders to clarify the position when it has considered the consultation responses received.

In respect of the Committee's request to examine any "finished product" after the summer recess, it may be helpful if I outline our current timetable in detail. Our legal aid reform programme is about maximising access to legal aid for the future and we have been working steadily towards this over the last few years. The first phase, as set out in *Legal Aid: A sustainable future* and Lord Carter's report, *Legal Aid: A market based approach,* in July 2006, was the introduction of new fixed fee remuneration schemes under a new Unified Contract from October 2007. This was followed, in June 2008, by the consultation on reductions to the Family Graduated Fee Scheme for barristers under which expenditure has risen unsustainably in the last five years. The LSC also consulted late last year on the procurement of new contracts from 2010, and published a summary of responses to this consultation on their website, on 15 April. They are aiming to publish the final policy on procurement at the end of June, in advance of the civil bid rounds for new contracts that they plan to run in September this year.

The final proposals on family fees (and amendments to civil fees introduced in October 2007) are planned to be published in August this year so that providers can produce realistic bids during the bid round from September, based on the final fee schemes. The LSC will then announce successful bidders in December and, allowing for any appeals to be heard, will notify successful bidders of the outcome in early March. I regret, therefore, that this timing means that the scheme will need to be finalised before your committee could consider it after the summer recess. It is important that we continue to work towards our current timetable for implementation as the current contracts expire in March 2010.

The LSC are now analysing the responses to the consultation (of which there were just over 1,500, including responses from the FLBA and the ALC). The LSC will continue a close dialogue with contracted providers through regular meetings with stakeholder groups such as the LSC's Family Representative Body Group and its Family Stakeholder Group throughout the evaluation period. Once the consultation responses have been considered, we will remodel the fee schemes to take account of changes suggested by stakeholders. The LSC will work closely with the Law Society and the Bar to ensure that any concerns about the data used for remodelling the schemes are addressed as soon as possible, and to agree an optimal way of assessing the impacts of implementation on the self—employed Bar.

I would of course be happy to answer any remaining concerns that the Committee has about our proposals, or their timing.

Parliamentary Under-Secretary of State
Ministry of Justice

30 April 2009

Written evidence submitted by The Law Society
(copy of response to Family Legal Aid Consultation (extract))

INTRODUCTION

This response has been prepared by the Law Society, the representative body for over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the solicitors' profession and lobbies regulators, Government and others.

We welcome the opportunity to respond to this consultation which outlines proposals for fixed fees in private family law from the issue of proceedings until the final hearing, and proposals for fixed fees for a Family Advocacy Scheme to cover both private and public family law.

The Law Society wishes to highlight the contribution made to society by the work of family legal aid practitioners whose clients include the most vulnerable adults and children in society. It would be a catastrophe if any change to the remuneration scheme caused family firms to re-consider in large numbers their commitment to legal aid work.

The Law Society believes that legal aid should be targeted at achieving good social outcomes for clients but the aim of the proposals appear to be to ease the administrative burden on the LSC. Vulnerable clients deserve access to good quality advice. If this is not available, such clients may be prevented from receiving the legal assistance required to maintain, or return to, their regular life in society. Failure to take effective early action on domestic abuse will inevitably result in increased burdens on the state later on. If such abuse is not tackled early, it can lead to costs in health and child care for the children, together with expensive criminal proceedings and custody expenditure.

The proposed remuneration for practitioners is so low that legal aid practitioners are once again questioning whether they can continue legal aid work. The Law Society believes that remuneration by fixed fee should only apply to simple work, such as undefended divorce, and that remuneration for complex work should be by hourly rate to reward those who grapple with the most complex cases.

The LSC states that the proposals are cost neutral overall, and that there will always be winners and losers. We have grave concerns that the winners are those firms which have few qualified panel member staff, and avoid complex cases. The proposals incentivise those who are tempted to bring cases to a premature end. This circumvents the purpose of court proceedings, which is to settle matters once and for all, in a manner which has the best outcome for all but particularly, the most vulnerable client, the child.

QUALITY

Quality must be at the forefront of any legal advice and representation scheme otherwise the scheme becomes worthless. It is vital that legal advice and representation be delivered by skilled and experienced practitioners if the client is not to be denied access to justice. We refer to the principles for public service outlined in the paper *Side by side and Implications for Public Services* produced by the Council on Social Action.[62]

> The best (public service) systems in the world treat each citizen as a unique individual … and then tailor the service to meet these personalised requirements.

The issue of quality of representation must be given priority if clients' welfare and best interests are to be fully and properly met within the legal process. These proposals do not encourage skilled practitioners to remain in legal aid, and clients might be let down. As a consequence some will drift into lives without purpose, costing society many millions more than the administrative costs the LSC anticipates saving by its proposals to treat all work the same, regardless of complexity.

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[62] The work of the Council on Social Action is funded by the Office of the Third Sector, Cabinet Office. The Council on Social Action was set up by the Prime Minister.

We are also hearing that the cost of young offender institutions amounts to £200,000 per individual. Skilled work from the beginning of a case may well prevent some of this expenditure, as well as preventing the misery of blighted lives.

Access

We are also concerned as to the effect these proposals will have on access to advice, especially in public law where four to five firms are frequently required, and in some cases even more. This scheme is based on the assumption that firms will have a sufficient volume of work to be able to handle those cases where the costs exceed the standard fee, because they will have a sufficient number of cases where the costs are lower.

It may be that large firms, which are likely to be in the major cities, can sustain high case loads, but outside the cities there are numerous firms in small towns which cannot, because there is not the market to sustain large caseloads. Such firms may well find that they are running at a loss as they do not have enough cases for the mechanism to work. Some firms may subsidise this work through other private work, but partners may take the view that this cannot be continued, and so decide not to undertake any more legal aid. If such decisions are made on a major scale, there may be a serious effect on access.

This is happening already. In the Medway region in Kent, 13 solicitors are listed by the LSC as undertaking legal aid work, but only three are actually taking on new clients. The remaining 10 have either terminated their legal aid contracts, or are winding down and taking no new cases.

It is also unrealistic to expect clients in rural areas to secure proper representation from firms in large centres of population many miles away. Family law is an area of law where personal contact, and the securing of proper instructions based on personal interview by an experienced, skilled advisor are vital. Again we refer to the CoSA paper above. Many clients will be disadvantaged if there is a significant exodus of smaller firms from this area of work.

Practitioners report that in public law, there are cases with over eight parties, especially with an increasing number of putative fathers and grandparents involved. Firms are often prevented from acting due to conflict of interest issues arising from previous cases in a generational client population, and we have doubts that the provision of 4/5 firms per procurement area is sufficient, given that some procurement areas cover whole counties.

Cost of Private Family Legal Aid

Carolyn Regan in the foreword to the consultation indicates that cost increases pose a serious threat to the legal aid budget and need to be addressed.

However, the table on page 33 of the consultation indicates very small increases in the average solicitors profit costs' column for the four years from 2004/5 to 2007/8.

	2004–05 pc	*2007–08 pc*	*% increase over four years*
Children Act	£1,726	£1,995	13%
Finance	£1,875	£1,909	1.8%
DV	£930	£982	5%

In private family law, it is not solicitors' costs which pose a threat, but those of barristers and experts.

The Consultation

We answer the questions as posed in the consultation, but repeat our assertion that hourly rates are the most suitable form of remuneration for skilled practitioners undertaking work, which will radically change the lives of vulnerable clients, particularly children.

Data Issues

We are concerned that inconsistencies in the data, on which this consultation is based, have not yet been properly explained by the Legal Services Commission. This response is written on the basis that the consultation paper is based on robust data. If this is not the case, we will wish to submit further views once the situation has been clarified.

April 2009

Supplementary written evidence by The Law Society

FAMILY LEGAL AID REFORM

1. *Summary*

1.1 The Law Society is the representative body for over 115,000 solicitors practising in England and Wales. The Society negotiates on behalf of the solicitors' profession and represents the profession's interests to regulators, Parliament, Government and others.

1.2 These observations are submitted following the Committee's oral evidence session on 16 June 2009. The Law Society supports the Legal Services Commission's (LSC) policy to harmonise the rates of remuneration between solicitor advocates and barristers on a cost-neutral basis. Currently barristers are often paid significantly more than solicitors for the same work and the Society does not think this is appropriate for 2010. In order to secure best value for the taxpayer, the same fee should be paid for the same work, regardless of who delivers it.

1.3 The Society agrees with the concerns of the Family Law Bar Association to the extent that it believes there are problems with some of the assumptions used for the LSC data modelling, which means that the impact of any proposals cannot be accurately assessed. The Society differs from the FLBA in that it believes that further work by analysts should reduce the impact risks to an acceptable level in order for the harmonised advocacy scheme to be finalised in time for the summer deadline for 2010 contract bidding. If, however, that does not prove possible within the time available, then a short delay may be necessary, but that should be in the order of a few months, rather than until 2013.

1.4 Even accurate historic data would not give absolute certainty as to the impact of the new scheme, as the family justice system, local authority policies and Court processes do not remain constant. The Society requires the LSC to propose a structure that appears broadly fair, properly paying for more complex work, while reasonably reflecting that even the simpler work has a cost to it, with fee rates that are acceptable to our members.

2. *Family law solicitors*

2.1 Family law solicitors advise and represent the most vulnerable individuals in society, and those, who at certain times, become vulnerable because of the emotional upheaval in their domestic lives. Solicitors are the first point of call for those requiring legal advice on family issues. Solicitors are obliged to incur heavy overhead office costs in order to provide reasonable access for clients across England and Wales. Many matters are settled by agreement and only if settlement cannot be reached, are Court proceedings then instituted.

2.2 Most family solicitors work in firms situated in inner cities, high streets and rural areas. These firms vary in size from one fee earner to, perhaps, fifty fee earners. The LSC currently lists 2,658 family solicitor contracts which undertake legal aid work. Payment rates for this work are about one quarter to one half of the remuneration rates for private clients. The Society believes that this represents excellent value for money for the taxpayer.

2.3 Family work is divided into private law and public law. Private law covers disputes between individuals, problems following divorce or relationship breakdown, such as children contact and residence issues and financial problems, also domestic violence and now forced marriages. Public law involves the representation of children, parents and extended family members within the context of care proceedings when a local authority has intervened in order to protect the child(ren).

2.4 Solicitors undertake all the preliminary work on cases. When matters come to Court, the advocacy may be conducted by the solicitor with conduct of the case, a self employed solicitor advocate or a barrister. Reasons why the solicitor with conduct of the case may conduct advocacy include continuity for the client; having a deep understanding of the intricacies of the case; reduced cost to the client or the legal aid fund.

2.5 A junior solicitor might instruct a barrister or a self-employed solicitor advocate because the case is particularly complex and requires a higher level of advocacy skills than the junior solicitor possesses. Both junior and senior solicitors might instruct a barrister or a self-employed solicitor advocate because the professional obligations created by other client work, and the administrative burdens imposed by the LSC, make it impractical for the solicitor to be in Court, perhaps for many days consecutively; or because the solicitor has a clash of hearing dates. There is now an increasing trend for firms to train and instruct in-house solicitor-advocates to undertake Court hearings. The Society believes that this should be encouraged as in many cases this delivers the best service to the client.

3. *Solicitor advocacy*

3.1 The Society believes that solicitor advocacy is increasing, and will continue to increase, especially if parity of remuneration with the Bar is achieved. Barristers in public law advocacy are paid for advocacy preparation. Solicitors are not. Answering oral questions in the House of Lords on 18th May, Lord Bach spoke of:

3.2 "….reapportionments across all advocacy cases so that the same costs are payable regardless of who undertakes the work. The House should know that solicitors do the majority of family work, including these days, some of the most complex and difficult cases of all".

3.3 The Law Society supports Lord Bach's statement.

4. *Current legal aid remuneration structure*

4.1 Apart from the limited tailored fixed fee scheme, until October 2007 solicitors were remunerated according to the time spent on a case with various uplifts for panel membership and complexity. In October 2007, regional fixed fees were introduced for all care proceedings work in public law except advocacy, and for the work prior to the issue of proceedings in private law work. The LSC called this Phase 1 of the reform process.

4.2 Although allowing for escapes, fixed fees do not remunerate the more complex work. Some firms, which are highly dependent on family legal aid work, and do not have the subsidy of private clients, are struggling financially.

5. *LSC April 2010 remuneration proposals*

5.1 The LSC now intends to introduce fixed fees for private law legal aid work from the issue of proceedings until the hearing, and a Family Advocacy Scheme to cover both private and public law family work. This is known as Phase 2. There is also a debate about how solicitors should be paid for preparation for the examination of witnesses in Court, the preparation of skeleton arguments and submissions. Although this is an advocacy function, solicitors are not paid for this work. The LSC argues advocacy preparation is included within the casework fixed fee. If, and to the extent, that this is correct, it means that the money is being shared between those who do advocacy work and those who do not. The LSC is now putting forward proposals for a reduction in the casework fees in order to pay a separate fee for the preparation of advocacy.

5.2 The LSC published its proposals in the latter half of December, although informal discussions had previously been held with representative bodies on some of the proposals. All representative bodies reported to the LSC that the proposals as discussed with them were unworkable.

5.3 Once publication had taken place, the Law Society took soundings from its members. The majority were agreed that they would struggle to remain in business.

5.4 The consultation took place over three months and just before it closed, the LSC, in one last attempt to persuade solicitor firms of the benefit to them of the proposals, released impact assessments showing the impact on each individual firm of the proposed changes. Unfortunately, the manner in which they were released gave little hope for optimism. Firms found it very difficult to reconcile cases they had undertaken with the references given by the LSC. Hours of work were put in with little effect. In paragraphs 5.4.1–5.4.3 below, the Society sets out the views of one firm that examined the assessment:

> 5.4.1 The solicitor who persevered wrote that it had taken her two hours to sort the references to the cases as no names were given. Although she was informed she would receive an additional £7,723 under the new scheme, the cases selected were non Public Law Outline (a new process for care cases), and the LSC had added on to the impact costs payments for advocates meetings. In other words, the LSC had treated as a benefit to the firm under the new payment structure, a payment that the firm would have received for new work that was not required in the period covered by the base-line data, even if the new scheme were not introduced.
>
> 5.4.2 The final hearing fees were also overestimated as she had instructed counsel, and no one sat behind Counsel, so the LSC included an allowance of £614.52 which would not in fact have been payable.
>
> 5.4.3 She also felt the LSC picked the files selectively. She felt the shorter hearings had been selected and that travel costs had not been worked out. Two of the final hearing costs were listed as £44.27 and £73.15 which she could not understand at all because they were so low.

5.5 When the Law Society considered assisting some firms to understand their data, and enquired as to the cost, the Society received a response from a firm to the effect that:

> 5.5.1 The list covered 122 cases in all. The two senior cost draughtsmen had already taken some time to track down file references and set up templates for analysing data. They estimated they would now be able to analyse 10 cases per working day. The best estimate to complete the case load would be 10 person days at £150 per day equalling £1,500.

5.6 The Society fully appreciates that the lack of conformity between firms' actual case costs and the LSC estimated impacts was produced by applying assumptions which might work in the aggregate, but did not produce believable impacts at the individual firm level. However, the result was that solicitor practitioners were not convinced that they would benefit from the LSC proposals, and the LSC agreed to remodel the proposals.

6. *Ernst and Young survey*

6.1 Shortly after the consultation closed, the LSC contacted the Law Society on 22 April to discuss the Ernst and Young solicitor survey. Solicitors were already consultation fatigued, having responded to the 84 questions in the LSC Family Funding consultation in the spring, and having tried to work out the LSC Impact Assessments. The Law Society was asked to obtain feedback as to whether firms would respond to this survey. In paragraphs 6.1.1–6.1.3, one solicitor wrote:

> 6.1.1 She was not sure she would complete it as it involved going back to 2007 which would mean getting out papers. She could report her annual income but not broken down as the LSC required. Sorting out payments to previous partners, staff etc, would be time consuming. The hours worked could only be an estimate as she doubted that anyone had that information to hand now.
>
> 6.1.2 Questions on whether advocacy would be undertaken if paid more highly were self serving as most solicitors do their own advocacy if within their expertise. She imagined firms would guess as they will not bother to check. If she answered the survey correctly it would take her and another member of staff at least one day. She felt whatever came out would be either ignored or manipulated. The government would not put up fees just because an accountant indicates it is in order.
>
> 6.1.3 On balance she felt she did not have the time to complete the survey and imagined other firms would feel the same.

6.2 The Society thinks that the above response is indicative of the weary feelings of the profession after numerous consultations which lead nowhere. In the light of this feedback, the Society made clear to the LSC that if it wanted firms to provide data to Ernst and Young, it was wholly unreasonable to expect firms to undertake the hours of work this would entail for nothing. The Law Society suggested that the LSC pay solicitors for the time they would have to spend, to compensate for the loss of fee income, but this was not forthcoming. The Society is unaware of the steps taken by the LSC to publicise this survey but certainly many firms appeared unaware of its existence.

6.3 The Society completely rejects the LSC's argument that solicitors are at fault for not providing the evidence to the Ernst and Young survey.

7. *Data issues*

7.1 The LSC has used management information data, and data collected from samples through file reviews, to develop its proposals and model the associated fee values. Unfortunately the data does not provide perfect and complete information and, in order to arrive at fee values, some assumptions have been made, based on estimates from the file review exercises—these introduce the possibility of error into the modelling. Our main concern is that no work has been undertaken to ascertain the level of risk associated with the assumptions made.

7.2 The LSC is now taking a different approach to estimate costs of solicitor advocacy and volumes of solicitor advocacy, believing that applying more sophisticated techniques to existing data will produce better estimates for the "missing data" and because some estimate is needed to be able to calculate fee values.

7.3 The Society accepts that there has to be a certain amount of realism as to what can reasonably be expected from the LSC in terms of data collection and other constraints. Whereas the Society appreciates that perfect data is not possible, the Society has yet to be satisfied that the LSC has done enough to assess the impact of the fresh proposals on solicitors.

7.4 However, many firms are struggling financially. The Society believes that the combination of harmonisation of advocacy fees and proper payment for preparation for advocacy may bring that extra income to enable them to survive. The Society would like, if possible, to resolve the outstanding data issues with the LSC in time for the bidding process for 2010 contracts which commences at the beginning of September. There will not be a further bidding process until September 2012, and the Society believes a three year delay to harmonisation will be deleterious to firms.

7.5 Even complete, accurate historic data will not give absolute certainty as to the impact, as the family justice system, local authority policies and Court processes do not remain constant. Therefore, the Society urges the LSC to propose a structure that appears broadly fair, properly paying for more complex work, whilst reasonably reflecting that even the simpler work has a cost to it, at rates our members think are acceptable.

7.6 Whereas the Society agrees that more experienced advocates, whether solicitors or barristers, should be remunerated appropriately for more complex cases, the Society must stress that solicitor overhead costs are significant, and the firms on the front line may simply cease to exist if remuneration is insufficient to cover the costs of delivering the service. Alternatively, firms may reduce the quality of staff. If even apparently simple cases are delegated to inadequately qualified staff, because the fees have been reduced too far, vital elements of issue may be missed at an early stage, and the cost to rectify this may be considerable. This may make the final cost in excess of a more complex case managed by a senior solicitor in the first instance. At the moment, the majority of clients are legally advised, and manage to settle their domestic issues without Court hearings. A reduction in the availability of solicitors' services may result in more people representing themselves, and fewer cases settling.

8. *Family legal aid firms' current difficulties*

8.1 Family legal aid firms are struggling to cope with demand. The Society quotes from a firm who wrote to it in the last week:

> 8.1.1 At the moment we are having difficulty fitting clients in and for the first time I can recall in my career we are having to offer appointments in three weeks which I hate. However, we have told people to try elsewhere and they have often come back saying they cannot find anyone else to take them earlier.
>
> 8.1.2 I hate having such a long time but apart from keeping working at weekends and Saturdays as there as so few legal aid firms around now there seems no alternative.
>
> 8.1.3 We have taken on a legal executive and promoted an assistant to paralegal which is helping but with the uncertainty of the (legal aid contract) bid process and not knowing whether our bids will be accepted and what fees we can be paid I cannot risk taking anyone else on at present.

9. *Legal Aid advice deserts*

9.1 The Society has concerns that advice deserts are developing. For instance in Cumbria, the designated Circuit Judge has stated that there are advice deserts in the south of the county. Public transport in Cumbria is poor. There is only one child panel member in Barrow, and the work has to be covered by solicitors in Blackpool and Carlisle. It is also understood that a large firm in Carlisle will not be applying for a new contract in 2010. The Society also has concerns as to the amount of supply in Kent and Hertfordshire.

10. *Conclusion*

10.1 The Society believes that the LSC should have taken note of the concerns of representative bodies as long ago as autumn 2008, and considers that proper data collection should have taken place before this to achieve such radical proposals.

10.2 However, the bidding process for the 2010 three year contracts will take place in September 2009; full details of the contracts on offer must be available to providers from early August at the very latest.

10.3 Again the Society would stress that solicitor firms have high office overheads. These firms, which usually undertake a variety of legal aid work, are struggling financially, require the certainty of new contracts and the increased remuneration that harmonisation with the Bar will bring. The Society believes that the best future in family legal aid lies with firms undertaking the greater proportion of their own advocacy in-house.

10.4 The Society invites the Committee to recommend that the LSC take on additional resources to deal with data issues, and to measure the impact of the new proposals so that the bidding process can proceed in September. The Society would also ask the Committee to urge the LSC to properly monitor the results following the implementation of the new fee schemes over a period of two years.

10.5 Baroness Butler-Sloss in her evidence asked for a redistribution of the money in a more effective way to pay more to those who do the complex cases and less to those handling the simpler cases. The Society would like to sound a note of caution as to the definition of complex and simple cases. Often what appears a simple case becomes complex as the case progresses, especially bearing in mind the lengthy delays currently being experienced. The Society believes that experienced advocates should be properly remunerated, but would remind the Committee that even those simpler cases have a cost which must not be ignored otherwise the foundations of the family legal aid system will collapse.

10.6 The Society requires the LSC to propose a structure that appears broadly fair, properly paying for more complex work, while reasonably reflecting that even the simpler work has a cost to it, with fee rates that are acceptable to our members.

30 June 2009

Written evidence submitted by the Legal Aid Practitioners Group

LAPG is an independent membership organisation representing several hundred firms and organisations working under LSC contracts.

Our members are spread throughout England and Wales. They range from sole practitioners to large legal aid firms, from firms with a contract in one area of law to firms with contracts in all or almost all areas. A significant number of our members carry out family work.

LAPG is represented on numerous government and other stakeholder and advisory groups including the Legal Services Commission Civil Contracts Consultative Group and the Family Representative Bodies Meetings.

THIS SUBMISSION

Following on from the hearing on the 16th June we thank the Committee for the opportunity to submit evidence. We have had the benefit of reading the response from Resolution. Many of our members are also members of Resolution so there is considerable discussion and unanimity of views. Like Resolution, many of our members are high street practitioners and have not been represented by the views already submitted to the committee.

LSC PROPOSALS

The LSC's proposals as set out in their recent consultation were addressed by LAPG in our response which will be attached to this paper. However since then we have been involved in a number of meetings trying to resolve the issue of fees payable.

We completely agree with the proposal from Resolution [Ev 105–108] that fees for solicitors and barristers should be equal. It is not right that barristers are paid more for carrying out the same work. At present their overheads are likely to be considerably lower than solicitors' overheads so the proposal to harmonise does not equate to complete equality.

We are greatly concerned about any delay in implementing the proposals. While in an ideal world we would like to see more money being paid by the government to run legal aid services we are realistic that at a time of recession all we can press for is for efficiencies to be tackled and for our members to be paid at a reasonable rate. The LSC have identified spending on the Bar's FGF scheme as increasing and we seek a prompt solution so that hard pressed family practitioners will remain in practice.

We too support the ALC advocacy fees model in principle but with the same caveat as Resolution i.e. that in remodelling fees must not be taken from other parts of the family legal aid budget.

We too do not want any delay in payment of preparation time for solicitors and support the proposals for increasing the fees for the level three fees.

DATA

We applaud the detailed work that FLBA is carrying out on the data presented by the LSC. We hope that there will be a solution to the data problems. However we have had to ask ourselves if the faulty data affects the ability to remodel the fees and put forward proposals for a new scheme. With some concerns we have taken the view that we can proceed in this way notwithstanding the flawed information.

CONCLUSION

This is a time of great uncertainty for providers. For a firm that does all or several areas of law the decisions that need to be made in the next few months are momentous. There are changes proposed in many areas of legal aid work.

LAPG's preferred solution is for the current negotiations over family fees to continue and for the various practitioner groups to try to reach some agreement on the way forward.

We urge the LSC and the Ministry of Justice to try to resolve outstanding concerns rather than to delay the current uncertainty. We would like a simplified fee system and most importantly would like to see the remodelled fees as soon as possible before the meeting with the LSC later this week.

Carol Storer
Director

29 June 2009

Written evidence submitted by M Mackey, president of the Manchester Law Society

I am writing to you on the LSC's proposals for the future of criminal defence services, termed "Best Value Tendering for Criminal Defence Services". I am the President of the Manchester Law Society and, as you may be aware, Greater Manchester is one of the so-called pilot areas for the above scheme.

Although I write as President, I should point out that I have practised criminal law for over 35 years and I am senior partner of Burton Copeland, a nationally recognised volume supplier of services. My firm has supported previous Legal Aid Board initiatives, we do not have a reputation for aggressive billing, have always been LSC "category 1" and were preferred a supplier for criminal work in that LSC project.

As a practitioner myself, and representative of others, I am anxious that the LSC appears to be pressing ahead with yet another hopeless initiative; this one being a straight run to disaster; for defendants, even the innocent, the criminal justice system and, of course, the practitioners who facilitate access to justice in the provision of legal advice and representation.

I appreciate that mainstream opinion may not concern itself with the provision of a legal system that strives for justice, except, of course until there is a major and high profile miscarriage, such as befell my client, the late Sally Clark.

My key point is that what the Government is proposing is not "best value" or indeed any other sort of tender. This is an auction based on lowest cost. This risk, and the consequent potential for either significant reductions in service quality, or simply supplier failure, following a "loss-leader" bid, was highlighted by your Committee itself in its 2007 report on the Carter review. The problem is that there is no provision for the assessment of quality to be a factor in successful bids. The reason for this is that, despite the years since legal aid was entrusted to the Commission, they have never been able properly to assess quality. In your 2007 report your committee said "Lord Carter and the LSC envisage a bidding process against the criteria of quality, capacity and price. Not much is known about the LSC's current thinking about the design of the tendering process." It does not appear that the LSC has advanced its thinking on "robust quality control" beyond setting a floor.

The so-called "peer review" approach seeks no more than "threshold competence"; and that is a phrase coined by LSC, not mine. Small wonder then that over 90% of all suppliers achieve this. Nevertheless, achievement of threshold competence is the only quality criterion proposed in bid qualification; therefore competition will not, and cannot, take place on quality of supply.

As a practitioner, I have tendered (successfully in some cases) to provide legal services direct to the government itself. It seems when procuring for itself, the government is rightly concerned with cost, but also every tender I've completed requires demonstrations of quality, innovation and so on.

The proposals have so many flaws that I could not begin to address them in a letter so for the detail I refer you to the responses to the LSC's consultation from [the Law Society] [Legal Aid Practitioners Group] [others?].

I do ask that your committee consider an urgent review of what is proposed. Unfortunately, the time scale proposed by LSC is such that within months it will too late for action.

26 June 2009

Written evidence submitted by Baroness Delyth Morgan of Drefelin, Department for Children, Schools and Families

CAFCASS: IMPLICATIONS OF PROPOSALS OF THE CONSULTATION ON FAMILY LEGAL AID FUNDING FOR 2010

Thank you for your letter of 3 March 2009 to Beverley Hughes requesting a response on the issues raised by the National Youth Advisory Service (NYAS) regarding guardians and independent social work. I am replying as Cafcass and family law are part of my responsibilities.

I understand that you have also addressed questions to Lord Bach about the Legal Services Commission consultation process so, to avoid repetition, I will focus on those areas on which the DCSF leads.

The Roles of Cafcass and NYAS

Cafcass' functions, as set out in the Criminal Justice and Courts Service Act 2000, in relation to children who are involved in family court proceedings, are to:

- Safeguard and promote the welfare of the child.
- Give advice to the court about any application made to it in such proceedings.
- Make provision for children to be represented in such proceedings.
- Provide information, advice and support for children and their families.

Cafcass is obliged, under rule 9.5 (1) (a) of the Family Proceedings Rules 1991, to provide a guardian in cases where the court makes an appointment. There are, however, cases where a court chooses to appoint non-Cafcass guardians (including, but not limited to delay in availability of a Cafcass guardian). These guardians may be provided by the Official Solicitor or "some other person" (which may include NYAS). Where NYAS is appointed, this arrangement should operate under the terms of a protocol that was agreed between Cafcass and NYAS in December 2005. This arrangement is consistent with the President's April 2004 Practice Direction which governs the circumstances in which rule 9.5 appointments are to be made. The protocol is at annex A for reference.

The Committee specifically asked for the number and proportion of cases where Cafcass ceased to or did not supply guardians and provision fell to NYAS. This data is not collected by Cafcass. However, from discussions with the LSC and NYAS, it appears that NYAS is being appointed in about 100–150 cases a year though this figure is dwarfed by the much larger number of appointments of solicitors as guardians, under the "some other proper person" route (rule 9.5 (1)(c), where the solicitor is not from NYAS and where any independent sociai worker (or other type of expert) that the solicitor then appoints is also not from NYAS. It is understood from NYAS that where their social work resources are limited, they understandably choose to prioritise those cases where the parties' relationship with Cafcass has broken down, rather than those where the court's sole concern is that waiting for a Cafcass guardian will cause unwelcome delay.

Cafcass already commissions services from a range of providers, including NYAS to help meet the needs of families before the family courts and the consultation proposals envisage that Cafcass would continue to do so.

Cafcass' Performance and Guardian Services

Cafcass' key performance indicators in the current operational year require Cafcass to appoint a guardian within two days of the receipt of the case in 65% of cases. Cafcass are currently achieving this. The recent increase in the volume of care cases will put pressure on Cafcass and the Cafcass Board are taking action to implement a duty system to ensure that service levels are maintained in spite of growing volumes. The key performance indicators for 2009–10 are currently being finalised but will also include a focus on early allocation and the Cafcass Board will continue to focus on this issue.

Joint Working with the Ministry of Justice and the Legal Services Commission

I am clear that it is important we secure the right level of support for vulnerable children within the family justice system. I understand that officials from my Department, the Legal Services Commission, the Ministry of Justice and Cafcass have already had discussions about how to achieve this within the context of the current tight resource climate and I understand further discussions are planned at official level to resolve issues and explore practical ways forward in the light of consultation responses.

I am copying my reply to Lord Bach.

Parliamentary Under-Secretary of State for Children, Young People and Families
Department for Children, Schools and Families

24 March 2009

Written evidence submitted by NAGALRO

STATEMENT FROM NAGALRO TO THE HOUSE OF COMMONS JUSTICE COMMITTEE TUESDAY 16 JUNE 2009

NAGALRO is the professional association for Family Court Advisers and Independent Social Work practitioners. It has over 600 members who include many of the most highly trained and experienced child care professionals in the country. They include children's guardians and independent social workers employed by CAFCASS and by NYAS and those who are self employed. Together they have many years of accumulated experience of representing children and their interests in the full range of proceedings across the family jurisdiction. Each year NAGALRO members work with around twenty thousand children in need and at risk. It is from the perspective of those children that this statement is made.

It is surprising in view of this wealth of front line experience and in depth knowledge of extremely complex children's cases, that the association was not consulted by the Legal Services Commission before the proposals were made.

NAGALRO are alarmed and dismayed by the LSC's proposals which will, we believe:

— Have a disproportionately negative effect on highly vulnerable children who are not identified as stakeholders in the consultation document. The proposals are entirely orientated around adult services and there has been no impact assessment of the likely effect of the proposed changes upon children.

— Fail to provide sustainable access to justice for children. We believe the proposals are not convention compliant and would constitute a breach of the Government's obligations under the UNCRC, the ECHR and the Human Rights Act 1998. Instead, organizational and managerial imperatives are driving an agenda which takes no account either of the principles of children's access to justice or the crucial importance of the tandem model of children's representation in which children's guardians and children's lawyers work together to form a powerful axis of child protection. Both wheels on the tandem are being attacked by these proposals—the impact on the availability of skilled children's lawyers will be devastating. By also removing Independent Social Work reports from funding scope, the LSC strikes at the heart of the court's responsibility to consider the welfare of each child and at scarce specialist services for children suffering the negative effects of family breakdown and domestic abuse. The fact that the National Youth Advocacy Service's (NYAS) highly valued and effective holistic socio legal services for children would be ruled out of funding scope are a prime example of this. As a result CAFCASS would be expected to take on an additional estimated 5–600 cases private law cases a year, at a time when more than 600 children are already waiting for Guardians and there is no spare capacity within the organization.

— There is no evidence to support the assumption that too many children are being represented. Indeed, the LSC data base is not even able to tell in how many different sets of proceedings a particular child has been involved. In fact Parliament has twice debated the need for more

representation for children in private law proceedings and twice passed legislation to achieve it. No explanation has ever been given for the fact that neither s64 Family Law Act 1996 or s122 Adoption and Children Act 2002 have been implemented.

— The proposals constitute a dangerous disconnect in thinking between two Government departments-the MOJ and The DCSF—both of whom have an overarching responsibility for children as part of the wider safeguarding agenda set out in the Government's Every Child Matters. It is very worrying that the LSC are apparently ignoring both this responsibility and Lord Laming's first recommendation after the tragic death of Baby P—"*First and foremost the Sec of State for Health, Justice, Home Office and, DCSF must collaborate in the setting of explicit strategic priorities for the protection of children and YP in each of the front line service".*

This is precisely what is not happening.

Judith Timms OBE
Policy Officer

7 June 2009

Supplementary written evidence submitted by NAGALRO
(copy of response to Family Legal Aid Consultation (extract))

INTRODUCTION

NAGALRO is the professional association for over 600 Children's Guardians, Family Court Advisors and Independent Social Work Practitioners and Consultants. Many of our members are appointed to provide expert reports in Family Courts and appear in family cases alongside medical experts. A proportion of them also work as employed or self employed practitioners of CAFCASS appointed in public and private law cases, as caseworkers for the National Youth Advocacy Service and act as independent social work experts in public and private law matters. They have substantial experience in safeguarding children's interests in family proceedings, especially in those cases where children are parties.

NAGALRO does not contract with the LSC to provide services to clients but most of our members work with solicitors who do and the proposed changes would have a significant effect on the way in which our members are able to carry out their work. Many members are actively involved in representing children in court proceedings, either in public law or as 9.5 guardians for CAFCASS or for NYAS. Given the central involvement of our members with children, families and the courts we were surprised not be named in the list of stakeholder organisations set out in the consultation document.

NAGALRO members have first hand knowledge of practice across the country and from this perspective the consultation gives rise to a number of issues of principle and practice which we will address in the first part of our response. These will be followed by our answers to some of the specific questions posed by the consultation document.

Whilst appreciating the need to use all public funds in an efficient and responsible manner, NAGALRO is alarmed and dismayed by proposals which we believe will have a profoundly deleterious and disproportionate effect on vulnerable children and their families. There is nothing in the consultation document to suggest that proper consideration has been given to the impact of the changes on the long term welfare of children involved in private law proceedings. There is no evidence base for the assumptions in the document nor is there a proper risk analysis of the likely impact of the proposals on children and young people as a stake holder group. We would strongly counsel against subjecting children's legal services to the *"move towards market principles"*. It must surely be the case that this is not the appropriate approach and that the proposals cannot be considered in isolation from the wider safeguarding agenda in relation to children. It is from their perspective and from the perspective of the many years accumulated experience of our members that we make our response.

In view of the above, the submission of this response does not entail our acceptance of the accuracy of the data contained within the Legal Services Commission's consultation paper. This consultation should not have been launched in the absence of transparently reliable data underpinning its proposals and also of the fundamental market research that it has since commissioned. This response is submitted without prejudice to that contention. We reserve the right to respond further if and when that information is produced.

1. *Disconnection with Other Government Strategy and Policy in Relation to Children and Young People*

The proposals appear to have been drafted within a particularly narrow context sadly lacking in either joined up thinking or the evidence base needed to support them. In spite of the statement in the foreword that *"this is not about cuts"* it is hard to escape the conclusion that these are ill considered, short term, cost driven imperatives with scant regard, or respect, for the disproportionately adverse impact the proposed changes would have on children and young people who are dependent on the family courts and its practitioners for their access to justice. The fact that children and young people are not even identified in the consultation as a key stakeholder group is particularly disappointing given the over arching responsibility of every government department in relation to the wider safeguarding agenda as set out in "*Every Child Matters*".

The Ministry of Justice has recognised this responsibility by acknowledging the importance of making "*a reality of children's rights by setting an ambition of wellbeing for every child, described in terms of the five outcomes, and by setting an expectation that services should work together to promote this.*"[63] The consultation document completely fails to do this and there is no room for complacency at a time when Lord Laming has warned that *"recent events have shown that very much more needs to be done to ensure that services are as affective as possible at working together to achieve positive outcomes for children"*.[64]

We also seriously question the wisdom of removing expert independent social work expert witness evidence from scope at a time when Government policy in response to the Laming Report is allegedly "to *strengthen the social care work force"*.[65] It is precisely this inconsistent disconnect between departmental policies which leaves children tragically vulnerable.

2. *Limitation of Sustainable Access to Justice for Children and Young People*

In September 2008 the UN Committee on the rights of the child formally examined the UK Government's implementation of the UN Convention on the Rights of the Child (UNCRC) following up the examination with 124 recommendations showing where the UK government is falling short of its obligations under the widely ratified international human rights treaty for children. There is mounting evidence that children cannot get the advice they need from the civil justice system to claim their rights. Research by Youth Access with the Legal Services Research Centre reveals that the majority of children and young people who have complex problems are far more likely to have tried and failed to get advice than adults.[66] Many experience health problems or become homeless as a result of their unmet needs. The ongoing reforms to the legal aid system is making working with vulnerable children uneconomic and forcing many of the specialist lawyers and advisors to abandon legal aid work.[67]

Taken together the proposals contained in the LSC consultation documents "Civil and Family Legal Aid funding from 2010" further erode the infrastructure of experienced child care law professionals carefully built up over the last thirty years to protect vulnerable children and young people.

This is a particularly dangerous and ill advised strategy at a time when the global recession and the attendant social fall out and upheaval caused by widespread unemployment, rising poverty levels and the consequent stress on families, mean that children and young people are even more in need of a coherent network of services including legal services of advice and representation.

The requirements of the Human Rights Act 1998 which incorporated the European Convention on Human Rights into our domestic legislation gives children and young people equal rights to be represented in proceedings which affect them as all other parties. (Article 6 ECHR) There is no explanation in the consultation document of how the proposals will impact on the Governments wider obligation to hear the voice of the child in the proceedings and ensure that they have the same representational rights as other parties. Similarly, the impact of the proposals on Article 8 ECHR—rights to respect for a private family life—Article 10 ECHR—rights to freedom of expression—and Article 13 ECHR—rights to redress—are not considered in a consultation document which does not demonstrate convention compliance.

Children's human rights are free standing and not within the gift of any person or organisation. It follows from this that children's rights to representation should not be "*gate kept*" (para.8.27) by CAFCASS or indeed by any other body, whose priorities in relation to an individual child may be skewed by organisational or resource driven imperatives, rather than giving paramount consideration to the welfare of each child. The LSC itself acknowledges that the welfare of the child will not be the paramount consideration when it states at para 8.27 that *"The requirement of consent allows CAFCASS to gate-keep the cases which it takes on and deals with entirely in-house and also to ensure the caseload reflects its High Court caseworker headcount and resources"*

It is for the courts to decide which children need separate representation, based on their hearing of the evidence, their duties under s1 CA 1989 and guided by the excellent Presidents Practice Direction of April 2005—which has proved very effective in its implementation, not CAFCASS however well intentioned.

The proposal constitutes a dangerous undermining of judicial discretion, a breach of the Article 6 rights of children and a clear admission that the welfare of the child is an expendable commodity in the drive to cut costs.

On the basis of the evidence presented to the UNCRC, Children's Rights Alliance for England (CRAE) has in its general recommendations stated that "the Legal Services Commission should conduct an urgent assessment of the impact on children of the current reforms to the legal aid system. Legal aid policy and planning should recognize and take far greater account of the specific needs for information, advice and

[63] "*Rights and Responsibilities: developing our constitutional framework*" Ministry of Justice. March 2009. Cm 7577. para 3.71
[64] *The Protection of Children in England—A progress report*. Lord Laming. TSO March 2009. para.1.1
[65] See *The Protection of Children in England—A Progress Report*. Lord Laming. TSO March 2009
[66] Balmer NJ, Tam T, Pleasence P (2007). *Young People and Civil Justice: Findings from the 2004 English and Welsh civil and social justice survey*. Youth Access
[67] The Guardian (7 January 2008) *Solicitors shunning legal aid work as pay rates fall, survey reveals exodus of experts is acute in child cases.*

representation of vulnerable children, including separated asylum seekers, care leavers, children in conflict with the law and children who are homeless and in housing need. This should involve meaningful consultation with children about their access to justice."[68]

3. *The Need for Specialist Services for Children and Young People*

Both of the consultation document's key proposals which deal respectively with the creation of a Private Law Representation Scheme and a Family Advocacy Scheme have considerable implications for children and young people and in our view, actively discriminate against them. NAGALRO is concerned that the LSC should not seek to make changes to family funding which affect the fragile fabric of children's services in isolation from other government departments and in defiance of the wider interdepartmental government policy for children and young people.

The prime purpose of state intervention into family life is to limit the collateral damage to children and yet there are very few socio—legal services, which are either visible or accessible to children. There is an urgent need for a nationally co-ordinated range of direct support services for children and young people experiencing parental separation, familial conflict and domestic violence. (See further the NSPCC Policy recommendations arising from the findings of the *Your Shout Too!* research)[69]

The models being proposed with a greater reliance on telephone and internet advice rather than face to face meetings are clearly inappropriate for children and young people who may be seeking help with acrimonious situations of family conflict in which the safety of the children concerned is the major factor. This cannot be assessed over the phone. Yet the LSC proposes at para 5.32 that " *In order to ensure that advice is suitably accessible for clients, providers will be required to have a permanent presence in each procurement area they bid in*"

This would mean that NYAS, who offer a national range of well established high quality, face to face services to children and young people, would no longer be able to offer those services except in a small area of the NW. There is a strong case to support the development of niche specialist services to children and young people. High quality interdisciplinary services of consultation, casework and representation specifically developed to be both visible and accessible to children and young people such as those provided by NYAS are a rare commodity. They are highly valued by courts and practitioners as being both effective and cost effective for the children who use them. It seems extraordinary that they are apparently seen as of such little value that they can be completely swept away by the proposals.

NAGALRO members have many years experience of safeguarding the rights and welfare of children and young people in the full range of both public and private law proceedings. The rigorous independent investigation and scrutiny that they provide is, above all else, a central plank in the quality control which is essential to ensure that vulnerable children do not slip through an increasingly overstretched net of statutory services. NAGALRO has recently given evidence to Lord Laming's Review into the death of Baby P. Our evidence highlights the inconsistency of services available. In relation to the proposals for the Private Law Representation Scheme, children in private law proceedings are not separate beings from children in public law—they are part of the wider population of children who may also, as HIMICA highlighted in its inspection of Private Law front line service in CAFCASS in 2006, may also be children in need or at risk of significant harm.[70] There are, for example, currently 200,000 children who live in households where there is a known high risk case of domestic abuse and violence.[71]

There is a marked variance between the LSC's stated objectives in relation to children and what is being proposed. Two years ago the LSC stated that *"Children are particularly at risk from high conflict relationship breakdown*" and promised that *"access to specialist legal advice will be a priority over the next five years"* [72]

How do the Proposals in the Consultation Document Fulfil This Promise?

4. *Lack of Evidence to Support the Proposal to Limit Separate Representation under r9.5 FPR 1991 to CAFCASS.*

There is no evidence in the consultation document to support the LSC's underlying assumption that too many children and young people are being granted party status under the provisions of r9.5 FPR 1991. In fact all the evidence that exists suggest otherwise. It is assumed that the increase in the percentage of children represented is a bad thing although as a proportion of the total numbers of the approximately 250,000 children whose parent's divorce or separate each year it is infinitesimal. In 2007–08 CAFCASS acted in a total of 1,269 r9.5 cases compared with 1,206 in 2006–07, an increase of only 63 cases. Over the same period requests for s7 welfare reports fell by 15.3%.[73] This is not mentioned in the consultation document

[68] *State of Children's Rights in England—Review of UK Government's implementation of the Convention on the Rights of the Child—2008*. Annex C Full list of Recommendations. Rec.10. P55

[69] *Your Shout Too!* A survey of the views of children and young people involved in court proceedings when their parents divorce or separate. Judith E Timms, Sue Bailey and June Thoburn, NSPCC 2007. P.71

[70] Her Majesty's Inspectorate of Court Administration (HMICA) August 2006. *Private law front line practice in CAFCASS*. Inspection Report. London. HMICA.

[71] Co-ordinated Action against Domestic Abuse based on their work to date on Multi Agency Risk Assessment Conferences.

[72] *Making Legal Rights a Reality for Children and Families*—The Legal Services Commission's Strategy for Family Legal Aid, Volume 1. para 1.18

[73] CAFCASS Annual Report 2007–08

in which statistics are used selectively. The numbers of cases in which NYAS represents children or in which a Solicitor guardian is appointed who appoints an ISW, do not appear to be included in the data set underpinning this consultation.

In fact, the need for more private law representation for children has twice been debated and acknowledged by parliament. S 64 Family Law Act 1996 and S122 Adoption and Children Act 2002 both extended the right to the tandem representation afforded by a children's panel solicitor and a children's guardian to children involved in s8 residence and contact proceedings. In introducing the government amendments which became s122 Adoption and Children 2002 the then minister for families, Rosie Winterton, stated that:

> There is too stark a distinction between public and private law cases;
>
> The power to provide for the separate representation of children should be referred to in primary legislation; and
>
> Children should have access to separate representation more frequently than they do at present.[74]

No explanation has ever been given as to why this section still lacks the court rules to introduce it. In the meantime r9.5 FPR 1991 remains the only route to the separate representation needed to remove children from the revolving doors of repeated proceedings and the LSC are now seeking to impose restrictions on it.

Further, the LSC has already consulted on the limitation of separate representation for children under the provisions of r9.5 and conceded in July 2007 that: "The majority of respondents…felt that the President's Practice Direction was a 'robust enough framework' taking proper account of a range of critical factors in the child's life and the 'judiciary's discretion to order separate representation based upon particular facts of the case'."[75]

There is also substantial case law which supports the benefits of r9.5.[76] The proposals directly undermine the discretion of the judiciary to decide which children need representation in their courts as set out in the President of the Family Division's practice Direction of 5 April 2004. This direction specifically allows for the appointment of NYAS or "*other proper person*" to act as guardian ad litem for the child under the provisions of r9.5 Family Proceedings Rules 1991. As Lord Justice Wall has said—

> "I have to say quite bluntly that if I, as a judge charged with the duty to resolve an intractable contact dispute, take the view that the children involved need separate representation and the Family Proceedings Rules and s122 give me the power to order that representation, then I will expect the children to be provided with the service I think they need".[77]

This leads directly to the issue of practice. CAFCASS and NYAS have a well-established protocol for the allocation of r9.5 cases. The protocol which is working well on the ground, enables both CAFCASS and NYAS to work together to ensure that children have the representation ordered for them by the courts and makes good use of all available professional skills. The proposal to limit r9.5 representation to CAFCASS will impose considerable additional stresses on a service which is already fully stretched in dealing with a complex raft of new statutory responsibilities introduced by the Private Law programme, the Adoption and Children Act 2006 and as a consequence of the proposed changes in LSC funding of contact centres. Pressures on the service—which our members are in a position to report on first hand in terms of their impact on day to day decisions made in relation to children and young people—have been further exacerbated by the rise in the number of public law care proceedings following the death of Baby P and the Lord Laming's subsequent review of the Care Proceedings system in England and Wales. All of these factors have increased pressure on practitioners and have led to a sharp increase in demand and unacceptably long waiting lists in both public and private law proceedings in many parts of the country.

What will the position of the child be when the court orders separate representation in disputed s8 CA contact proceedings, appoints some *"other proper person"* to act as guardian and the LSC refuse to provide the necessary funding?

Research and practice in the past decade has consistently demonstrated and endorsed that need and it is hard to follow either the thinking or see any evidential base to justify the restriction of children's access to the separate representation afforded by r 9.5 FPR 1991 to cases undertaken by CAFCASS. Neither is there any mention of the now substantial research and practice evidence from CAFCASS, NYAS and others to demonstrate that separate representation is both effective and cost effective in the resolution of intractable and long running disputes involving children's residence and contact arrangements and is, itself, a key factor in safeguarding the welfare of the child.

The CAFCASS Annual Report 2005–06 stated that:

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[74] Hansard. HL November 4 2002.
[75] Separate Representation of Children—Summary of Responses to a Consultation Paper—Code No CP(R)20/06, published 26 July 2007
[76] See discussion of cases set out in HHH Clifford Bellamy's paper to NAGALRO conference Oxford 16 March 2009. "*Representation and Participation of Children and Young People in High Conflict Contact Cases*"
[77] Lord Justice Wall. Making Contact Work. 15 February 2003

> "A sample analysis (of 100 cases in which children had been represented under r 9.5, all of whom had been trapped in the revolving door of repeated proceeding) suggests the use of r9.5 is proving an effective measure in resolving disputes and supporting children in some of our most complex private law cases"

CAFCASS's findings replicated earlier findings by NYAS in their review of 95 r9.5 cases. None of the cases had returned to court at the time of the review.[78]

Research by Douglas *et al* commissioned by the DCA in 2006 also highlighted the fact that—"the development of separate representation in private law proceedings has been prompted at least as much by concern that the welfare of the child is properly safeguarded and is not lost sight of underneath the parents own priorities and concerns"[79]

The researchers also recommended that all children who had a parent who was the subject of endorsement proceedings should be separately represented in order to safeguard their welfare. The consultation document fails to address the fact that representing children with the significant welfare issues involved is very different from representing other adult parties. Given this complexity and the vulnerability of the children involved, separate representation of children under r9.5 and 9.2 FPR 1991 should not be included in the proposals for the Family Law Representation scheme.

There are a small number of very high conflict cases such as those set out in the CAFCASS/NYAS protocol, in which it is either not possible or not advisable for CAFCASS to be appointed. It would be false economy to limit funding in these cases as they are amongst the most intractable and expensive in the system.

It would also be dangerous to assume that an expansion of extended dispute resolution and conciliation procedures eventually obviate the need for court proceedings. They are not mutually exclusive but equally important parts of a range of the interventions needed. Recent research by Trinder and Kellet commissioned by the Ministry of Justice warns that "conciliation is an effective way of reaching agreements and restoring contact over the short term but it is often followed by further litigation and has very limited impact on making contact actually work well for children"[80]

What conciliation can do is to assist in the early identification of those cases which will later prove intractable and damaging and facilitate the separate representation of the child at a much earlier stage thus preventing a childhood punctuated by repeated and costly court proceedings. There will however always, in our view and experience, be a small number of children whose high conflict cases can only be resolved through the expertise of a skilled children's solicitor and independent social worker working "in tandem" to ensure that the rights and welfare of that particularly vulnerable child receive the careful assessment and separate representation that only full party status can give.

A more constructive approach would be for the LSC to work with NAGALRO, CAFCASS, NYAS and others, towards early identification of those children who are suffering significant emotional harm through repeated involvement in highly conflicted cases concerning their residence and contact arrangements. The fact that the LSC database is not capable of identifying the number of proceedings in which an individual child has been involved demonstrates the weakness of the LSC evidence base and how little thought has been given to the position of the child at the centre of the proceedings.

5. *Proposal to Limit Funding for Independent Social Work Expert reports*

NAGALRO is particularly concerned at the linking of the role of an independent social work expert and that of the guardian representing a child in tandem with a solicitor, when the remit is to represent the child in the court setting and to provide information about the child's welfare needs. These tasks are very different and should be addressed entirely separately.

An independent social work expert is instructed in a case to provide an expert opinion on a specific aspect. This does not involve an ongoing role in the case, and it is the individual has been asked because their expertise meets the needs of the case. This is the same as all other expert witnesses who provide services in family proceedings.

We are concerned that independent social work and other expert witnesses are apparently being treated in very different ways and in a way which again, impacts adversely and disproportionately on children .We are not aware of any proposals to limit independent social work reports in proceedings affecting other particularly vulnerable groups—adults with mental incapacity for example. Similarly, independent social workers operate within a framework of multi disciplinary expert witness reports. Are there similar proposals to limit funding for expert witnesses from other related professions? If not, then why it is that the availability of social work expertise for children that is being limited at a time when it is so badly needed?

Additionally, properly trained and experienced expert social work opinion is not a commodity that is in over supply. In fact CAFCASS and the Children's Workforce Development Council have consistently expressed concern at the diminishing pool of experienced practitioners. Whilst we are aware of the difficulties caused by the proliferation of expert witness evidence with its attendant increase in costs, it seems premature

[78] Rule 9.5. Separate Representation and NYAS. Family Law Jan 2005. (35) pp 49–52. Fowler E and Stewart S.
[79] Research into the Operation of r 9.5 of the Family Proceedings Rules 1991. Final Report to the Department of Constitutional Affairs. Douglas G, Murch M, Miles C and Scanlon L 2006.
[80] The longer term outcome of in-court conciliation Trinder and Kellet. Ministry of Justice Research Series 15/07 p iv

to propose changes ahead of the results of the LSC's pilot arrangements with the Department of Health to commission multi-disciplinary teams of health professionals to provide jointly instructed health expert witness services to family courts in public care proceedings. (Para 8.60) Could this pilot not be expanded to include independent social work experts and to encompass private law proceedings also rather than perpetuating a historically dichotomised approach to children involved in public and private law proceedings, some of whom are the same children moving through a range of care and related proceedings over a number of years?

NAGALRO's membership is shared approximately equally between independent social workers who do no work for CAFCASS, those who are employed by CAFCASS and those who undertake work for CAFCASS on a self-employed basis. Our independent social work membership is growing. Many of these members undertake expert assessments for family courts, but alongside this they also carry out work in a wide range of spheres. This adds to the value of the skills they bring to the court setting, and is the reason often why they are asked to undertake the assessment.

The cases in which independent social work experts are instructed are usually the more complex cases which do not have an easy resolution. The court has identified an area where additional information is required without which a resolution is likely to be more problematic. By contributing their specialist knowledge it is often the case that the report of the independent social work expert has the effect of "un-sticking" a case. This leads to a resolution, often without a contested hearing. Independent social work experts are not often called to court to give evidence; for example one member has estimated that she has attended court in less than 5% of those cases where an assessment has been prepared in family cases. A well argued conclusion based on sound experience and knowledge is very effective in enabling an agreement to be reached thereby reducing the cost of the case.

An example of a situation where this was the outcome is a case where the child had a significant relationship with a person who was not a blood relative, and the local authority had determined that adoption was the best plan. The independent social work assessment of this person was very positive, the parents accepted that the child would remain within the extended network and were able to accept that the child would not be returning to their care. If the outcome had continued to be adoption it is likely there would have been an extended contest.

Independent social workers are able and willing to work more flexibly and often more quickly than other resources and are therefore able to contribute to a reduction in the length of proceedings, which results in fewer court costs and court hearings.

In some circumstances a local authority is not always in a position to carry out the work of assessing a family member, perhaps because of its involvement with these family members at an early point in proceedings, because they have taken an initial negative view at a stage where not all the information was available or because the structures of the local authority militate against an early resolution of the choices available.

If a local authority has reached an early decision not to consider extended family members then the court is faced with a potential failure to address the human rights issue if it does not consider fully the question of whether a child can remain within its extended family. In these circumstances it is vital that there is an alternative source of expertise available.

A further positive factor in instructing an independent social work (ISW) expert to provide the work is that the person involved in the assessment is someone who does not have any other role within the court proceedings, either in terms of making a recommendation to the court, implementing any plans agreed at court or representing the child's views. This aspect can assist parents in accepting the view of the expert more easily—and therefore reduce the prospect of contested hearings.

An ISW takes full responsibility for maintaining his or her professional skills and expertise. This expertise has built up over many years, and contributes to the quality of the information placed before the court. An independent social work expert carries full responsibility for the work done on any case. He or she carries the professional risk, has to be able to be challenged in court on the work undertaken and has to maintain credibility for his or her expertise. This should be remunerated at a rate which is commensurate with the skills, knowledge and experience that they have developed. NAGALRO strongly opposes the recommendation that the fees of independent ISW experts should be capped at the CAFCASS/CAFCASS CYMRU level.

NAGALRO'S view is that the fee which CAFCASS pays currently is grossly below the rate which should be paid; it is not equivalent to the rate that the employed workforce is paid because it does not take into account all the additional costs that are carried by the independent practitioner. CAFCASS has recently offered an increase to its self-employed FCAs, the first one for four years. A consequence of the low fee level has been that a number of highly experienced independent social workers no longer take work from CAFCASS. If the LSC chose to use this level then many of those who at present are available to provide expert services for the court will cease to do this.

The consultation suggests that "there appears to be a buoyant market" for social workers. NAGALRO does not accept this. As mentioned above CAFCASS and the Children's Workforce Development Council have consistently expressed concern at the diminishing pool of experienced practitioners. Many of those who provide expert reports for the courts have a broad portfolio. Their work extends to teaching, managing

teams, research, contributing to the work of fostering and adoption agencies, therapeutic work with children. These people, who can provide the most valuable information for the courts, are going to stop doing this work if it does not provide an income which meets the costs of the work. Implementing the proposals in the consultation paper will reduce the number of experts available at a time when they are already not in plentiful supply.

Inevitably, the proposals to remove all independent social work expertise from scope in Rule 9.5 cases will further diminish the pool of suitably trained and experienced practitioners to represent children and to provide expert reports in family law cases.

The courts will not be best served if the only persons who are willing to provide the service to the courts are those who have not had the time to build up the expertise which contributes so constructively to assisting and resolving cases.

Judith Timms
Policy Advisor

Judy Tomlinson
Secretary

April 2009

Written evidence submitted by the National Youth Advocacy Service

FAMILY LEGAL AID FUNDING FROM 2010

Thank you for your copy letter from Lord Bach. I thought it would be of some assistance to you to give you our response to the content and to his letter to us. I have followed the layout of his correspondence with you.

BACKGROUND

There is no evidence to suggest that the number of Rule 9.5 separate representation cases has decreased, nor indeed that there is an increase in the costs of those particular cases. The Legal Services Commission (LSC) have not provided any evidence by way of research or analysis of Rule 9.5 cases in the consultation document. They take no account of the complexity of cases, the changes in family dynamics and society's influences, the greater number of unrepresented parties which results in additional input for children's solicitors as the most independent party in the instruction of experts. The LSC never separate 9.5 cases from general private family law, which relates mainly to the representation of parents.

NYAS does not seek any additional monies to be provided for Rule 9.5 representation but, as we indicated to you at the recent session before the Justice Committee, we seek a clear acknowledgement of the value and importance of the work we undertake on behalf of these children and young people who are caught up in acrimonious family breakdown.

In respect of the introduction of standard fee schemes and change to the scope of funding, the proposals in the consultation take no account of the value of different skill sets and the importance of maintaining this expertise to ensure that young people have the best representation. Whilst the LSC have forwarded to us an individual impact assessment which suggests that we would benefit from a family advocacy scheme, it does not take into account the fact that our solicitors would be spending more of their time in the role of advocate and would be less available for their other duties including seeing young people. It ignores that if a case is particularly complex it requires an experienced advocate, and in some instances, it is highly appropriate for a young person to be represented by Counsel. The proposals for the specification for new contracts for the provision of family law services seek to limit the geographical provision of legal services so that NYAS would be limited to cases on the Wirral. Currently our work is referred from the courts on a national basis.

With regard to the changes to the scope of funding we have previously set out our concerns in respect of the proposal to remove from scope the work of independent social workers and the impact this would have on the NYAS model of representation and we have submitted our response to the Consultation. Whilst Lord Bach indicates that the work undertaken by the MoJ and LSC seek to encourage greater use of mediation to involve family disputes, this does not take account of the small number of high conflict cases which will not be resolved out through mediation, or even through an early contested hearing, but require the input and expertise of the NYAS model of representation. The LSC do not give any acknowledgement to 9.5 representation, given that it is evident that NYAS are able to provide long term outcomes where even the most entrenched families do not return before the court, therefore providing a long term saving to the public purse. We believe that there should be an acknowledgement of our work in this respect, in the same way that there is a great emphasis on the effectiveness, albeit untested, of mediation. A concern in respect of mediation is that often the initial agreements are a short term fix which unfortunately result in families returning before the Court. However, again the LSC have not produced a long term study in respect of the benefits of mediation.

NYAS has attempted to move towards a mediation contract but bids for funding for training have been unsuccessful. There are no current mediation funding rounds which would allow us to acquire the SQM. We have been told that the SQM would be made available if we can find funding from another source to provide a mediation service, although such funding it seems is not available from any other source.

Family Funding Scope Changes

The LSC focus on expert costs and in particular the costs of independent social work expertise. Whilst there has been a pilot set up in respect of other experts, no such pilot or model has been proposed for independent social work. There has been no attempt to cap costs which can be (according to the LSC consultation) up to £70 per hour. NYAS casework costs are £32 per hour and this represents a significant difference in payments by the LSC and would provide a significant cost saving if there was a cap on the costs of experts which were to be paid by the LSC.

— In respect of the outline of services removed from scope, which the LSC do not see as a priority, it is concerning that residential assessments of vulnerable young parents whose child may be separated long term from them, is not considered to be an appropriate use of public funding.

— The removal of funding for supervised contact centres was another source of concern to us and one which we highlighted at the time of the consultation. We have seen, as a result of the removal from scope and the responsibility for contact placed solely with CAFCASS, a major reduction in our funding for supervised contact which has reduced from £100,000 to £15,000. As a result NYAS must now close its supervised contact centre. This is of great concern to the judiciary locally and to NYAS in respect of those families who will not have an appropriate venue from which to build their contact and relationship with their children in a safe and appropriate environment.

— NYAS has no faith in the contracting arrangements for 2009–10 given the process adopted by CAFCASS, the significant drop in our income and the resultant closure of the contact centre. There has been no discussion from CAFCASS or the DCFS, this is particularly surprising given that NYAS House was one of the 14 specialist centres opened when the initial funding was provided to the DCA. As a result of the commissioned relationship with CAFCASS in respect of supervised contact, and other work, we would foresee difficulties in commissioning arrangements with CAFCASS in respect of Rule 9.5 separate representation.

CAFCASS and NYAS/Other Solicitor Guardians

NYAS has never challenged or had any issue with the functions of CAFCASS. We entered into a Protocol with CAFCASS in December 2005 in which it was acknowledged that CAFCASS was the statutory agency, and setting out those cases where it was more appropriate for NYAS to undertake separate representation under Rule 9.5. This arrangement is consistent with the President's April 2004 Practice Direction which governs the circumstances in which 9.5 appointments are to be made. NYAS undertakes such work, both in England and in Wales.

We have consistently expressed our concern to CAFCASS and the LSC that we have not been included in any discussions in respect of Rule 9.5 cases, given that we are constantly under scrutiny from the LSC, and are unsupported by CAFCASS, despite the Protocol agreement working well at a local level. There is no analysis or research in respect of the figures quoted by the LSC in respect of Rule 9.5 appointments and, when we have asked for details of the same in the past, the LSC have been unaware of the number of appointments made and do not know whether their figures relate to the number of certificates issued/number of children represented or number of Court cases. The number of cases undertaken by NYAS in the past two years has only risen from 115 to 158.

Whilst it is accepted that the current consultation does not affect the funding of legal representation of children in Rule 9.5 cases, there is a direct threat from the previous Consultation in respect of the new service specification. Also, it is our submission that without the social work element of the work the Court will not have a sufficient picture to protect the welfare of the child, and NYAS provides a preventative approach to safeguarding children in private law.

As we have already said, we have great concern at the exclusion of NYAS from discussions in respect of Rule 9.5 cases and the development of proposals in respect of such cases, given our specialism and expertise in this field.

CAFCASS' Workload and Performance

It is accepted that there has been a surge in the level of care applications and as a result, renewed pressure on CAFCASS and it is not accepted that the LSC could not provide controls in respect of the provision of independent social work in Rule 9.5 cases by way of a control of cost and a system of quality control.

Whilst it is acknowledged that NYAS currently have a contract for representation of children under Rule 9.5 and the funding for this is still available, we have recently encountered a number of delays in particular high cost cases and we are subject to exceptional scrutiny by the LSC in respect of every application which we submit. We are unclear, and have never had any response from the LSC in respect of other Rule 9.5 providers subject to the same level of scrutiny.

Whilst CAFCASS is independent of the Court, it is not independent of the state. For families where there is a breakdown in their relationship with CAFCASS it is vital and incumbent in respect of access to justice, that there is an alternative independent agency with whom they can work. If this is not available, a significant number of children stand to lose their relationship with a parent.

Consultation with Other Organisations

We are concerned to note that there is no reference to any "not for profit" providers in those organisations which were consulted, and whilst it is accepted that the LSC has met with NYAS, our issues have not been resolved and we are again meeting with the LSC to attempt to resolve outstanding issues.

We have submitted a response to the LSC Consultation and will be putting forward proposals for a "joined up" approach between the MoJ and the DCSF, to enable us to continue to support the most vulnerable children caught up in long standing acrimonious parental disputes. It makes little sense for NYAS legal services to close whilst CAFCASS incurs the additional cost of setting up services which we already have in place, and which are trusted and effective. With a genuine partnership approach we could ensure that there would be no additional expenditure and genuine expertise is retained.

I do hope that this is of some assistance to you, and would like to express our gratitude for the time given to us by the Justice Committee.

Elena Fowler
Chief Executive

7 April 2009

Supplementary written evidence submitted by the National Youth Advocacy Service

Further to our informal discussions with Select Committee members last month, I enclose a copy of NYAS' proposal in response to the difficulties we are experiencing in relation to changes in the specification and scope of publicly funded Family Law.

I would be most grateful if you were able to give this your support as I know that the MOJ, DCSF and CAFCASS are due to meet to discuss matters shortly and I have asked that this be given serious consideration.

I also enclose a Background paper which provides the context for this proposal.

Maintaining Independent Socio-Legal Services for Children in Private Law Proceedings

The National Youth Advocacy Service (NYAS)

The National Youth Advocacy Service (NYAS) is a unique not-for-profit children's charity which supplies socio-legal advice, information, signposting and advocacy services to children and young people, and has provided a range of safety net services over the last 30 years. NYAS was the first Children's Charity to achieve a legal aid franchise 10 years ago and offers a complete range of social and legal advice and representation to children.

NYAS has developed a range of specialist advocacy services, with more than 60 projects and 14 offices across England and Wales. Some 50,000 children use our broad range of services annually. These include a child-friendly Help Line accessible by direct chat or text with specialist services to children and young people in mental health settings or with disabilities, as well as for children and young people looked after in residential care, foster care and residential schools. With a joined up approach to advice giving for children, these services provide a ready gateway for children to access legal advice and information. NYAS provides participation and consultation with young people through the development and support of young people's groups, and Children in Care Councils. In Birmingham, NYAS provides a Signposting service which, with an online directory of the community services available, allows children and their families to seek advice and support for any issue they may have, and to obtain referral to appropriate voluntary or statutory services across all the tiers.

The Case for Change

NYAS appears to be the victim of a "disconnect" between two government departments—DCSF and the MOJ—and their two non departmental public bodies—CAFCASS and the Legal Services Commission (LSC). Under the new proposals the LSC will fund legal work and the responsibility for all social work input in rule 9.5 private law cases will be passed to CAFCASS and removed from the LSC's funding scope from 2010. In the process, it is estimated that the numbers of children who have a voice in complex private disputes about their future residence and contact arrangements will be reduced by approximately a third. NYAS' highly valued services will fall through the resulting departmental funding gap in the same way as many thousands of the children they help, who have fallen through the gaps in statutory provision. The problem is that NYAS' rare combination of children's social work and legal services do not fit readily into the LSC new specification for family law services. What is needed is a joined up departmental funding route to

support NYAS' established infrastructure of joined up specialist services for children. If no route can be found then the agency's expertise and capacity to help hundreds of children at risk in private law proceedings will be lost. In addition, NYAS' specialist teams of children's caseworkers—some of the most experienced in the country, will be broken up at the same time as the government is committing £58 million to recruit and train child care social workers.

In their response to the Consultation on fees the Family Justice Council commented: *"We take the opportunity to remind the LSC about what the FJC said in its Civil Bid Rounds response about the position of NYAS" (see para. 10 of that response):*

> *"The proposed new framework will also drive out organizations such as NYAS who have been committed to providing a service for children; it is not in their remit to provide a range of family legal services for adults. It provides specialist legal advice, support and services to vulnerable children. Its' services are of high quality and great value and, consequently, the LSC should maintain a system which allows excellent organizations such as NYAS to continue their work".*[81]

The LSC conceded in July 2007 that *"The majority of respondents* (to their Consultation on Separate Representation, 2006) *felt that the President's Practice Direction was a 'robust enough framework' taking proper account of a range of critical factors in the child's life and the 'judiciary's discretion to order separate representation based upon particular facts of the case".*[82] Yet the proposals contained in the two 2009 Consultations undermine the present use of rule 9.5 and make a targeted assault on NYAS' "tandem model" approach. The Judiciary are only too well aware of the problems. "*It is proposed that from 2010 an already impossibly overstretched and underfunded CAFCASS will be required to accept all appointments under rule 9.5, even those cases in which a judge considers it to be plain that the allocation of the case to CAFCASS is inappropriate*".[83]

Inspection reports have consistently revealed CAFCASS' difficulties, and despite some improvements, their CEO, Antony Douglas, acknowledges *"there is still a challenge to meet demand from the amount of court proceedings, mainly in private law (divorce proceedings) and recently there has been an increase in the amount of care proceedings being taken by local authorities to protect children at risk of harm, which also places pressure on CAFCASS".*[84]

NYAS' legal team specialise in the separate representation of children and the NYAS approach involves a "tandem model" with the social worker and solicitor working closely together. If the proposals put forward by the LSC in the "new Unified Contract" for Family Law, and their proposals for Family Legal Funding from 2010 are adopted, NYAS would no longer be able to deliver a national specialised socio-legal service for children.

There are a small number of very high conflict cases such as those set out in the CAFCASS/NYAS protocol, and which comply with the criteria for separate representation of a child as set out in the President's Practice Direction.[85] For these cases it is either not possible or not advisable for CAFCASS to be appointed. They can only be resolved through the expertise of a skilled children's solicitor and independent social worker working "in tandem" to ensure that the rights and welfare of that particularly vulnerable child receive the careful assessment and separate representation that only full party status can give. It would be false economy to limit funding in these cases as they are amongst the most intractable and expensive in the system. Where the needs of the children are not satisfactorily addressed this vulnerable group go on to make long term demands on mental health, residential care, and/or youth justice services and budgets.

It would be more costly if CAFCASS were to attempt to replace NYAS' services and it is likely that they would be less effective. Any such services would not be perceived by the service users to be independent. A commissioning relationship with CAFCASS would undermine NYAS' independence, and jeopardise NYAS' effectiveness with those families where the relationship with CAFCASS has broken down. It would reinforce the "power imbalances" which are inherent in the relationship between purchasers and providers and are described in the Government's Compact with the voluntary sector.[86] NYAS is not an independent social work agency and the supply of independent social workers to CAFCASS would not fit with our charitable purpose, per se.

There is a strong case to support the retention and development of NYAS' joined up services. The combined work of the NYAS solicitor and social worker, and our excellent links with reliable experts in other disciplines, can unstick cases so that they progress after many years in the system and do not come back to court. This makes the service cost effective for the family justice system. It is also effective in improving outcomes for children. It is not unusual for NYAS to see children who have been involved in between 10 and 20 different sets of court proceedings during the course of their childhood.

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[81] *Family Legal Aid Funding from 2010. A Consultation. Representation, Advocacy and Experts fees*. Response of the Family Justice Council. Para 59. April 2009.
[82] *Separate Representation of Children—Summary of Responses to a Consultation Paper*—Code No CP(R)20/06, published 26 July 2007.
[83] His Honour Judge Clifford Bellamy. Op Cit.
[84] CAFCASS Ofsted S1 report press release 7 January 2009.
[85] Representation of Children in Family Proceedings Pursuant to Family Proceedings Rules 1991 Rule 9.5)(2004) 1 FLR1188
[86] www.CabinetOfTice.gov.uk. The Compact: An alliance for cultural change. Ed Milliband. 11.04.07.

NYAS has had consistent support from all levels of the Judiciary, including the President of the Family Division. The Response of the Circuit Judges[87] to the LSC Consultation on Civil Bids Rounds for 2010 clearly demonstrates this:

> *"NYAS has, since its inception, been regarded by all levels of judiciary who came across its workers, as an invaluable resource. NYAS has an excellent record of resolving cases of implacably hostile parents refusing contact to the non-resident parent, NYAS operates country-wide. Having one office is, in this instant case, a distinct advantage, due to having central organisation and administration, employing highly qualified workers, based in different locations and available to work countrywide".*

THE PROPOSAL

The proposal is for the MOJ/LSC and the DCSF/CAFCASS to establish a funding route from current budgets, as recommended by the Family Justice Council, to ensure the continuation of NYAS' independent services for the most vulnerable children embroiled in family law proceedings. This could be achieved through a joint agreement between the DCSF and the MOJ, to provide protected funding of the legal and social work input to the most complex children cases in private law. This would be in line with the Government's Funding and Procurement Code.[88] Cash limited and ring fenced money from the two departments could maintain NYAS as a small, independent, grant funded socio-legal agency for the protection and representation of children in rule 9.5 proceedings, and for those who need the services of a body that is independent of CAFCASS, using the same model as the Office of the Official Solicitor.

A new model could take the form of a partnership between NYAS and CAFCASS with shared funding from the DCSF and the MOJ; this would allow for a cost-effective, coherent and creative response in a highly specialised area of work to protect some of the nation's most vulnerable children. Ring fenced, targeted funding would ensure that budgets were controlled, and the service outcome driven. The MOJ/LSC would take responsibility for an amount corresponding to current legal and non social work expert/disbursement costs and DCSF/CAFCASS would take responsibility for the social work costs. This would comply with the funding direction proposed in the LSC Consultation. The LSC would no longer incur social work costs. No additional costs would be incurred, and the LSC would effectively make a saving in their budget. Funding would be drawn from existing budgets with a protected fund established, to enable at least current levels of NYAS' activity to continue. The existing funding, including disbursement costs currently met by the LSC, should be transferred to the fund. This would remove NYAS' legal work from the limitations of the service specification criteria of the Unified contract and set out in the proposals for 2010, and would allow continuation of a service that meets the needs of a small but critically important group of vulnerable children.

Under such an arrangement, DCSF/CAFCASS would not have to replicate NYAS' existing provision, and they would be spared the necessary development and management costs. Thus both departments would deliver effective services for children in private law proceedings with some efficiency savings.

NYAS would be happy to be subject to the same independent Quality Assurance processes and monitoring as CAFCASS, which could include monitoring against the revised outcomes framework which recognises the crucial role of parents, carers and families.[89]

The LSC strategy paper acknowledged that *"Children are particularly at risk of harm from high conflict relationship breakdown"* and promised that *"Access to integrated specialist legal advice"* for such children *"will be a priority for the LSC over the next five years".*[90] In addition, Government policy in response to the Laming Report is "to *strengthen the social care workforce".* It is important to ensure that NYAS' skilled specialist child care practitioners remain available to children—recognised for their important contribution as essential experts within that workforce. The recent DCSF Select Committee report highlighted the need for a renewed emphasis on Safeguarding and in her evidence, Baroness Morgan of Drefelin described her department's *"longer term strategy bringing together experts from across the profession to create a comprehensive and joined up children's workforce highlighted in the Children's Plan"*,[91] This joined up approach should surely also be the aim of the LSC and should allow the DCSF and LSC to reach an agreement for shared funding for NYAS' socio-legal model, as two Government departments engaging with the Voluntary sector and both working in the best interest of children. NYAS is not seeking additional or new money, but as Lord Justice Wall said in his Cardiff speech, there is *"an urgent need for funding to establish a 'joined up' approach".*[92]

The view of the judiciary is concisely expressed:[93]

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[87] Response of the Circuit Judges of the Principal Registry of the Family Division ("PRFD") and Gee Street to the Legal Services Commission Consultation on Civil Bids Rounds for 2010 contract.
[88] Compact.Working Together, Better Together. Funding and Procurement Code. 2005. www.thecompact.ora.uk
[89] Every Child Matters. Change for children. Revised outcomes framework. 03.04.08. DCSF.
[90] Making Legal Rights a Reality for Children and Families—The Legal Services Commission's Strategy for Family Legal Aid, Volume 1, Para 1.8.
[91] House of Commons Children, Schools and Families Committee. Vol 2. 09.03.09.
[92] Whattaya Mean—'Quo Vadis?": Thoughts and Aspirations for the Future of Family Justice. (A Lecture In Honour of Professor Mervyn Murch, Delivered by Lord Justice Nicholas Wall at The University of Cardiff on 30 November 2006).
[93] Response of the Circuit Judges of the Principal Registry of the Family Division ("PRFD") and Gee Street to the Legal Services Commission Consultation on Civil Bids Rounds for 2010 contract.

> "NYAS is often invited to intervene when CAFCASS has failed, due to lack of resources or expertise. NYAS are asked by the judiciary to resolve longstanding problems as a result of which children invariably suffer significant harm, mostly emotional . . . the demise of NYAS, whichever way it may be approached, flies in the face of logic. CAFCASS is stretched to its maximum capacity. NYAS has a record of excellence. Abolishing the latter would add to the already overstretched CAFCASS, detracting from available expertise without substituting it with anything viable.
>
> *The child/young person will be ill served by this approach. This must not be allowed to happen."*

Elena Fowler
Chief Executive, National Youth Advocacy Service

May 2009

Background to the Proposal for Maintaining Independent Socio-Legal Services for Children in Private Law Proceedings

The Aim of the Proposal

NYAS' proposal would protect a comparatively small but particularly vulnerable group of children whose risk of physical and emotional harm is high, whilst also improving their longer-term outcomes. It is consistent with the wider Government safeguarding agenda in relation to children and young people and the LSC's stated objectives in terms of the future sustainability of legal aid, the protection of representation and advocacy services and access to justice for children.

LSC have stated in their consultation document that *"this is not about cuts: we expect to spend the same under the new scheme as we do currently"*.[94] What NYAS is asking for is not new money, but a collaborative funding mechanism for the current approximately £1.5 million which constitutes NYAS' gross income from the LSC to be set aside for children's specialist services, and administered through a grant or NYAS/CAFCASS service level agreement in line with the current NYAS/CAFCASS protocol. This would allow continuation of a service that meets the needs of a small but critically important group of vulnerable children.

The Role of NYAS

NYAS has developed an effective infrastructure for the provision of legal services for children and young people and has demonstrated that, whilst recognising the statutory responsibilities of CAFCASS, in a minority of cases there is a need for an independent and alternative service to CAFCASS. This alternative service makes legal advice accessible to all the 50,000 children who contact NYAS annually. It is accessible by children and young people in need and looked after, both through the Help Line and web site and through direct referral from the courts. For those children caught up in Private Law proceedings, the service offers protection and independent separate representation in complex and entrenched cases within the criteria set out in the President's Practice Direction. The authority for the involvement of NYAS stems from a number of Court of Appeal decisions, including *Re A*[95] and *Re D*.[96]

Our work is characterised by the provision of a specialised and responsive service. Our caseworkers are highly experienced and qualified child care social workers, and our solicitors have developed considerable specialist expertise. The team is skilled at communicating with children and are prepared to work with children and families at evenings or weekends if necessary. Some two thirds of referrals received by NYAS are due to the complexity of the case, including but not exclusively when there is a breakdown of the relationship with CAFCASS. Approximately one third of referrals received are complex cases subject to delay by CAFCASS. NYAS has recently had to limit the number of cases accepted where delay is the main reason for referral, as CAFCASS has a growing backlog of cases and there is a danger that these deflect us from our core purpose.

NYAS and CAFCASS have an agreed protocol for working together.[97] It recognises that CAFCASS' ability to provide separate representation should always be considered first and it ensures discussion takes place between CAFCASS and NYAS with adherence to the Practice Direction and notification of the court. This is well established and works well at a local level across England and Wales.

In January and February 2004 NYAS undertook a snapshot of cases in which NYAS had been involved.[98] The research showed that in 100% of cases, two or more of the factors referred to in the Practice Direction were present. The CAFCASS Annual Report 2005–06 stated that *"A sample analysis* (of 100 cases in which children had been represented under r 9.5, all of whom had been trapped in the revolving door of repeated proceeding) *suggests the use of rule 9.5 is proving an effective measure in resolving disputes and*

[94] Family Funding from 2010.A consultation document. Foreword. p2. December 2008.LSC.MOJ.
[95] Op cit.
[96] (Intractable Contact Dispute; Publicity)(2004)(2004)EWHC 727 (Fam).
[97] Between NYAS and CAFCASS (2006) Family Law 243.
[98] Rule 9.5. Separate Representation and NYAS. Family Law Jan 2005. (35) pp 49–52.Fowler E and Stewart S. Family Law *35 (49)*.

supporting children in some of our most complex private law cases". CAFCASS' findings replicated the earlier findings by NYAS in their review of 95 rule 9.5 cases. None of the cases had returned to court at the time of the review.[99]

Research by Douglas et al, commissioned by the DCA in 2006, also highlighted the fact that *"the development of separate representation in private law proceedings has been prompted at least as much by concern that the welfare of the child is properly safeguarded and is not lost sight of underneath the parents own priorities and concerns."*[100]

Policy Development in Practice

The need for more private law representation for children has twice been debated and acknowledged by parliament. S64 Family Law Act 1996 and S122 Adoption and Children Act 2002 both extended the right to the tandem representation afforded by a children's panel solicitor and a children's guardian to children involved in s8 residence and contact proceedings. In introducing the government's amendments, which became sl22 Adoption and Children Act 2002, then minister for families, Rosie Winterton, told the House of Commons that the Government believed that *"there is too stark a distinction between public law cases… and private law disputes between individuals".* She said that the Government believed children in private law disputes *"should have access to separate representation more frequently than they do at present".*[101]

LSC strategy paper in 2007 acknowledged that *"Children are particularly at risk of harm from high conflict relationship breakdown"* and promised that *"Access to integrated specialist legal advice"* for such children *"will be a priority for the LSC over the next five years".*[102]

However, the Consultation paper, "Separate representation of Children,"[103] issued in 2006, stated that separate representation *"is only relevant for a small proportion of children who are involved in private law proceedings arising from parental conflict."* It proposed that a child should only be made a party to the proceedings *"where there is a legal need to do so".*[104] It also proposed that when a decision is made to make a child a party to the proceedings *"CAFCASS should be the preferred choice of the court to act as the Children's Guardian.".*[105]

Those proposals were met with considerable criticism from those who responded to the consultation. Lord Justice Wall summed these up in his "Cardiff paper"[106] when he said: *"It would, in my view, be a serious loss to the vulnerable children who need to be separately represented if access to NYAS' services were restricted in the manner which the Consultation Paper contemplates",* and further: *"I wish to make it as clear as I can that I would strongly deprecate any suggestion by the Legal Services Commission that it should not pay for the guardian in a case where a judge has appointed NYAS, and where the judge takes the view that the work of the guardian is of critical importance to the successful outcome of the case—as in A v A and in Tuesday's case in the Court of Appeal".*

The LSC conceded in July 2007 that *"The majority of respondents . . . felt that the President's Practice Direction was a "robust enough framework' taking proper account of a range of critical factors in the child's life" and the "judiciary's discretion to order separate representation based upon particular facts of the case"*[107] The Government shelved the proposals; they said that *"Alternative options are being developed with the DCSF, CAFCASS and LSC colleagues, which will, require further consultation".*[108]

The further consultation has emerged two years later, containing another attempt to limit the right of children to representation in private law proceedings within the two consultations issued in the joint names of the Ministry of Justice and the Legal Services Commission. The first, "Civil Bid Rounds for 2010 Contracts: A Consultation",[109] closed in January 2009 and the second, "Consultation on Family Legal Aid Funding for 2010" closed on 3 April 2009.

The "foreword" to the first of those consultations states that the proposals *"enable us to procure more client-focused services through securing easier access to face-to-face advice,"* Although it is stated that the LSC Family Strategy *"identifies priority areas of funding as services for children"*[110] the proposals directly discriminate against them. They will have a devastating effect on the ability of children to access legal advice, as well as on NYAS' ability to continue to represent them. Particularly problematic are the requirements for

[99] Ibid.
[100] Research into the Operation of r 9.5 of the Family Proceedings Rules 1991. Final Report to the Department of Constitutional Affairs. Douglas G, Murch M, Miles C and Scanlon L. 2006.
[101] Hansard. 04.11.2002, col 108.
[102] Making Legal Rights a Reality for Children and Families—The Legal Services Commission's Strategy for Family Legal Aid', Volume 1, Para 1.8.
[103] Separate Representation of Children', Consultation Paper CP/20/06 . DCA 01.09.2006.
[104] ibid, p 21.
[105] ibid, p 25.
[106] "Whattaya Mean—'Quo Vadis?": Thoughts and Aspirations For The Future Of Family Justice._(A Lecture In Honour Of Professor Mervyn Murch, Delivered By Lord Justice Nicholas Wall At The University Of Cardiff On 30 November 2006).
[107] "Separate Representation of Children—Summary of Responses to a Consultation Paper—Code No CP(R)20/06, published 26 July 2007.
[108] "Separate Representation of Children—Summary of Responses to a Consultation Paper", CP (R) 20/06. Department for Constitutional Affairs. 26 July 2007, p 38.
[109] Civil Bid Rounds for 2010 Contracts: A Consultation1 LSC MOJ 01.09.
[110] Ibid. Para 3.9.

access set out in Section 5 of that consultation: Providers must *"have a presence in all the procurement areas that they bid to work in."* All clients would be expected to receive face to face services only from designated registered local offices, within the specified procurement areas.[111] Outreach could only be negotiated with "Relationship managers" in that area once contracts have been awarded and "New Matter Starts will be allocated to each access point in line with the level of demand indicated by data on historic location."[112] Many of these criteria are included in the new Unified Contract, already in place, which could result in NYAS being found to be "in breach of contract" and unable to go forward.

The second consultation paper[113] resumes the direct attack started in the 2006 paper. This consultation paper subsumes within its proposals for the transformation of funding arrangements for Family Law, proposals to limit the appointment of and funding for Guardians in rule 9.5 cases. It says that *"the exclusive handling of [rule 9.5] cases by or through CAFCASS would ensure a consistent, quality assured process subject to appropriate controls and Inspection, achieving best value for money".*[114] This is a repetition of the proposals which were roundly rejected when they were put forward by the Government in 2006. The LSC goes further this time and proposes *"to remove all independent social work expertise from scope in Rule 9.5 cases"* [115]It also proposes that the funding of solicitors to act as guardians in rule 9.5 cases should be removed from the scope of LSC funding.

Children and young people are the over arching responsibility of every government department in relation to the wider safeguarding agenda as set out in "Every Child Matters". The Ministry of Justice has recognised their responsibility by acknowledging the importance of making "*a reality of children's rights by setting an ambition of well-being for every child, described in terms of the five outcomes, and by setting an expectation that services should work together to promote this."*[116]

NYAS proposal complies with the first of Lord Laming's most recent recommendations:—*"First and foremost, the Secretaries of State for Health, Justice, the Home Office and Children, Schools and Families must collaborate in the setting of explicit strategic priorities for the protection of children and young people for each of the key frontline services and ensure sufficient resources are in place to deliver these priorities".*[117]

In addition, Government policy in response to the Laming Report is "*to strengthen the social care workforce",* and it is important to ensure that the skilled specialist child care practitioners who act as NYAS Guardians continue to be available to children and are recognised for their important contribution as essential experts within that workforce.

There are a small number of very high conflict cases such as those set out in the CAFCASS/NYAS protocol, in which it is either not possible or not advisable for CAFCASS to be appointed and which can only be resolved through the expertise of a skilled children's solicitor and independent social worker working "in tandem" to ensure that the rights and welfare of that particularly vulnerable child receive the careful assessment and separate representation that only full party status can give.

It would be false economy to limit funding in these cases as they are amongst the most intractable and expensive in the system.

The need for a "joined up" policy that puts children first

Despite the consistent policy recognition of the vulnerability of children caught up in private law proceedings, and a stated commitment to legal advice for children, there has been a complete disregard for this position in the current proposals for change. The LSC proposal to remove social work expertise from their funding scope will have a disproportionate impact on the welfare of children and young people and takes no account of their needs as a separate stakeholder group. It also reflects a dangerous inconsistent disconnect between departmental and organisational policies which risks leaving children tragically vulnerable.

There is mounting evidence that children cannot get the advice they need from the civil justice system to claim their rights. Research by Youth Access with the Legal Services Research Centre reveals that the majority of children and young people who have complex problems are far more likely to have tried and failed to get advice than adults.[118] Many experience health problems or become homeless as a result of their unmet needs.

There are also currently 200,000 children who live in households where there is a known high-risk case of domestic abuse and violence.[119] As HIMICA highlighted in its inspection of Private Law front line service in CAFCASS in 2006, the children involved may also be children in need or at risk of significant harm.[120]

[111] Ibid. Para 5.32.
[112] Ibid. Para 5.21.
[113] 'Family Legal Aid funding from 2010: A Consultation', December 2008. LSC MOJ.
[114] ibid, Para 8.21.
[115] ibid, Para 8.23.
[116] "Rights and Responsibilities: developing our constitutional framework" Ministry of Justice. March 2009. Cm 7577 para 3.71.
[117] The Protection of Children in England. A Progress Report. Lord Laming. P4. The Stationery Office. 12.03.09.
[118] Balmer N J, Tarn T, Pleasence P (2007). *Young People and Civil Justice: Findings from the 2004 English and Welsh civil and social justice survey.* Youth Access.
[119] Co-ordinated Action against Domestic Abuse based on their work to date on Multi Agency Risk Assessment Conferences.
[120] Her Majesty's Inspectorate of Court Administration (HMICA) August 2006. Private law front line practice in CAFCASS. Inspection Report. London. HMICA.

In September 2008 the UN Committee on the Rights of the Child formally examined the UK Government's implementation of the UN Convention on the Rights of the Child (UNCRC). It followed up the examination with 124 recommendations showing where the UK government is falling short of its obligations under the widely ratified international human rights treaty for children.

The LSC proposals are not convention compliant in that they do not afford children and young people in private law proceedings, the sustainable access to justice required by international conventions and domestic legislation.

Sl(3)(a) of the Children Act 1989 establishes the basic principle that when considering any application from a child the court must have regard to *"the ascertainable wishes and feelings of the child concerned"* (considered in the light of their age and understanding). The United Nations Convention on the Rights of the Child (UNCRC) (Articlel2 (2)) requires that any child affected by judicial and administrative proceedings have "the right to express views freely", and "the opportunity to be heard".

The requirements of the Human Rights Act 1998 which incorporated the European Convention on Human Rights into our domestic legislation gives children and young people equal rights to be represented in proceedings which affect them as all other parties. (Article 6 ECHR) It also includes a requirement for proceedings to be within a 'reasonable time'. Delay by CAFCASS in appointing a suitable Guardian for children in both public and private law proceedings is a major concern which will be exacerbated if no arrangement is made for the continuation of NYAS services.

Rule 9.5 FPR 1991 remains the only route to the separate representation needed to remove children from the revolving doors of repeated proceedings and the LSC are now seeking to impose restrictions on it. There is substantial case law which supports the benefits of rule 9.5.[121] The LSC proposals directly undermine the discretion of the judiciary to decide which children need representation in their courts according to the evidence put before it and as set out in the President of the Family Division's practice Direction of 5 April 2004. They put the responsibility for the decision entirely onto CAFCASS. This is an extremely dangerous and particularly ill-advised proposal in which there is no pretence that the welfare of the child will be the paramount consideration. The LSC Consultation document states quite clearly that: *"The requirement of consent allows CAFCASS to gatekeep the cases which it takes on and deal with entirely in house and also to ensure that the caseload reflects its High Court caseworker headcount and resources."*[122]

The proposal ignores the President's Direction which specifically allows for the appointment of NYAS or *"other proper person"* to act as Guardian ad Litem for the child under the provisions of rule 9.5 Family Proceedings Rules 1991. As Lord Justice Wall has said: *"I have to say quite bluntly that if I, as a judge charged with the duty to resolve an intractable contact dispute, lake the view that the children involved need separate representation and the Family Proceedings Rules and s122 give me the power to order that representation, then I will expect the children to be provided with the service I think they need."*.[123]

The proposals, together with the Unified Contract specification, will dismantle NYAS' skilled and experienced specialist provision for children and young people which young people can currently access from anywhere in England and Wales, regardless of whether any other child in that area has previously requested such help. They will prevent continuation of existing integrated services by restricting provision to geographical procurement areas and requiring young clients, many of whom do not have parental or adult support, to attend at suppliers' offices.

Taken together the proposals, which are the subject of both these consultations, constitute a consistent undermining of the present use of rule 9.5 and a specific and targeted assault on NYAS and our "tandem model" approach. It is NYAS' view and the view of some members of the judiciary, that the proposals amount to a direct attack on the ability of judges to exercise their discretion in the appointment of guardians and *"therefore amount to an attack on judicial independence*".[124]

It is disappointing that, as a significant contributor to work with children caught up in the most entrenched cases, data held by CAFCASS and the LSC has not been shared with NYAS. It is NYAS' experience that the figures relied upon by the LSC are unreliable. Judge Clifford Bellamy set this out clearly in his recent talk to the NAGALRO conference: "I want to begin my attempt to make good those views by reference to some statistics. I use the word 'attempt' advisedly since comprehensive, reliable statistical information is not available. Let me take the year 2007–08. If you ask the Ministry of Justice how many private law applications were made during that period, it cannot give you an accurate figure. ……If you then go on to ask the Ministry of Justice how many orders were made under rule 9.5 in 2007; it will not even be able to hazard a guess. It does not record that information on it's IT system, 'FamilyMan'. … So, if we cannot get statistical information about the use of rule 9.5 from the Ministry of Justice, where else might we try to find that information? The Legal Services Commission funds all of these ride 9.5 appointments, so surely it can give us some statistics? In a recent letter from the Legal Services Commission I was told that 'Ride 9.5 cases are not specifically identified in our systems".[125]

[121] See discussion of cases set out in HHH Clifford Bellamy's paper to NAGALRO conference Oxford 16 March 2009. "Representation and Participation of Children and Young People in High Conflict Contact Cases".
[122] Family Funding from 2010 Consultation document ibid, para 8.27.
[123] Lord Justice Wall. Making Contact Work. 15 February 2003.
[124] His Honour Judge Clifford Bellamy "Representation And Participation Of Children And Young People In High Conflict Contact Cases" NAGALRO Conference 2009.
[125] "Representation and Participation of Children and Young People in High Conflict Contact Cases" Oxford. 16.03.09.

Alongside the LSC proposals which would limit NYAS' ability to provide specialist services for children, considerable change has already been implemented in relation to risk assessments and contact activity which are now no longer within the funding scope of the LSC. The responsibility for these services now rests exclusively with CAFCASS. The impact of these changes will only be truly felt in the coming year, and there are clear indications that many well established Supervised Contact Centres will have to close and many children will not be able to access supervised contact with their parent. The withdrawal of LSC funding of Contact Centres from lst April 2009, is already causing more children involved in private law proceedings to be at risk, with considerable additional delays in contact provision. Yet more children will lose contact with their non-resident parent.

The proposal to limit rule 9.5 representation to CAFCASS will impose considerable additional stresses on a service which is already fully stretched in dealing with a complex raft of new statutory responsibilities introduced by the Private Law programme, the Adoption and Children Act 2006.

Inspection Reports of CAFCASS have consistently highlighted the deficiencies of that service, and despite some improvements their CEO, Anthony Douglas, acknowledges *"there is still a challenge to meet demand from the amoimt of cowl proceedings, mainly in private law (divorce proceedings) and recently there has been an increase in the amount of care proceedings being taken by local authorities to protect children at risk of harm, which also places pressure on CAFCASS"*.[126]

Inspection reports have found CAFCASS services to have *"unacceptable variations in the quality of assessments, case plans, recording and court reporting,"* with *"a lack of focus on children and their welfare."*[127] A recent report states *"assessment intervention and direct work with children are inadequate…reports and recommendations to court are inadequate…the contribution to improving outcomes for children is inadequate overall….value for money is inadequate"*.[128] Antony Douglas has acknowledged the difficulties and recognises it will take time to put right, stating his aim for private law services is for them *"to be graded as adequate."*[129] In the light of CAFCASS poor performance and mediocre aims, it is difficult to justify giving them sole responsibility for private law services whilst removing the well established and effective services currently delivered by NYAS.

It is clear that NYAS services do not fit readily into the new LSC specification for family law services and the LSC do not value NYAS work under the new contract. A shared approach to Casework with the solicitor and social worker working in tandem is at the heart of our socio—legal model of separate representation. NYAS is not an independent social work agency, and our service would be seriously detracted from if we were only to provide only half of it. If CAFCASS were to attempt to replace NYAS services the development of those services would be costly and it is likely that they would be less effective. To replicate NYAS services in-house, CAFCASS would have to overcome the difficulties they are already experiencing within their current responsibilities and reflected in the numerous inspection reports. If they attempt to commission similar services they would be likely to encounter the same difficulties revealed in their recent commissioning of contact activities and section seven reporting and there would be a serious lack of available specialist legal and social work expertise. Any such services would not be perceived by the service users to be independent.

There is a strong case to support the retention and development of a niche specialist service to children and young people. High quality interdisciplinary services of consultation, casework and representation specifically developed to be both visible and accessible to children and young people such as those provided by NYAS are a rare commodity. (See further the NSPCC Policy recommendations arising from the findings of the Your Shout Too! research).[130]

The Judiciary are only too well aware of the problems: "It is proposed that from 2010 an already impossibly overstretched and under funded CAFCASS will be required to accept all appointments under rule 9.5, even those cases in which a judge considers it to be plain that the allocation of the case to CAFCASS is inappropriate".[131]

Two years ago Lord Justice Wilson observed: *"What we have seen since 2002 has been governmental retreat, for no child centred reason, from its stance at that time; and by contrast, a growing perception by the court that children in private law proceedings require the services of a guardian far more frequently and thus its increasing use of the power in rule 9.5 to appoint one for them"*.[132]

It would be more cost effective to maintain NYAS' well established specialist provision. It has the trust of the Judiciary and of families who have lost confidence in CAFCASS, and this would comply with government policy in other areas of child care service provision where the involvement of the third sector is positively encouraged.

[126] CAFCASS Ofsted S1 report press release 7 January 2009.
[127] Community Care 17.02.09.
[128] HMI:C5001.16.02.09.Ofsted.
[129] Community Care Op cit.
[130] Your Shout Too! A survey of the views of children and young people involved in court proceedings when their parents divorce or separate. Judith E Timms, Sue Bailey and June Thoburn, NSPCC 2007 P 71.
[131] His Honour Judge Clifford Bellamy. Op Cit.
[132] "The Ears of the Child in Family Proceedings"—The Hershman/Levy Memorial Lecture, 28 June 2007.

In 2007 Ed Milliband described the government's vision for coherent delivery of government policy through the Compact, creating "an environment for a thriving third sector". He set out the need for *"an alliance for cultural change",* which was based on *"partnership not rivalry"* between the statutory and voluntary sector, and which provides funding opportunities allowing the third sector to have an "influence on decision making." There is an opportunity now to contribute to that cultural change.[133]

Lord Justice Wall called for a coherent approach to the funding difficulties in 2006, and the position has not improved. "I agree with NYAS that rather than reducing the number of ride 9.5 appointments by changing the court rules, and in so doing depriving children of legal representation and access to justice in processes that shape their future, there is an urgent need for funding to establish a 'joined up' approach."[134] NYAS' proposal seeks to address that need.

In their response to the Consultation on fees the Family Justice Council commented: "We take the opportunity to remind the LSC about what the FJC said in its Civil Bid Rounds response about the position of NYAS" (see para 10 of that response): "The proposed new framework will also drive out organisations such as NYAS who have been committed to providing a service for children; it is not in their remit to provide a range of family legal services for adults. It provides specialist legal advice, support and services to vulnerable children. Its services are of high quality and great value and, consequently, the LSC should maintain a system which allows excellent organisations such as NYAS to continue their work".[135]

It is widely recognised that there is a need to reduce delay in Private Law proceedings and to achieve better cooperation between all parties involved. There is an over-riding need to simplify the representation and protection of children in more complex private law cases whilst also ensuring that the costs are kept within bounds with savings where possible. A partnership between CAFCASS and NYAS would allow an effective process for those complex cases requiring an independent service, with continuity and responsiveness for the courts. It would also allow a partnership approach to the measured development of a Private Law Outline in line with the Public Law Outline. The aim being to achieve higher quality applications to court with shorter timescales for court processes with core assessments carried out and care plans prepared and developed with children and families. A partnership could facilitate research into complexity and predictors for effective intervention in private law proceedings, so as to develop an effective preventative strategy which addresses the needs of children caught up in long-standing and acrimonious parental disputes.

It is notoriously difficult to achieve agreement for the sharing of budgets between departments. Nobody will easily relinquish funds. This proposal offers an opportunity for the DCSF and the MOJ to lead the way in creating a new culture of cooperation, demonstrating the effectiveness of multi-disciplinary, multi-agency and joint departmental working for the benefit and protection of the most vulnerable children.

Elena Fowler
Chief Executive
National Youth Advocacy Service

May 2009

Annex 1

PRESIDENT OF THE FAMILY DIVISION'S PRACTICE DIRECTION. 5 APRIL 2004

Representation of Children in Family Proceedings Pursuant to Family Proceedings Rules 1991 (Rule 9.5)(2004)

The court may appoint a GAL to take part in the proceedings in accordance with rule 9.5 of the Family Proceedings Rules 1991[136] when it *"appears to the court that it is in the best interests of any child."* The President's Practice Direction offers" Guidance" as to circumstances which may justify the making of an order and recognises that such an appointment would be made only in unusual cases and after consideration of alternatives. It establishes eight key factors which would support such an appointment:

1. where a child has a standpoint or interest inconsistent or incapable of being represented by any of the other adult parties;
2. where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is an irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
3. where the views of the child can not adequately be met by a report to the court;
4. where an older child is opposing a proposed course of action;
5. where there are complex medical or mental health issues to be determined or where there are other unusually complex issues that necessitate separate representation of the child;

[133] www.Cabinet Offlce.gov.uk. The Compact: An alliance for cultural change. Ed Milliband. 11.04.07.
[134] Op Cit.
[135] Family Legal Aid Funding from 2010. A Consultation. Representation, Advocacy and Experts fees. Response of the Family Justice Council. Para 59. April 2009.
[136] Representation of Children in Family Proceedings Pursuant to Family Proceedings Rules 1991 Rule 9.5)(2004)1 FLR1188.

6. where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court;
7. where there are serious allegations of physical, sexual or other abuse to the child, or there are allegations of domestic violence not capable of being resolved with the help of the CAFCASS Officer; and
8. where the proceedings concern more than one child and the welfare of the child is in conflict or one child is in a particularly disadvantaged position.

Rule 9.5 allows forjudicial discretion in choice of guardian. It establishes at s (1)[137] that the court may appoint as GAL for the child either:

— a CAFCASS Officer;

— the Official Solicitor (if they consent); and

— some other proper person (if they consent).

Consideration will initially be given to appointing an officer from CAFCASS who have no discretion about accepting the appointment. However it is recognised that CAFCASS may not always be the most appropriate appointment, notably where there is a particular concern to avoid delay, s (4) or where the relationship with CAFCASS has broken down. A typical example of this is demonstrated in *Re C*[138] when the court of appeal appointed NYAS because the child had lost faith in the CAFCASS Officer.

Annex 2

PROTOCOL BETWEEN THE NATIONAL YOUTH ADVOCACY SERVICE AND THE CHILDREN AND FAMILY COURT ADVISORY AND SUPPORT SERVICE (CAFCASS)

This protocol aims to clarify the roles of both agencies representing children in private law proceedings in order to meet, in the best possible way, the needs of all children and families.

Shared Commitments

— Compliance with article 12 of the United Nations Convention on the Rights of the Child.

— Improved Services for Children in family proceedings.

— A coordinated response to changing practice and regional needs.

National Youth Advocacy Service

1. NYAS is a UK charity offering socio-legal information, advice and legal representation to children and young people up to the age of 25. NYAS has developed a strong identity as a leading Children's Rights organisation with provision of advocacy services. NYAS has advocates across England and Wales, supported by a Legal Team and a free phone helpline and advice service for children and young people. NYAS also provides separate representation for children and young people where the court considers that such representation is necessary under Rule 9.5 of the Family Proceedings Rules and in line with the Practice Direction of The President of the Family Division of April 2004.[139]

2. NYAS is committed to Article 12 of the UN Convention of the Rights of the Child. The object of NYAS representing young people, is wherever possible to protect the young person from the damaging effects of being caught up in legal proceedings. It is a common misconception that children as parties to the proceedings would always give instructions, although they may do so with leave of the court or if they are competent to instruct a solicitor directly. A child who is capable of forming his or her own views has the right to express those views in the proceedings with the views being given due weight in accordance with the age and maturity of the child. The child's true wishes and feelings should be put before the court as part of an holistic approach in terms of assessing the whole background and dynamics of the situation. The child should have the opportunity to have their situation represented separately from that of any of the adults.

3. The suitability of NYAS to act as guardian in appropriate cases was approved by Dame Elizabeth Butler-Sloss in the case of Re: A[140] (Separate Representation). There are a number of accepted situations in which separate representation of children in private law proceedings is either appropriate or acceptable and NYAS has also been involved in the recent cases A & A (Shared Residence)[141] and Re S (Uncooperative Mother)[142]

4. It is the policy of NYAS to appoint a caseworker who is an independent social worker and usually a children's guardian in the public law sense. The lawyer and caseworker work in tandem to provide representation for children and young people.

[137] Op cit.
[138] Re C (2005) EWCA Civ 300.
[139] [2004] 1 FLR1188.
[140] [2001] 1 FLR715.
[141] [2004] EWHC 142 Fam.
[142] [2004] EWCA Civ 597.

Children and Family Court Advisory and Support Service (CAFCASS)

5. CAFCASS is a Non-Departmental Public Body. The service was established to combine the functions previously carried out by the Family Court Welfare Service provided by the Probation Service, the Children's Branch of the Official Solicitor's Department and the GALRO Service provided by local authorities. Its function is to safeguard the interests of children who are the subject of family proceedings. Social workers employed by CAFCASS are appointed as Family Court Advisers (FCAs) and carry out a number of roles according to the nature of the proceedings in which the child is involved.

CAFCASS duties are to :

— Safeguard and promote the welfare of the child.

— Give advice to the court about any applications made to it in such proceedings.

— Make provision for children to be represented in such proceedings.

— Provide information, advice and support for children and their families.[143]

Safeguarding and Promoting the Interests of Children

6. CAFCASS' responsibility is to safeguard and promote the interests of individual children who are the subject of family proceedings by providing independent social work advice to the court. In addition to its general duties it meets these responsibilities in some private law Children Act cases where an officer of CAFCASS accepts appointment as guardian under r9.5 of the Family Proceedings Rules 1991. In these cases the child will always have the benefit of legal representation and the FCA acting as guardian will instruct the solicitor.

7. Certain specialist High Court appointments for children are handled by the CAFCASS High Court Team based at National Office in London. They are responsible for medical treatment cases and cases with particularly complex features.

Children made a Party in Private Law Proceedings

8. Rule 9.5 of the Family Proceedings Rules 1991 states:

(1) "…if in any family proceedings it appears to the court that it is in the best interests of any child to be made a party to the proceedings, the court may appoint:

(a) an officer of the service

(b) (if he consents) the Official Solicitor;[144] or

(c) (if he consents) some other proper person,

to be the guardian ad litem of the child with authority to take part in the proceedings on the child's behalf."

9. The President's Practice Direction makes it clear that the child should only be made a party in a minority of cases featuring issues of significant difficulty. Such decisions are only made by a Circuit Judge, High Court Judge or District Judge in the Principal Registry of the Family Division (unless there are exceptional circumstances when a District Judge can make an order).

10. CAFCASS should be approached first to provide a guardian. The provision of a guardian when requested by the court is a significant and core task for CAFCASS and CAFCASS has a duty to appoint a guardian and cannot refuse appointment. Guidance has been issued to clarify that where a judge has decided that an appointment under rule 9.5 is necessary that Service Managers must prioritise the allocation of the case.

National Youth Advocacy Service and CAFCASS Working Together

11. The National Youth Advocacy Service often provided a guardian in private law proceedings before the inception of CAFCASS when there was limited provision for guardians to be appointed. NYAS has continued to provide such a service particularly where judges have previous experience of their effective work in this area. This is part of NYAS' broader commitment to provide information and advice to children and young people.

12. Since 2001 when CAFCASS was created to provide a service in both public and private law proceedings there has been a considerable growth in rule 9.5 appointments undertaken by CAFCASS. As clarified in the President's Direction it is recognised that in many cases the child will benefit from representation by a guardian who has already met them in their capacity as children and family reporter in the case.

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[143] Criminal Justice and Court Services Act 2000, Section 12.

[144] For the Official Solicitor's functions in family cases see Practice Note dated 2 April 2001 [2001] 2 FLR 155. He acts as guardian ad litem of minors who are not subject of the proceedings such as respondent minor parents and child applicants.

When NYAS may be appointed guardian:

13. The Practice Direction of April 2004 states;

"5. When a child is made a party and a guardian is to be appointed:

5.1 Consideration should first be given to appointing an officer of CAFCASS as guardian

5.2 If CAFCASS is unable to provide a guardian without delay, or if for some other reason the appointment of a CAFCASS officer is not appropriate, FPR rule 9.5(1) makes further provision for the appointment of a guardian"

14. CAFCASS should be approached first and will usually provide a guardian. However, NYAS may, for example, be asked by the court to provide a guardian in any matter (likely to be long standing) where, despite the best efforts of CAFCASS staff, one or more members of the family can no longer work with the organisation.

General principles

15. Both agencies are committed to effective communication in the best interests of the child in accordance with the law. The normal points of contact should be the CAFCASS service manager and the nominated NYAS lawyer. If any case moves between the two agencies it is particularly important to pass on information which may assist the work with the child and family, eg aspects of risk management, conflict of interest issues and any particular needs of the child. If NYAS is invited to provide r9.5 representation where CAFCASS has not been approached, NYAS will discuss the matter with CAFCASS and will be responsible for notifying the court in the first instance.

16. CAFCASS and NYAS will work together to advise the court whenever there appears to be good reason for a guardian not to be appointed eg when there is an alternative preferable route such as a section 37 report from the local authority.

This Protocol will be reviewed in 12 months' time.

22 December 2005

Further supplementary written evidence submitted by National Youth Advocacy Service

FAMILY LEGAL AID FUNDING FROM 2010

Thank you for inviting me to give evidence to the Committee. I appreciate that the concerns of the legal profession are predominantly about the complex changes to the fee structure, which was the main focus of the consultation. However subsumed within that consultation was the proposal to remove the work of the Guardian, either by social worker or solicitor, this is in addition to the proposed contract criteria presented in the consultation on Family Legal Aid Funding from 2010.

It is vital for the continuation of our work that the impact of these combined consultations upon our ability to provide accessible and meaningful legal services for children is fully appreciated, and I set our current position below.

1. THE NATIONAL YOUTH ADVOCACY SERVICE

The National Youth Advocacy Service (NYAS) is a children's charity, providing a range of specialist socio–legal services for children and young people aged from nought to twenty five. It provides preventative safety net services for around 50,000 children and young people annually. For many of them, NYAS is a service of last resort and its intervention is critical in arresting the downward spiral of need and neglect associated with family breakdown and family dysfunction. NYAS's services are effective and cost effective in assisting each child to achieve their potential in line with the five outcomes set out in Every Child Matters, ensuring that children have a voice in decisions made about their lives and in the process reducing further demands on public services. NYAS supports children who are looked after by local authorities and children in need and at risk by providing telephone Helpline and Signposting services , social advocacy and support (provided by NYAS' geographically dispersed network of approximately 400 children's advocates) volunteer Independent Visitors , mentoring, and legal advice and representation in both public and private law proceedings.

2. SERVICES FOR CHILDREN AND YOUNG PEOPLE INVOLVED IN PRIVATE LAW PROCEEDINGS

NYAS has its own team of in house children's lawyers and caseworkers Most of the requests for general help come from children pre or post proceedings, and from the vast cohort of young people accommodated under section 20 Children Act 1989 who have never been subject to court proceedings and never had any representation when far reaching decisions were taken about their lives.

Most, but not all, of NYAS's certificated work under the Legal Services Commission contract is for representation under rule 9.5 Family Proceedings Rules(FPR) 1998,which enables children to be made parties in disputes about their residence and contact arrangements and which provides them with both a

children's guardian and a children's panel solicitor to represent them in court. The majority of referrals for rule 9.5 FPR 1998 work come directly from the courts in England and Wales. Legal advice underpins all our work and ensures that children's rights are respected by decision makers.

NYAS uses a team "tandem' approach between its solicitor and experienced child care social workers, to establish the true wishes and feelings of the child, identify and address the welfare issues of children and to report to the court so that the court can properly determine what is in the best interests of each individual child. It is our view that establishing the wishes and feelings of the child and ensuring that they are properly represented is critical in assisting courts to identify and inform the welfare decision making which lies at the heart of the Children Act 1989.

In most of the 160 cases we work with annually under R 9.5, the children have been subject to court proceedings for a substantial part of their young lives. These vulnerable children all have vociferous and actively acrimonious parents. Many are the focus of allegations of abuse and may have witnessed or heard physical violence and aggression between their parents. NYAS works with the most intractable disputes, where the parent's relationship with CAFCASS has broken down. In most cases CAFCASS has worked with the family for many years and have been unable to achieve resolution. There is substantial evidence from both research and practice to support NYAS's view that the independent and separate representation of the child's own situation is central to the decision making of the courts in determining future arrangements for children and in providing a resolution of previously intractable cases. It is on the basis of many years experience of working with children trapped in these entrenched and complex cases that we are opposing the removal of the provision of independent social work from the scope of LSC funding for Family law services.

NYAS is recognised by the courts as having particular specialist expertise in this field, and there is considerable evidence of support from the judiciary including the President of the Family Division. (Please see attached case example)

3. Consultations

The Consultation Papers: Civil Bid Rounds for 2010 contracts, and Family Legal Aid Funding from 2010: A Consultation: Representation, Advocacy and Expert's Fees are two of the four LSC consultations issued since October last year with the potential for significant and damaging impact on the delivery of family law services for children, despite the LSC's stated aim to maintain expenditure at current levels, improve client access, quality services and value for money. There is a marked variance between the the LSC's stated objectives in relation to children and what is being proposed. Two years ago the LSC stated that "children are particularly at risk from high conflict relationship breakdown" and promised that "access to specialist legal advice will be priority over the next five years".

The current consultation fails to identify children as a stakeholder group and there is no impact assessment of the proposed changes on them.

The proposal to remove Guardians work from the funding scope of LSC was first consulted on in 2006 and following a robust response was rejected at that time. The same proposals have been re–presented in the consultation on Fees.

4. NYAS' Key Concerns about the Proposals

- The LSC should ensure that reforms continue to provide access to justice for all children and young people and should ensure that their contract criteria properly address the particular needs of children.
- The LSC's current proposals are adult orientated and ignore the Government's over arching departmental safeguarding agenda for children by effectively ruling out any child centred service.
- We strongly disagree with the proposal to remove from scope the funding of solicitors acting as independent guardians and all independent social work in cases where CAFCASS/CAFCASS Cymru do not provide for a Guardian under rule 9.5.FPR 1998. The proposals seek to remove the effective provision for children provided by NYAS through separate representation. They do not take into account the long term savings to the public purse of NYAS specialist and independent intervention, and ignore the effectiveness of the NYAS model for children caught up in protracted and long standing family disputes. They will deny the most vulnerable group of children and young people, caught up in the most acrimonious parental disputes, the resolution of their parents long standing disputes and positive outcomes achieved from having the opportunity to have their wishes and feelings properly understood by the courts. This will leave those children exposed to the risk of significant harm, and an increased likelihood of permanently losing a relationship with their non-resident parent.
- It is the responsibility of the court to ensure that when any decisions affecting a child are made, the welfare of the child is a paramount consideration. s1 (1) Children Act 1989. The discretion of the Judiciary should not be fettered by the proposed "gate keeping" of access to Guardian services by a government agency which is currently struggling to provide an adequate response to its statutory duties.

— It is unrealistic to suggest that this work can be carried out in its entirety by CAFCASS. There are already in excess of 600 children waiting for CAFCASS Children's Guardians. To suggest that placing exclusive handling of these cases by or through CAFCASS "*would ensure a consistent quality assured process subject to appropriate controls and inspection, achieving best value for money,*" ignores the evidence of recent inspection report findings and judicial concerns reflected in court judgements. Such "gate keeping" would also constitute a potential breach of children's rights to representation as required by the United Nation's Convention on the Rights of the Child (UNCRC) and the Human Rights Act 1998.

— NYAS already addresses the vacuum in CAFCASS service provision and achieves successful results with those entrenched cases where CAFCASS has failed or the relationship with the family has broken down. The proposals would prevent children and young people from accessing independent services. This is particularly important in work with families where a conflict of interest means that CAFCASS cannot act or where families and or courts have lost confidence in CAFCASS. Under these proposals there will be nowhere else to turn for families whose relationship with CAFCASS has broken down and the experience and skills built up by NYAS over many years will be lost. As a result, more private law matters which could have been effectively resolved through NYAS intervention will continue use up public funds and occupy court time with all the protracted accompanying distress for the child concerned. Unresolved private disputes are also liable to translate into public law concerns with an accompanying increased cost to the public purse for many years to come.

— The LSC have not addressed the escalating costs of other experts' fees within this consultation. There has been no evidence of an attempt to monitor, cap or standardise the cost of independent social work which the LSC highlights with rates considerably higher than those charged by NYAS, rather, they propose to deal with the issues by a blanket removal from scope.

— The proposals recognise the need to value and retain social work expertise, and NYAS consider this could be achieved through a consistent approach to payment for all experts.

— The proposals will reduce the availability of skilled and experienced Counsel. There is no recognition of the different and particular skill sets required for different roles of solicitor and Counsel. The proposals fail to recognise the benefits in terms of cost, of having experienced legal and social work practitioners.

— The "systematization" of family legal aid work will not achieve a better understanding of the real costs of family work. Block contracting, especially with price competition, will drive down standards, reduce time spent with clients, and encourage the employment of less qualified and experienced staff.

5. Immediate Concerns

Our concerns remain with the new contract criteria which were presented in the Consultation on Civil Bid Rounds 2010. An adult model of service provision is now being applied to children with disastrous effect as it does not recognise the different needs and behaviours of children and young people. The particular difficulties relate to:

— *Procurement Areas*—The strictly defined procurement areas do not allow for national provision. NYAS is now restricted to taking general help referrals only from the Wirral.

— *Activity*—How children request advice, children rarely say "*I want some legal advice"* but will set out their wishes in relation to decisions being made about them.

Children do not readily complete or return paperwork, they do not understand legal phraseology, yet the LSC now insist on every child completing the same forms as adults, despite previous arrangement with NYAS that there was some discretion about this.

— *Access*—There is no provision for outreach, children are expected to attend a solicitors' office in the same way as an adult.

— *Referral Method*—Not all NYAS cases come through general help—without a requisite number of new matter starts no certificated work can be done.—Most of our specialist rule 9.5 FPR 1998 work is referred directly by the courts.

— *Criteria for Public Law Children*—Despite being given a contract for public law children, we are told that there is no criterion which includes direct work with children. It is defined as work with parents who have been issued notice of proceedings.

6. The Current Position

Whatever constructive discussions have taken place between NYAS and the LSC about Policy over the years, their procurement through contracts and audit takes no account of our purposes, or the reasons why NYAS was set up, nor does it recognise the support we have from other agencies. It fails to recognise the best Practice Model which is requested by Senior Judiciary, but is ruled out of scope by those responsible for the agency contract. Despite the LSC having previously recognised our national work, and helped to

fund the training for our outreach model, and despite declaring that our work is of "sufficient benefit and merit" to children, under the new contract our general help is now deemed "out of scope." This is at odds with the last Peer Review rating of our work as Category 1. Under the contract it will not be possible to provide the more complex certificated work without providing new matter starts through general help. Without a contract we will be unable to bid in the forthcoming funding round. We are appealing this decision.

There is a notable lack of clarity and consistency from the LSC about contractual requirements. For example, having asked our local contracts manager for advice about the contract specification for the avoidance of doubt, she responded by writing to ask whether we intend to change our charitable "Mem and Arts" in order to comply with the contract and to allow us to work with adults, as our current charitable remit is for work with children. Following the publication of the Consultation, NYAS has been subject to a Specialist quality mark audit, which we passed, albeit with some corrective action, a re—audit is scheduled for September, and a Contract compliance audit, following which we are now involved in an appeal of the LSC's decision. We have met a sudden demand to repay £45,000 following a re–calculation of general help payments, and the LSC payment of High Cost cases has come to a standstill whilst the LSC seek to understand more about the work of NYAS. We have been given to understand that on Merseyside, where the Court seeks to make a Rule 9.5 appointment to NYAS, the LSC contact the local CAFCASS Office to check that they have authorised it and to request that they pay the costs. We are seeking clarification of this. In the meantime, we must prepare for submitting a bid in the "Best Value" tendering round scheduled to close in September, with the Consultation results published on August 14th, and currently, our practitioners continue to represent children. At a time when CAFCASS are struggling both generally and specifically, and in order to protect the interests of some of the most vulnerable children, we hope that these matters can be swiftly resolved through constructive dialogue with all departments of the LSC.

There is early indication that the LSC may recommend that some social work remain in scope and that they may create a specialist children's contract. If NYAS are to continue to be able to work with some of the most vulnerable children with the confidence of their alienated and warring parents, and if we are to retain the specialist skills of our legal team and social workers, it is essential that we remain independent of CAFCASS and that the criteria for LSC contract compliance be addressed to take account of children's needs. NYAS and CAFCASS already have a well established protocol for the referral of cases. Any commissioning relationship with CAFCASS would undermine NYAS's independence, and irrevocably alienate those families where the relationship with CAFCASS has broken down. It would reinforce the "power imbalances" which are inherent in the relationship between purchasers and providers and acknowledged in the Government's Compact with the third sector.

A more measured approach, to allow the continuation of NYAS specialist, niche services for children, would ensure sustainable access to justice for the most vulnerable children across the country.

I am grateful for the opportunity to put these matters before the Committee.

Elena Fowler
Chief Executive Officer

22 June 2009

NYAS CASE EXAMPLE—

Extract from a recent judgement, In the High Court of Justice (Family Division)
Before The Honourable Mr. Justice Ryder—June 2009:

MR JUSTICE RYDER:

1. This is the judgment in proceedings FD07P02305. On 21 November 2008 this Court handed down a brief interim judgment upon the adjournment of proceedings between the parents of a child, D. D was born on xxx 2002 and is now six rising seven years of age. Her parents are Mr A and Mrs B.

2. The interim judgment sets out the sorry tale of how two dedicated, committed but opposed parents came to be failed by the family justice system. On that occasion this Court was forced to discharge CAFCASS upon the basis that the Children and Family Court Reporter's written and oral evidence was of no value to the parties or the Court. That was an agreed conclusion and considerable costs were wasted. In due course I shall investigate the nature and extent of those costs and whether CAFCASS should pay the same and I shall direct that a notice to show cause why the wasted costs should not be paid be issued. At the same time I shall consider whether the interim judgment should be released as it records matters of public concern.

3. Upon discharging CAFCASS from any further involvement in these proceedings I joined D as a party and appointed the National Youth Advocacy Service, an independent voluntary agency and charity which specialises in legal and social care representation, to be the child's Rule 9.5 guardian ad litem. Fortunately, and despite the significant restrictions imposed on that body by the Legal Services Commission, an agreement was arrived at which permitted NYAS to represent the child. The consequence, as is the common experience of the senior judiciary, is that NYAS have negotiated a significant measure of agreement between the parents. This is despite the fact that (a) these deeply opposed parents have striven since October 2007 to find a resolution to their problems without success, (b) both now act as litigants in person because of the

financial impact upon them of the proceedings and delay, (c) there are nearly 1500 pages of contentious issue driven materials and(d) there has been an alleged unlawful retention of the child in a foreign jurisdiction and there are significant financial issues between the parties yet to be resolved by another family court.

4. The measure of agreement had not been achieved by highly competent legal teams who I find had likewise striven to achieve resolution but who were missing the services of a socio–legal organisation who understood how to perform this task. At a time when the future of NYAS hangs in the balance, being dependant on funding from Government and/or the Legal Services Commission and where steps are being taken to restrict NYAS's work this simple example ought to be made known so that some reconsideration can be given to the ability of agencies such as NYAS to provide needed services for families. The agency of the State, namely CAFCASS, was unable to provide what this family needed. This Court should not shrink from warning of the consequences should it be faced with demise of NYAS. Without that organisation's services this Court would have been involved in seven days of contested, damaging and ultimately unnecessary litigation at great cost, emotional and financial, to the State and everyone involved.

5. D is a little girl who was born with a number of quite severe difficulties. She will have continuing complex special needs throughout her childhood and has a statement of special education need which sets out specific, therapeutic and support services. She is reviewed by a team of medical experts at Great Ormond Street Hospital every year. Fortunately, I need not dwell on the detail of D's difficulties because they are not in dispute. I can summarise them in layman's terms and note that any welfare resolution for D has to make provision, professional, practical and financial, for those needs.

6. In summary, she has marked communication difficulties with delayed speech and language skills and no direct speech, delayed cognitive development, significant learning difficulties and complex medical issues relating to feeding, kidney function, hearing and hip alignment, which have been resolved by medical intervention but which remain under annual review. She uses Makaton signing and pictures to communicate.

7. Upon the adjournment of the proceedings in November 2008 the stark issue before the Court was whether either parent's proposal for residence was capable of meeting those needs. Both parents had disavowed state sector educational provision but wanted D to experience inclusive mainstream education and social care provision. There was no analysis available to the Court as to who was in fact the primary carer of D or what the benefits and detriments of each proposal would be from D's perspective.

8. The parties' proposals remains on the face of it worlds apart. D's mother wishes to care for her in a European country where the maternal grandmother and her partner live and where D has previously experienced a period of care. That interlude in D's life ultimately led to an allegation of her unlawful retention in that jurisdiction and the intervention of the courts in this jurisdiction and in the European Country under the Hague Convention and Brussels two Revised to restore the status quo ante so that welfare decisions might be made in the jurisdiction of habitual residence of the child, that is in England and Wales.

9. The circumstances of the period of care in the European Country remain in issue between the parties and in light of the agreements now facilitated by NYAS this Court need say no more than that the habitual residence of D was in this jurisdiction and whatever the parties separately understood of this period of care and whatever their different intentions in that regard there was no meeting of minds as to D's future care in the European Country:

> D's father has previously argued that he should care for her in X County in England or in the alternative that D should be cared for by her mother in X X County where the maternal grandfather, MR E, lives so that she might have the benefit both of special educational need services in that county and extended family support in this jurisdiction.

10. As a consequence of the involvement of NYAS the parents have agreed the following significant issues: (A) That primary care for D is now provided for her by her mother. (B) That MRS.B shall continue to provide primary care for D. (C) That father has a loving and committed relationship with and to D, which D needs to have maintained. (D) That father should exercise significant regular staying contact every month to include holiday staying contact in every school holiday. (E) That a residence order should be made in favour of mother, and (F) that a contact order should be made in favour of father. I say in parentheses that the precise detail of the general contact agreements to which I have referred are set out in a draft minute of order placed before the Court by MR.C on behalf of the child through NYAS which sets out in greater particularity and accuracy the specific provisions which have been agreed.

11. I have very carefully scrutinised the parties' agreements and the guardian's advices upon which they are based and I approve of them as being in D's best interests now and for the foreseeable future during the balance of her minority. Although the parents could have argued for a shared care or residence regime for their future care of D they have realistically recognised that in day to day terms D needs consistent coordination of the support she receives and that that degree of primary care suggests that one person should be in control. They have likewise recognised the guardian's assessment of D's care is that her primary carer is her mother. However good her father's care will be (and for the purposes of this hearing I can state for the record that both parents emotional and physical care is exemplary) this child's primary attachment is with her mother and father to his credit no longer seeks to persuade the Court otherwise.

12. If primary care is agreed and there is a full recognition of the importance of father's relationship in the contact, which is agreed wherever D is to live, then what are the surviving issues in law and fact? They are: 1. Should mother have permission to remove D from the jurisdiction to the jurisdiction of the Kingdom

of a European Country? And 2. Does father need to obtain mother's consent to extend his paternal family care of D when D is having contact with him? I will deal with the second issue shortly and will do so before recollecting the legal principles I must apply to the evidence I have heard and read. The purpose of mother wishing father to inform her of third party carers so that she can agree to the same may have an element of control about it but in great measure it is informed by her desire to ensure that adults are Makaton trained so that they can communicate reliably with D. Father tells the Court that the extended paternal family and his new partner will be so trained in the very near future and this will not be an issue. There is, everyone agrees, obvious benefit derived from this particular training.

13. I have heard mother and father give evidence as well as the guardian on behalf of D and she advises that this level of control is not necessary. I agree. Father should be free to arrange for family members in his extended family, including his partner, to participate in D's care without having to obtain prior consent from mother. It is necessary before addressing the sole remaining issue to digress and summarise the legal principles I must apply.

14. Leave is required to remove a child permanently from the United Kingdom where those with parental responsibility do not agree. In general an application for permission is governed by the paramountcy principle and the factors set out in Section 1(3) of the Act, known as the "Welfare Checklist'. The leading authority remains the decision in *Payne v. Payne* [2001] 1 FLR 1052. Within the context of paramountcy the following six propositions are usually relevant: 1. There is no presumption in favour of the applicant parent. 2. The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight. 3. The proposals have to be scrutinised with care and the Court needs to be satisfied there is a genuine motivation for the move and it is not the intention to bring contact between the child and the other parent to an end. 4. The effect upon the applicant parent and the new family of the child of a refusal of leave is very important. 5. The effect upon the child of the denial of contact with the other parent and in some cases his family is very important. 6. The opportunity for continuing contact between the child and the parent left behind will be very significant.

15. The judicial approach often involves the following considerations: Is the application genuine in the sense that it is not motivated by some selfish desire to exclude the other parent from the child's life? Is the application realistic? Is it founded on practical proposals both well researched and investigated? If the application fails either of these "tests" refusal will almost inevitably follow. If, however, the application passes these "tests" then there must be a careful appraisal of any opposition to the application. Is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to the remaining parent and the future relationship with the child were the application to be granted? To what extent would that be offset by any extension of the child's relationships with the removing parent in her new home? What would be the impact on the applicant either personally or in the context of any new family relationships or the restoration of existing family relationships of a refusal of a realistic proposal? Something that may have to be given great weight having regard to the best interests of the child concerned. All of these matters are to be considered within an overriding review of the child's welfare as the paramount consideration.

25. The children's guardian has analysed the benefits and detriments of both proposals and unexpectedly concludes in a careful and well researched report that European Country is better. I agree.

26. In summary the application to remove is genuine. There is no intention to exclude father from D's life, quite the contrary. The proposal is realistic, founded on practicable, researched and investigated ideas. Father's opposition is properly motivated by welfare concerns, namely the impact of the proposal on his own contact and the feasibility of the financial arrangements. If finance cannot be provided for in the ancillary relief hearing father's relationship with D would suffer and the services she needs would have to be funded elsewhere. The maternal grandfather can provide for that eventuality. The benefits to D of the proposal put by mother are greater than the risk of detriment. The proposal is in her best interests. To pursue a second best option would adversely impact on mother who is D's primary carer. One can judicially infer, and I do, that that would not be good for D.

27. Accordingly, and for the reasons I have given, I shall give permission for D to be removed permanently from the jurisdiction to the jurisdiction of the Kingdom of European Country and I shall ask that that order be added to the agreed minute of order that was very kindly produced for the Court by Mr C yesterday. In addition to which I have before me a draft minute of order relating to the relisting of the proceedings to consider costs issues and in particular whether a wasted costs order should be made against CAFCASS and whether my judgments, either in the singular or the plural, in an anonymised form, should be made available in the public domain.

28. I give the parents this commitment bearing in mind that I am releasing them from any further attendance not only to save expense but emotional energy. These proceedings need to be regarded by everybody as concluded, but nothing will be put into the public domain which discloses their names, their relatives' names, the child's name, their whereabouts, the child's whereabouts or educational arrangements so that neither they nor D can be identified by anything in the judgment. I have not of course decided whether to take the step of publication but I will hear any submissions that anybody wants to put to me on the

adjourned hearing date when costs are in issue. If the parents are not present they are more than welcome to send me an e mail, copied to each other of course, to say what their view would be when they send in the costs schedules that will help me to determine how to deal with the costs issues.

Written evidence submitted by Resolution (copy of response to Family Legal Aid Consultation (extract))

INTRODUCTION

About Resolution

Resolution's 5,700 members are family lawyers committed to the non–adversarial resolution of family disputes. Resolution solicitors abide by a Code of Practice which emphasises a constructive approach to family problems and encourages solutions that take into account the needs of the whole family, and the best interests of any children in particular.

Resolution as an organisation is committed to developing and promoting best standards in the practice of family law amongst its members and amongst family lawyers in general. Resolution explores and promotes other means of resolving family disputes, such as mediation and collaborative law, so that couples can negotiate solutions without using the courts. Many Resolution members also practice as mediators and collaborative lawyers and many are accredited by the organisation as specialists in particular aspects of family law, such as contact cases, domestic abuse or financial aspects of separation.

Around two thirds of Resolution members do legal aid work. Those doing so work in approximately 1,500 firms, which form the bulk of family legal aid contract holders.

The LSC's consultation and data

The LSC sets out what it seeks to achieve by introducing the fee schemes proposed in the foreword to the consultation paper. In summary, its objectives are:

— To control the cost of family legal aid at the current level.

— To move more fees onto a standard fee basis which is as simple as possible.

— To reward practitioners appropriately for the valuable client work they do.

— To implement extra payments to reflect objective measures of complexity.

— To pay the same fee for advocacy regardless of the type of advocate doing the work.

We broadly support these aims but say more in our response about whether the proposed scheme would achieve them, particularly in relation to simplifying the standard fee scheme, rewarding practitioners appropriately and paying the same advocacy fee regardless of the type of advocate.

This consultation document was launched on 17 December 2008 following a period of data gathering by the Legal Services Commission which began over two years ago. The launch had been delayed by over two months and the final release just before Christmas was unexpected. We do consider that a consultation period of three months (considerably shortened by the Christmas break) is inadequate, notwithstanding the extension to the consultation period agreed by Lord Bach. These consultation proposals are a significant shift away from the principles of the existing payment regime. Most individuals and representative organisations are simply not equipped either in expertise or financially to mount an appropriately critical examination of the proposals. In addition, during the consultation period, considerable concerns about the reliability of the data on which the LSC have relied to develop their proposals have arisen and there is little confidence in the data that the LSC has sent to individual firms.

Resolution has committed itself to undertaking a series of roadshows seeking the views of members around the country, despite the very short time period. The views gathered by members are indeed very varied and it is impossible to put forward a common view on behalf of our members. The overwhelming view of practitioners is that the individual fee proposals for both case preparation and advocacy in public law and private law are too low. We are concerned that this results from some fundamental problems with the data that the LSC has compiled and upon which it has relied to formulate its proposals, and we are concerned that the fee proposals have not accurately been calculated.

The child care case review analysis was undertaken without any practitioner input, despite offers from various representative groups. We believe that this has led to the apparent flaws in the data. This concern has been supported by the problems with the LSC's data uncovered by Professor Martin Chalkley, instructed by the Bar. We understand that the Commission undertook to cleanse the data, but do not know whether this has been successfully completed or whether the flaws in the data are statistically significant in the calculation of the fees.

Further, in late March the LSC sent individual data to each family solicitor account holder which purported to offer a tailored comparison of the fees paid to the organisation in their recent billing and what the LSC say would be payable on the same cases under the new fee proposals. The data was in such a format that it has been virtually impossible for any of our members to be able properly to verify the statistics. In many cases the data given in respect of the existing costs was simply wrong, based on wrong assumptions, for example mis–stating the number of interim hearings undertaken. In many cases firms have not been able

to identify the files on which the data is based and, where they have, they have been unable to verify the data. There appears to be a high level of inaccuracy in the data and some straightforward misunderstandings of the stages in the case to which the data relates.

Practitioners have expressed concern to us that the data they have received is incomprehensible or inaccurate. This, together with concerns about the macro data on which the fees have been calculated, gives us no confidence that the data that the LSC has relied on in drawing up its proposals is reliable.

There is also concern that there has been an insufficient time lapse since the introduction of the phase one reforms appropriately to assess their success or otherwise. The vast majority of the practitioners report that in both private law and public law they are still conducting cases which commenced at the outset of the introduction of the phase one reforms.

There have been other changes in the family justice system such as the introduction of the Public Law Outline in April 2008 and the enforcement mechanism introduced by the Children and Adoption Act 2006 in December 2008 which will impact on case costs in future, and are as yet untested. In addition, the allocation practice direction and changes in practice, such as cases following judges around the circuit, are having an impact on our members' costs in many areas. If they are to work in practice, the fees must be sufficiently flexible to provide appropriate remuneration in the dynamic context of family litigation.

For all these reasons we are not confident that figures are correct. A period of time must be allowed so that accurate data can be presented by the LSC and then fully assessed by the practitioners. There is an overwhelming unease about the specific figures presented. Therefore, our response is restricted to matters of principle.

Fixed fees

Resolution agrees in principle with the introduction of fixed fees for advocacy and for private law Court work. There are disadvantages to fixed fees if they are not pitched at the right level and there are not appropriate safeguards, but it is also clear that there are some advantages to fixed fees.

However, for fixed fees to be truly effective there must be a consequential reduction in the currently increasing bureaucracy that surrounds the conduct of family work in relation to the grant, amendment, reporting and billing of individual matters. Those firms that perform adequately should have devolved powers granted to them to enable them to issue full certificates and amend certificates. Also, the fixed fee levels must coincide with appropriate cost and scope limitations. The requirement for prior authority to instruct counsel in the FPC must also be removed.

Having said we support fixed fees, we do believe that there should be an appropriate escape for long–running cases, but the present consultation offers practitioners only one set of figures based on the three times escape. It is unfortunate that the consultation did not offer a range of options from which to choose. We have therefore asked the Commission to produce fixed fees for private law based on both a two times escape and four times escape and are disappointed that these calculations could not be produced within the consultation period. Inevitably with a two times escape, the fixed fees will reduce, however with a four times escape they will increase. The production of the range of options will allow practitioners to study carefully the opportunities that are presented with each set of figures. It may well be that practices would prefer the certainty of higher fixed fees in exchange for a higher escape, and we seek further consultation on this.

We would also like to see more incentives offered for all level three private law work to encourage settlement. We propose that the fees at level three are enhanced, with a consequent reduction in the level four fees and, further, for a settlement fee to be paid if cases conclude within 21 days of either an FDR hearing in finance cases or a directions/review or conciliation hearing in children cases.

We would also wish to see how the preparation fees would look if enhancement for High Court cases was removed and the extra funding redistributed across all preparation fee levels.

Advocacy

We support the Commission's proposals in respect of advocacy in principle. We have many issues about the detail and about the level at which the proposed fees are set, which we refer to in the main body of this response. As we have indicated in previous consultations, we support the fundamental principle that advocates should be paid the same for undertaking the same work. We believe that the principle of equal pay for equal work should be applied consistently and without exception throughout the proposals.

We believe that the family law Bar have made an important contribution to the development of family law and have paid a significant role in the representations of disadvantaged adults and children. However, the current system is unfair in that, for example, a recently qualified barrister in a care case acting for a parent can earn four times more than a solicitor advocate with Higher Rights, Children Panel membership and Resolution accreditation in the same case. A barrister appearing in the County Court briefed on three injunction hearings can also earn significantly more than a solicitor advocate similarly instructed. Barristers are not always paid more than solicitors for undertaking advocacy but, as the statistics show, in the vast majority of cases they are. It is to the credit of the Family Law Bar Association that they have endorsed the principle of equal pay

From our investigations it is apparent that solicitors use counsel for a variety of reasons. Undoubtedly on occasions some solicitors consider it appropriate for them to instruct a barrister whom they believe to be a particularly good advocate to deal with a case that they consider to be complex on the facts or the law. However, it is also clear from our enquiries that in the vast majority of occasions where counsel is used, it is because the solicitor considers it convenient to do so. This is because they are unable to cover the hearing themselves because they are engaged in another court, the distance is too far to travel, or the trial is likely to last more than one day. It may also be the case in some instances that the solicitor does not have the experience to represent at a hearing, particularly the longer hearings. Practice does seem to vary throughout the country and there are undoubtedly some family solicitors undertaking legal aid who do not choose to do any advocacy at all. Whilst we understand there may, on occasions, be financial reasons why this might be so, it is difficult to see how this is in the best interests of the client, or the solicitor's practice development in the long term. It is only by attending court and conducting advocacy on one's own cases that experience of negotiation, settlement, legal argument, evidence gathering and judgement are developed.

Even with the introduction of fixed fees there will still be a need to brief specialist barristers, but also barristers able to undertake routine advocacy.

The choice of specialist barrister however, as we found from our enquiries, is very subjective. One solicitor's specialist barrister is another solicitor's suitable advocate for a routine contact case. An individual solicitor may well be able to describe quite precisely why they consider a particular barrister to be of top quality but it is not possible to set these views into a set of objective criteria which is independently verifiable.

In our response to the consultation on the Graduated Fee Scheme, we recognised the contribution that the family Bar has made to public funding over many years. We also recognised that the year–on–year expenditure on the Graduated Fee Scheme was unsustainable and that cuts had to be made in order to preserve both eligibility and payments for solicitors. In that consultation we endorsed the principle of equal pay. The statistics from the LSC show that if the principle of equal pay is to be put into practice then there must be a marked shift in the amount that is paid to the Bar for advocacy to the solicitor's profession. We support this as being fair. We recognise and sympathise with the fact that many members of the Bar will effectively be taking a cut in remuneration when the proposals are introduced. Sadly, that is an inevitable consequence of a fairer distribution of advocacy payments.

We believe that the majority of the Bar will adapt to the new basis of payment. However, there are also opportunities for solicitor advocates, whether employed or freelance, to increase their work. Over the next year or so it is likely that there will be an increase in the number of solicitors undertaking advocacy generally as well as more specifically seeking the Higher Rights qualification which puts solicitors formally on the same par as a newly qualified barrister. We also believe that in each region it is likely that a network of advocates will develop who, whether specifically employed by a firm or freelance, would offer advocacy services. Such networks are likely to be web–based.

However, despite the stated aim of the LSC, the current proposals do not yet achieve equality in many significant respects. Barristers will still be able to receive payment for opinions, conferences, preparation and travel where solicitor advocates cannot. We cannot see any justification for these distinctions. There is no justification for a newly qualified member of the Bar being paid to give a detailed written opinion on a case to a newly qualified family solicitor while a more senior solicitor in a firm with a Higher Rights accreditation or Resolution accreditation would do the same piece of work for no additional payment.

There is also a serious issue for some practices, particularly in rural areas, not receiving travel payments for advocacy. We have had examples from around the country of travel distances of 30 miles each way plus for the nearest court. Not to allow solicitor advocates travel costs (perhaps above a certain minimum distance) would discriminate against rural practices and those practices which are some way from the central courts.

On balance, we are also against graduation and/or payments for complexity. We are not satisfied across the board that there is objective evidence to corroborate the need for graduation. We also are concerned that there were insufficient safeguards for appropriately testing the bolt–ons in relation to the Graduated Fee Scheme which resulted in the cost of the scheme escalating. Therefore, our view is that there are insufficient objective criteria to judge appropriate graduation and Resolution would prefer a simple fee structure.

We believe that there should be advocacy payments for each day of a trial. We also consider that payments should be made at the final hearing advocacy rates for fact finding hearings and contested interim private and public law hearings where evidence is expected to be heard. We are particularly concerned that the current proposals allow a fact finding/threshold hearing to be part of the final hearing for payment purposes for public law work and not private law work. We do not consider it reasonable to have tapered fee payments. The fees should be based on the number of hearing days.

We also consider it essential that there is a separate payment for hearing preparation for in–house advocates regardless of whether the payment is apparently already factored in to the structure. Not only does it balance the payments made to counsel but it is directing payment to a key element of advocacy. It is fallacious to state that the overall knowledge of a case is a substitute for specific preparation, particularly when the case may be handled by a team within the solicitor's office.

We therefore fully support the Commission's aim of paying advocacy on the same basis regardless of who undertakes it. We understand and indeed consider it inevitable that members of the Bar and solicitor advocates, who derive a significant part of their income from advocacy, will criticise the advocacy fee levels. The Bar and certain solicitor advocates will argue that the advocacy payments must be increased in order to make the work cost–effective. Resolution very firmly believes that case preparation (the 'representation' element of the proposals) is a key element in achieving family justice. Case preparation involves a variety of skills, including management of clients and their expectations, identification of issues at the earliest opportunity, negotiation, and careful and detailed preparation for any subsequent Court hearings. Successfully conducted cases demand careful preparation and constructive communication with other parties which is vital in bringing cases to a conclusion or at the very least narrowing and defining issues in both the public and private law arenas. Solicitors' practices provide access throughout the day for all members of the community from 9am to 5pm at least five days per week, including emergency services. However, a consequence of that is that they have markedly higher overheads.

It is for that reason that Resolution would be absolutely opposed to any increase in the advocacy payments if that was at the expense of case preparation in public and private law.

Regional fees

Many of our members remain very unhappy indeed about the apparently arbitrary way in which regions of the country are divided up with the result that practitioners are paid markedly different fees for undertaking the same work. A clear majority of our members favour a national fee but virtually everybody recognised that there should be an additional allowance for practitioners in the extended London region.

Experts

We note with considerable concern that the government are seeking to introduce a payment structure that will reduce payments to the Bar across the board and to many solicitors too. It is well established that one of the principal cost drivers in family cases in recent years has been the increase in payments to experts in all fields (i.e. including counsel). Reductions in payment should also be borne by other experts. The LSC should introduce measures at the same time which limit payments to non–counsel experts, which should result in more money being made available to increase the standard fees. Clarification is sought as to whether these potential savings have already been factored into the fees proposed or whether they would be available to increase fees in future. At the very least, the Commission should introduce the same fee levels for experts in family cases as are paid in criminal cases, where we understand the fees can be as much as half the amount they would be in family cases. We have been calling for better controls over experts' fees for many years now and steps in this direction are long overdue.

3 April 2009

Supplementary written evidence submitted by Resolution

We note with interest that the Justice Committee is holding an evidence session looking at the Government's proposals for the reform of family law legal aid and the conduct of consultation on this issue.

Resolution is the largest association of family solicitors in England and Wales. We have a membership of 5,700 family solicitors, of whom at least two thirds undertake family legal aid work and whose firms make up around 1,500 family legal aid firms. Our members comprise the great majority of family legal aid contract holders and who undertake the vast majority of advocacy in family matters.

We were therefore concerned that we had not been invited to submit evidence to your committee on this issue. Resolution has been a key consultative body on the Legal Services Commission's Family Representative Body and Civil Contracts Consultative Group and meets regularly with Government ministers with responsibility for family legal aid. We have also in the past given evidence to your committee on enquiries into the reform of legal aid and also the family justice system and CAFCASS.

Family legal aid covers advice, assistance and representation across the range of family law matters: divorce, finances on separation, cohabitation and the complex trust and inheritance law associated, domestic abuse, private law children matters, international child abduction, adoption, care proceedings, special guardianship and placement orders. The vast majority of our members operate in firms which cover the range of legal aid work in private and public law and their ability to offer these services depend on a workable and viable legal aid scheme.

Like our colleagues who have been invited to present to your committee, we have some serious concerns about the proposed changes to the family legal aid scheme, as well as concerns about the changes that have taken place to date. We are however, concerned that the bodies you are taking evidence from do not represent the full range of family legal aid practitioners, but are primarily concerned with advocacy and with public law proceedings.

These are of course vital matters concerning access to justice for families but we are concerned that your committee will not have the full picture, as it will not be hearing from the bodies, including ourselves, the Legal Aid Practitioners Group and the Law Society that represent the range and volume of ordinary high street practices offering family legal aid services.

Despite our concerns, however, we would not wish there to be a delay in the introduction of the reforms as, without some steps to bring the budget under control, the longer the budget deficit will increase and there will be even less resources available to fund the provision of family legal aid through advice and assistance from solicitors. Currently barristers' fees are not fixed, whereas most solicitors fees are fixed. We are concerned that if one part of the family legal aid budget is not subject to the same controls as the other, the overall budget will be eroded and the impact will be to reduce access to justice for many ordinary people. We are not opposed in principle to payment by fixed fees.

We believe in the principle that solicitors and barristers should be paid the same for undertaking the same work. Under the current scheme, barristers are paid significantly more for undertaking the same work.

We hope that we will have an opportunity to give your committee a fuller picture of the concerns that family legal aid practitioners have about the challenges facing the family legal aid scheme.

David Emmerson
Chair
Resolution's Legal Aid Committee

15 June 2009

Further supplementary written evidence submitted by Resolution

BRIEFING FOR THE JUSTICE SELECT COMMITTEE:
FAMILY LEGAL AID—JUNE 2009

INTRODUCTION

Resolution is an association of 5,700 family solicitors, whose work covers the range of family work: divorce, finances, children, domestic abuse, child maintenance and support, international child abduction, child care cases, adoption and placement. Resolution has members in 1500 firms, which make up the vast majority of current family legal aid contract holders. Two thirds of Resolution's members undertake family legal aid work.

Resolution's members are committed to a Code of Practice that aims at reducing the conflict in family disputes and conducting family cases in a non–confrontational way. Many Resolution members are qualified mediators and over 1300 are trained as collaborative family lawyers, which is a method of conducting family cases which keeps them out of the courts. Most of our members who undertake legal aid work practice both public law and private law.

PURPOSE OF THIS SUBMISSION

We are aware that the Justice Select Committee has an interest in legal aid and the provision of family legal aid services. Resolution, as the largest association of family lawyers, has presented evidence to previous enquiries of the Committee, in particular its enquiries into legal aid, the family justice system, the Carter review of legal aid and into the working of CAFCASS.

We wrote to the Committee on 15th June, expressing concern that Resolution was not invited to give evidence to the Committee's most recent enquiry into family legal aid, which held a hearing on 16th June. We welcome the opportunity to present a written submission to the Committee.

The family law profession consists of family solicitors and family barristers. Our members as family solicitors cover a full range of family matters, ranging from simple divorces to complex children matters. Our members provide advice, assistance, negotiation, preparation for hearings, representation and advocacy. 63% of legal aided advocacy is undertaken by family solicitors. So far, the Committee has only heard from barristers who conduct advocacy in family cases, the Association of Lawyers for Children, the National Youth Advocacy Service and the National Association of Guardians ad litem and Reporting Officers, the latter three who are concerned with representation of children only, primarily in Public law (child care) cases and, less often in complex intractable private law cases. The Committee has not had the opportunity to hear from the high street practitioner who undertakes the full range of work for ordinary members of the public.

Our members undertake the majority of family law work and provide ordinary people with access to advice, assistance and representation for their family issues from high street offices situated in towns and cities throughout the country. Legal aid is a vital service to many members of the community, without which they would not have the coverage of the law to protect them from domestic abuse, from economic vulnerability and disadvantage on divorce and separation and from loss of contact with their children. Our members represent legally aided clients whatever family issues they present with, whether inherently complex children cases or problems which lack legal complexity but are of critical importance to those clients.

Concerns About the Current Legal Aid Proposals

As the Committee will be aware, the Government asked Lord Carter of Coles to undertake a fundamental review of the procurement of legal aid services in 2005. Lord Carter's report was produced in 2006 and recommended that the Government move to a system of competitive or best value tendering for legal aid services. To facilitate this move, Lord Carter recommended that the Legal Services Commission first introduce a system of fixed fees to pave the way for an eventual shift to competitive price bids.

The first phase of family fixed fees was introduced after a period of consultation in October 2007. These fees covered legal help and negotiation up to the issue of proceedings in private family law cases (i.e. divorce and disputes about children and finances arising from divorce and separation) and all aspects of child care cases except the advocacy. Advocacy in all cases has remained payable to solicitors on an hourly basis and on the Family Graduated Fee basis for barristers. Preparation for court in private law disputes has remained on an hourly basis for solicitors.

The LSC now propose to move to fixed fees for the remainder of private family cases and to propose a new scheme for advocacy which will apply to solicitor and barrister advocates equally. The LSC issued a consultation paper on 17th December on its proposed new Family Advocacy Scheme (FAS) and its proposed Private Family Law Representation Scheme (PFLRS). The consultation closed on 3rd April and the LSC has been holding a series of meetings with ourselves and the other lawyer representative bodies (The Law Society, Legal Aid Practitioners Group, Association of Lawyers for Children and the Family Law Bar Association) since then. The purpose of these meetings is to discuss these proposals and to remodel various of the proposed fee schemes to take on board the comments and concerns of the respondents to the consultation.

Principles

Payment for advocacy is currently handled differently depending on whether the advocate is a solicitor or a barrister. Solicitors' advocacy is paid on an hourly basis. Until the advent of fixed fees, solicitors' preparation for advocacy (as opposed to case preparation) was also paid for on an hourly basis. Since the advent of fixed fees, the preparation element for solicitor advocates is deemed to be included in the fixed fee.

On most calculations, independent barristers are almost always paid more for the same piece of advocacy than a solicitor advocate would be because of the structure of the Family Graduated Fee Scheme (FGFS) as opposed to what would be paid on an hourly rate.

Barristers received a substantial increase to their fees in 2005. Solicitors have received no fee increase for 14 years. The inequality between solicitor advocates fees and barristers fees is a glaring anomaly. In some cases a barrister can be paid as much as 4 times the amount paid to a solicitor for undertaking the same piece of advocacy.

It is a firm principle of Resolution's that solicitors and barristers should be paid the same for the same work. This is a principle that is accepted by the other lawyer representative bodies and we are encouraged by the LSC's agreement with this principle. There is no justification for paying barristers more than solicitors, especially as their overheads are substantially cheaper than solicitors who are obliged to provide high street services to the public with opening hours of 9–5 on weekdays.

The move to the FAS provides the first opportunity to achieve this aim and we would want to move ahead with the implementation of an equal payment scheme for solicitor advocates and barristers. We are therefore strongly opposed to any delay in implementing the FAS and are supported in this by the Law Society and the Legal Aid Practitioner Group. Delay will only increase the overspend on the Barrister's FGF scheme and place further pressure on the family legal aid budget.

We support the introduction of fixed fees in principle. We see fixed fees as an opportunity to undertake work in a different way and improve efficiency and cost effectiveness in an environment where increases in hourly rates are unlikely.

Family Advocacy Scheme

The LSC has accepted that their original proposals for the FAS are not satisfactory. They are in the process of modelling other fee structures. In particular, they are modelling a proposed scheme which has been drawn up by the Association of Lawyers for Children and which is largely based on the fee scheme that local authorities employ when instructing external legal representatives. This scheme has widespread support from ourselves and from the other representative bodies. However, on current costings the ALC scheme will significantly exceed the budget available to the LSC to pay for advocacy.

While we would wish for a larger budget to be available, this is not the political reality: the LSC has to operate within a fixed budget for family fees overall with individual pots available for the various aspects of family work (such as advice, representation and advocacy). In order to pay for an advocacy scheme that costs more than the available budget, funds would have to be found from other parts of the scheme. We do not believe that this is acceptable. So while we support the ALC advocacy fees model in principle, it must be delivered within the available budget and not take funds from other parts of the family legal aid budget. The ALC scheme must therefore be pro–rata'd down to within the existing budget.

We also believe that any advocacy scheme must have the minimum of additional payments (bolt–ons) for special features as this would lead to a loss of control over funding and has in the past allowed for a certain level of over–claiming. Any additional payments must be objectively measurable and should be limited to allow for predictability in the overall costs of the FAS.

Data

The LSC shared with us and with the other representative bodies the data which it used to generate its proposals. We recognise the concerns that the FLBA and ALC have about the robustness of the data and regret that the LSC did not involve practitioners at an early stage in the compiling of the data. That said, we believe that the statisticians have been working together and would hope that the data can be agreed as being sufficiently accurate within the bounds of a reasonable level of error to proceed with the modelling of a new advocacy scheme. We would not want unnecessary delay in preparing and implementing an advocacy scheme that guarantees more equal payment between the bar and solicitor advocates and are concerned that if this opportunity to equalise the fees between barristers and solicitors is not taken, there will not be another opportunity to do so until the 2010 contracts expire in 2013.

We are also concerned that if the FGFS is not superseded by another scheme, the rate of payment for advocacy will continue to grow above the fixed budget for family legal aid and will begin to eat into what is available for the early stages of cases: the legal help and negotiation stages, thereby reducing access to justice and preventing legally aid applicants from the opportunity to settle their disputes at the earliest possible stage.

Encouragement to Early Settlement

It should be a principle that legal aid is aimed at helping people settle their disputes at the earliest possible stage and without recourse to the courts if at all possible. We therefore believe that the incentives for settlement should be built into the fee structure, by for example, making the fees for the earlier stages of court proceedings (level 3 fees in the PFLRS) higher than the level 4 or final hearing fee.

Increase in Solicitor Advocacy

Throughout the consultation process we have held road shows and attended conferences with our members to obtain their views. It is clear that if payments to solicitors improved our members have indicated that they will both undertake more advocacy as individuals but also seek to employ new advocates to undertake the work. Resolution already provides a number of courses in advocacy and there is an increasing trend of solicitors undertaking their own advocacy including trial advocacy. Newly qualified solicitors are being encouraged and trained to undertake more of their own advocacy at the outset, developing their own confidence and skills rather than instructing Counsel as a matter of course. The equalisation of fees will see that trend continue.

Conclusion

Resolution had several reservations about the original proposals for the PFLRS and FAS but we are encouraged by the LSC's willingness to consider other models and to work with us to revisit the fee schemes. It is unfortunate that the LSC did not work more co–operatively with the representative bodies at an earlier stage as this may have prevented some of the concerns about the accuracy of their data and the appropriateness of some of their proposals. However, despite these concerns, we would not want to see any delay in the implementation of the new FAS scheme or of payment for solicitors' advocacy preparation as the failure to equalise advocacy payments has put solicitors at a significant disadvantage and has affected the financial viability of their practices, thereby affecting the public's access to justice. If the fee schemes are not settled soon then there will be no time for them to be included in the 2010 Contracts for solicitor organisations which are for a term of 3 years. Procurement legislation prevents any amendments to the contracts during their term so it would be 2013 before any beneficial changes to the payment for family legal aid work could be introduced

David Emmerson
Chair, Legal Aid Committee

Karen Mackay
Chief Executive

June 2009