



House of Commons
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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The Justice Committee

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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 attention¹² 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

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 Scheme⁶¹

	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 work⁶⁵

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 skimmed 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:

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

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 Report¹⁰⁷ 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 Outline¹⁰⁸ 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 need¹⁰⁹—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 child¹¹⁰. 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 2009¹¹¹, 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 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.

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 applicable¹¹² 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 Climbié (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 jurisprudence¹¹⁶, 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 *criminal* 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 CAF/CASS 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 CAF/CASS 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,

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, CAF/CASS 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 endorsed 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 Review¹²² 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 cases¹²³ 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 shortest 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

	<i>Page</i>
Baroness Butler-Sloss GBE, Lucy Theis QC, Family Law Bar Association, Caroline Little, Association of Lawyers for Children, Judith Timms OBE, NAGALRO and Elena Fowler, National Youth Advocacy Service	Ev 1
Carolyn Reagan, Hugh Barrett and Sara Kovach-Clark, Legal Services Commission	Ev 7

List of written evidence

1	Association of Lawyers for Children	Ev 13; Ev 31
2	Ministry of Justice	Ev 32; Ev 69
3	Family Law Bar Association	Ev 34; Ev 51
4	Family Justice Council	Ev 54; Ev 55
5	Rt Hon Beverly Hughes MP	Ev 69
6	The Law Society	Ev 71; Ev 73
7	Legal Aid Practitioners Group	Ev 76
8	M Mackey	Ev 77
9	Baroness Delyth Morgan of Drefelin	Ev 78
10	NAGALRO	Ev 79; Ev 80
11	National Youth Advocacy Service	Ev 86; Ev 88; Ev 99
12	Resolution	Ev 105; Ev 108; Ev 109

Reports from the Justice Committee since Session 2006–07

Session 2008-09

First Report	Crown Dependencies: evidence taken <i>Government response</i>	HC 67 HC 323
Second Report	Coroners and Justice Bill <i>Government response</i>	HC 185 HC 322
Third Report	The work of the Information Commissioner: appointment of a new Commissioner <i>Government response</i>	HC 146 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 <i>Government response</i>	HC 154 HC 406
Second Report	Work of the Committee in 2007	HC 358
Third Report	Counter Terrorism Bill <i>Government response</i>	HC 405 HC 758
Fourth Report	Draft Constitutional Renewal Bill (provisions relating to the Attorney General)	HC 698
Fifth Report	Towards Effective Sentencing <i>Government response</i>	HC 184 Cm 7476
Sixth Report	Public Appointments: Lord-Lieutenants and High Sheriffs <i>Government response</i>	HC 1001 Cm 7503
Seventh Report	Appointment of the Chair of the Office of Legal Complaints <i>Government response</i>	HC 1122 HC 342

Session 2006–07 (Constitutional Affairs Committee)

First Report	Party Funding <i>Government response</i>	HC 163 Cm 7123
Second Report	Work of the Committee 2005-06	HC 259
Third Report	Implementation of the Carter Review of Legal Aid <i>Government response</i>	HC 223 Cm 7158
Fourth Report	Freedom of Information: Government's proposals for reform <i>Government response</i>	HC 415 Cm 7187
Fifth Report	Constitutional Role of the Attorney General <i>Government responses</i>	HC 306 Cm 7355 and HC 242 (2007-08)
Sixth Report	The creation of the Ministry of Justice <i>Government response</i>	HC 466 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