

Reforming The Legal Aid Family Barrister Fee Scheme Consultation Paper - Response by the FLBA

10 September 2008

REFORMING THE LEGAL AID
FAMILY BARRISTER FEE SCHEME

CONSULTATION PAPER CP12/08

Response of the FLBA

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Executive Summary

The Broader Context

- 1. The FLBA represents the interests of specialist family barristers nationally (see paragraph 20 below). Its membership has an obvious financial interest in the consequences of the proposals set out in the Consultation Paper; more than that, the Association is deeply concerned for the societal-wide implications of the proposals upon the interests of family justice, access to justice and the management of family breakdown.
- 2. Our professional experience of the implications of family breakdown derives from being on the 'front-line' with those who are directly affected by it; the FLBA believes that the pursuit of budgetary goals

without due regard to their wider consequences will dramatically affect the welfare some of the most vulnerable members of society. We set out this view in more detail in paragraphs 26 to 48 (below).

3. We contend that an appropriately funded legal aid system is essential for family justice; given the central role played by advocates, be they barristers or solicitors, in achieving justice for those involved in family breakdown, it is essential that advocacy services are properly remunerated. We set out in detail the negative consequences of failing to ensure adequate funding in paragraphs 58 - 107 (below).

4. The current FGFS has been carefully crafted – following lengthy consultation and negotiation over a number of years – in order to produce a reasonable and durable business model for the remuneration of advocacy services. Any proposals which do not adhere to the underlying principles of this model risk compromising precisely the outcomes which the model has been developed to preserve. The approach taken in the Consultation Paper regrettably takes no account of these principles; we set them out for clarity in paragraphs 157 – 167 (below)

5. The FLBA considers that any adjustment to the FGFS should be considered cautiously, with due regard and understanding of the principles that underpin the scheme and with a careful consideration of the evidence regarding both its current operation and the likely implications of any change – both on the Family Bar and on those who seek access to justice; adjustments should not be made piecemeal or in haste or as a short term response to budgetary shocks.

6. In paragraphs 126 – 148 (below) we set out our concerns regarding the current evidence base for the proposals in the Consultation Paper. We find there is a worrying confounding of targets that are specified in terms of aggregate expenditure and analysis of the scheme that is based on the average cost of a case. To be clear: FGFS cannot and will not control expenditure against fluctuations in the volume of complexity of cases which enter the family justice system. These risks are ones that only Government can influence, through its broader social and justice policies. FGFS can only be judged in its performance in respect of controlling the cost of a given body of cases and of ensuring value for money from public funds. It is precisely these which will be compromised by hasty or ill-conceived reforms of FGFS.

Objectives of Reform

7. The Consultation Paper finds its case for its proposals with two principal objectives. The first objective is to ensure that different legal services providers are paid the same for the delivery of the same services. The second objective is to save £13m in RAB terms over just two years pending the implementation of a further revised scheme encompassing a broader range of advocacy and litigation services.

8. With regard to the first objective, the FLBA has always advocated equal payment for equal work and made proposals for an integrated approach to FGFS as early as the late 1990s. We are profoundly concerned that the Consultation Paper does not appreciate the distinction between simple and complex hearings within the same case, and thus is based upon the false premise that a solicitor supplying advocacy in a case is performing the same work as a barrister supplying advocacy in a different hearing within that same case. The issues regarding division of work between branches of the profession are dealt with in detail in paragraphs 239 – 260 (below).

9. We do not fully understand the basis of the second of these objectives and are deeply concerned that reductions of fees of this magnitude can only be effected by undermining the family justice system. Our concerns are set out in detail in paragraphs 141 – 148 (below) but in brief: we do not accept that it is reasonable to attempt to recover the budgeted savings that have been lost through the LSC's failure to implement its reforms earlier, we do not accept that it is feasible to adopt the transitional arrangements that are proposed and that as a consequence we contend that the savings target is neither reasoned nor reasonable.

10. The FLBA is committed to ensuring that going forward the FGFS is improved and adapted to changing circumstances. We further accept that there are aspects of the current FGFS which are not performing their desired functions and that cost savings can be made, from streamlining some parts of the scheme and refining some other parts. We are committed to working with the LSC to implement these improvements.

11. In summary the FLBA has carefully considered the proposals made in the Consultation Paper and wishes to advocate the following reasonable objectives

- (a) To ensure that the FGFS remains a durable business model capable of paying the same fee for advocacy services irrespective of who supplies them.
- (b) To note and remedy deficiencies and anomalies that have arisen as the FGFS has been implemented and reformed.
- (c) To deliver savings in order to ensure best value for the public purse recognising that inappropriate cost-cutting in FGFS will have long term and substantial social and financial costs.
- (d) To have regard to the naturally occurring savings in public law work, brought about by the PLO.

Proposals

12. We will contend that none of options A, B or C meet the objectives set out above. We deal with them in brief in the paragraphs which follow.

13. Option A preserves all of the deficiencies and anomalies that the LSC itself notes as existing in the current arrangements and is potentially disastrous in terms of ensuring adequate remuneration for the most difficult and complex advocacy services: (see paragraphs 168 – 176 below).

14. Option B as currently formulated risks removing too much graduation from the FGFS and will compromise its ability to reflect the variation in the requirements of work: (see paragraphs 177 – 183

below).

15. We have considered Option C carefully having regard to the fundamental principles underpinning FGFS; we do not consider it to be feasible to eliminate the two crucial elements that capture the overall magnitude of a case in terms of the required advocacy services (see paragraphs 184 – 191 below). Nevertheless we are concerned (now that we have been provided with the recent data in relation to the scheme) that the incidence of Special Preparation appears to be less restricted than originally intended or defined.

16. We note that the LSC has not yet undertaken a comprehensive impact assessment on the proposals set out in the Consultation Paper; the FLBA, for its part, is commissioning a survey of its members which is designed to providing statistical evidence about the operation of the FGFS in practice. On the feedback and information currently available to us from our members, we are able to suggest a number of alternative proposals, which we would welcome the opportunity to discuss further – most notably:

(a) The abolition of the 'more than 2 parties' SIP in public law proceedings;

(b) The abolition of the 'conduct' SIP in private law proceedings;

(c) Re-investment of some of the savings achieved by those abolished SIPs by the creation of a newly defined, and applied, 'parent/perpetrator' SIP which can be claimed (by counsel appearing for the parent/perpetrator against or by whom allegations of are made that he/she has caused or is likely to cause significant harm to a child) in public and private law proceedings.

(see paragraphs 192 – 225 below)

17. We propose a remodelling of Special Preparation as 'Exceptional Preparation', which should be payable more directly for the work done by the advocate (and therefore individually to the person entitled) rather than in respect of the type of case (which is payable to all advocates in the case irrespective of their endeavour); accordingly, we propose that this will be payable for "Demonstration (to the satisfaction of the judge) of exceptional skill or industry in the preparation or conduct of a case."

18. We will propose a monitoring group (see paragraphs 226 – 299 below) to review the effect of any proposed changes, and to monitor the operation of the scheme generally. We will arrange and maintain proper training for the profession, and for the judiciary.

19. We will propose that the proposed transitional arrangements for the implementation of the proposals is unworkable (see paragraphs 230 – 238 below); in no other graduated fee scheme has the proposal for implementation been proposed to apply to existing certificates.

FLBA

20. This is the response of the Family Law Bar Association ("FLBA") to the Consultation Paper [CP12/08] ("the Consultation Paper"). The FLBA has 2267 members, and represents the interests of specialist family barristers nationally. In preparing this response, we have taken account of the views of our membership across the Country.

Introduction

21. This Consultation Paper is all about money, and how the Government can save it.

22. This Consultation Paper is not about the promotion of family justice, nor is it about securing access to justice for the most vulnerable members of our society. This Consultation Paper is not about maintaining quality representation for litigants under the public funding regime. This Consultation Paper disappointingly lacks any recognition of the need to address significant problems in the family justice system brought about in many respects by inadequate funding; if its proposals are brought into effect, they will inevitably exacerbate, not redeem, the blights on the family justice system – delay in the courts, increasing numbers of litigants in person, dilution and ultimate suppression of expertise. This Consultation Paper does not address the fact that the family justice system is overstretched to the point of breakdown; its proposals are not likely to reverse that trend. The proposals of this Consultation Paper are only likely to accelerate its demise.

23. It is essential that radical cuts of funding to those who practice in the difficult field of family law must not detract from the importance of obtaining the right decision about a child's future, nor increase the social costs of getting decisions wrong, which are, of course, immeasurably high.

24. This Consultation paper overlooks the fact that far more members of the public are likely to be involved in family courts than any other part of the national court or justice system. Yet once again the family justice system is treated as an "Also Ran" in the funding handicap stakes.

25. This Consultation paper refers to working "within the available resources" (para.1.3). Of course, we recognize that the Government needs to work within budgets, but we contend that there is a proper case for arguing – not just for us to argue but for the MoJ and the LSC to be arguing with the Treasury – that the Government ought to be investing more in the family justice system at this time, not the same or indeed less. If it does not do so, it will soon not be 'fit for purpose'.

Social Crisis and family breakdown

26. The social context in which these proposals are made is critical. There is deep cause to be concerned about the disintegration of family life in current society. As Coleridge J. recently observed (Resolution conference: 4.4.08):

"In some of the more heavily populated urban areas of the country, family life is, quite frankly, in meltdown or completely unrecognizable".

27. He added that

"... the general collapse of ordinary family life, because of the breakdown of families, in this country is on a scale, depth and breadth which few of us could have imagined even a decade ago"

He referred to "the wholesale breakdown of ordinary family life in households of our land" and the consequent impact on the work of the family courts. He correctly reflected the obvious link between that "social phenomenon", and the increase in the workload of the family courts in last two decades.

28. Coleridge J. spoke of family breakdown "as catastrophic as the meltdown of the ice caps":

"family life in our society is on a steep downward trajectory and urgent and comprehensive action is required"

29. We draw attention also to the comments of Tim Dutton QC, the current Chairman of the Bar, who spoke on a similar theme (with a wider perspective across the public funded profession) in his opening remarks to the Remuneration Conference on 21st June 2008. He said that:

We have in the United Kingdom a prison population bursting at the seams. As at November 2007, prison capacity in the United Kingdom was at 81,500 and the population including those in police cells stood at a record 81,547. When this Government came to power in 1997 there was a prison population of approximately 50,000 people...

Notably – and we highlight for the purposes of this response – he added:

At the same time similar statistics show an ever increasing amount of family and social breakdown. The fact that the prison population has increased on this scale shows that social breakdown, family breakdown and crime go hand in hand. Add to this potent mixture an increase in drug use and drug related offending and we have the remarkable situation that of all of the countries in northern Europe we actually have an overall crime drop, but an increase in social breakdown and a massive increase in the use of prison as a tool of penal policy.

30. Tim Dutton QC further observed, and we emphasise, that:

Capping legal aid spend at £2billion and then attempting to make unprincipled cuts within the system, putting quality representation at risk, are the diametric opposite of what is required for advocates to assist in repairing the damage caused by social background I have been describing. This is the context in which Government and the Legal Services Commission should be providing for quality representation in the field of family and criminal law.

Managing Family Breakdown: the Family Bar

31. DEMANDS OF CLIENTS:

The Bar works at the 'front-line' with those, and for those, who are among the "poor and increasingly fractured society" (Coleridge J. Resolution 4.4.08) in which we live. Many of our clients are vulnerable – emotionally, socially, and financially. They are often bitter and resentful; many are victims of violence, or are perpetrators whose need for representation and advice is no less great. Many have lives blighted by alcoholism or drug abuse. It is our 'bread and butter' daily work to be involved in private law court disputes where the hatred between the parties seems tangible, though out of place in the Court context; the stresses of these parents are bound to be high, as they are dealing with children whose own levels of distress – in the centre of the conflict – are said to be comparable to those of children in care and protection cases. Many of our clients do not have English as a first language; many speak no English at all – vital instructions are communicated through interpreters. Many of our clients come to family litigation with mental health difficulties; many have a drug or alcohol dependence. Instructions have to be taken, and evaluated, against such potentially distorting backgrounds.

32. Practitioners in the field of family law need to develop and hone skills well beyond the requirements of legal training. Barristers have a rare combination of skills, and they are entitled to expect due remuneration for acquiring and using them. There is a uniqueness in the skill of advocacy itself; but that unique skill has to be complemented by other refined skills. The barrister does not need just to know and apply the law well, but the barrister who specializes in cases concerning children also requires a good technical understanding of child development, education, social work practice, of paediatrics, of radiology, of neurology, psychiatry, psychology, and haematology; it would be naïve to imagine that a barrister can cross examine an expert effectively in one of the specialist medical disciplines without a reasonable understanding of that field of medicine. In ancillary relief cases, it is essential to have a complimentary knowledge of accounts, company accounts, tax, the benefits system, conveyancing, valuations, and land-law. Not surprisingly, it can take years to build up relevant expertise.

33. In their paper "Legal representation and parental autonomy: the work of the English family bar in contact cases" (Cambridge November 2007) Mavis MacLean CBE and John Eekelaar (Joint Directors, Oxford Centre for Family Law and Policy) emphasise the importance of the family Barrister's work outside of the court room; they comment on the ability of the Barrister to relieve anxiety in the client (in cases observed at first hand) in a way which other professionals had failed to do; the member of the Bar used the Court process not to seek adjudication but to ensure parental confidence and compliance with an agreement reached between the parties. They added :
Very little judicial time or input had been required. The main activity was well-orchestrated bilateral negotiation with the client and welfare service, and then with the other side who were also talking with the welfare officer. Nine such meetings took place in that half-day. The court provided a safe and efficient location for this flurry of activity, and the framework to inspire confidence and deliver an enforceable plan for action. Could this have been achieved in another way? Not in present circumstances.

34. DEMANDING WORK:

The work is demanding, and stressful. The family courts experience the "ceaseless river of human distress" (Coleridge J. 4.4.08). For those involved in the work on a daily basis "it is very demanding and at times stressful work" (Coleridge J. *ibid.*). MacLean and Eekelaar describe the experience at court thus: The main task of the day for the barrister is client and judge management, grounded in close attention to the detail in the papers, which leads to negotiation and settlement. All those with whom he deals are highly stressed. The only friendly face is likely to be the barrister for the other side who will be a colleague or friend, and the only person in court who understands what the day is like... lack of sleep, no food, no personal space, physical or emotional. And at the end of the day he faces the final authority of the judge to make decisions, which he may find satisfying or profoundly unhelpful.

35. This work cannot be managed or conducted on 'supermarket' principles of cut-price services.

36. Apart from the derogation from its statutory responsibility to provide proper access to justice (as to which see below), it would be in the long-run, a false economy. As Coleridge J. rightly pointed out in his speech to the Resolution conference (4.4.08), the only thing which is worse, from the child's point of view, than family breakdown, is badly managed family breakdown. He added
"There is universal acceptance nowadays, and tons of pages of research which support it, that if family breakdown and parental separation cannot be avoided then the better it is managed and handled the less the emotional, and psychological fallout on the individuals concerned especially the children. Behind every contact dispute is mismanaged parental separation. One or other of the parties feels aggrieved at the financial or other effects of the separation, war breaks out, the children get caught in the crossfire. Both sides blame the other.

37. One of our members (a barrister called to the Bar in 1995) who wrote to us having read the proposals in the consultation paper said this:

I am sure that my letter will not be the only one that mentions the sort of families we deal with. Yesterday I represented a parent in a case where an interim care order was made in respect of the baby of a 17 year old mother who had earlier accused the 51 year old father of raping her. The day before I represented a Russian mother whose daughter is British but she is at risk of deportation and separation from her child. Tomorrow's case involves a father of four children who dearly want to have contact with him but he is currently in a mental health institution. These cases are not only complex, but also involve clients who are particularly challenging in their behaviour. My client yesterday was actually ordered out of the court because of disruptive behaviour. The very features of these sorts of cases lead to many barristers concluding that even on the current fees, the commitment, level of responsibility and stress of this sort of work does not make it worthwhile.

38. The collective value of the independent, competent family Bar is priceless. There is a corpus of highly efficient, highly trained advocates who regularly undercharge for their extensive services. Advocacy is a 'unique' skill for which the Bar trains, and in which the Bar excels. Advocacy cannot be easily combined with other aspects of family law litigation.

39. Mavis MacLean CBE and John Eekelaar in their Chapter for the Cambridge Socio-Legal Volume Independent Freedom: Autonomy and the State (November 2007) answered the question: "What are the skills and qualities which the barrister needs?" in this way:

These are: charm, quick intelligence and articulacy, but above all stamina! ... the workload is heavy and unpredictable. Even the experience of shadowing was exhausting ... the inability to plan ahead puts pressure on the barrister's own family life...

40. It would be surprising to find a solicitor advocate who did not charge unit by unit for their time whereas barristers are liberal with their time and expertise and regularly put in hours for which they do not charge. MacLean and Eekelaar observed at first hand the harsh reality of much which characterizes the nature of practice at the Bar including this:

Papers on the case will be sent by the instructing solicitor, often not arriving until late on the day before a court hearing, often incomplete, and without page numbers. Pagination might seem a minor irritation, but in practice it is a major concern as it affects the ability of counsel to direct the judge to a particular point, or refute a claim by the other side during a hearing. Papers are in heavy lever arch files, ranging from 3 to sometimes 30 per case, to be carried by the barrister to the hearing. Barristers type every word they produce, are responsible for all travel arrangements, and their own tax liability. They are basically self-employed lone operators sharing offices with a group with whom they are in competition for work.

41. On the upside, barristers are free from the constraints of salaried employment and have time and space to dedicate themselves to the task in hand: preparation, research, specialist cross-examination. They are time-savers and keep to the issues at hand. They are also brave. Whilst it is not suggested that solicitors lack these qualities, it is also the case that barristers are instructed for these very qualities

42. DEMANDING HOURS:

Cases require preparation, and invariably the preparation hours are put in with considerable sacrifices to personal life. In the public law field, many hours are often spent poring over medical records, social work records, education records, contact reports, or spent viewing often gruelling diagnostic interviews of children who have been the subject of sexual or other forms of abuse, gruesome films and photos of children with serious injuries, and in some instances post mortem. In ancillary relief, analysis of bank statements, company accounts, analysis of tax implications all combine to make the work time-consuming and demanding.

43. In her paper to the LSRC Conference (June 2008) entitled "Publicly funded work of the Family Bar: public purse and private troubles", Mavis Maclean CBE (who shadowed a member of the family bar – 10 years call – for a day: see above) observed:

"In considering the contribution of counsel to the resolution of the matter described here, it is important to note that of a 12 hour working day without a break only two hours were spent in the court room."

That is not at all untypical of our daily routine.

44. DEMANDS ON THE SYSTEM:

The system as a whole is creaking under the pressure, criticism and complaint. Ryder J. in a speech delivered for the 25th Anniversary of the Butterworths Family Law Service (July 2008) referred to the fact that "there has rarely been more critical comment about the [family justice] system itself". This is the wrong time to undermine those advocates who represent the most disadvantaged and vulnerable in our society at a time when they are most in need of effective representation.

45. Ryder J. cited, by way of example, the following stresses/demands on the system:

- The argument that secret justice is not justice at all. It is said to be partial and biased
- The lottery and expense of ancillary relief division
- Both the over zealous and the under resourced failures of child protection provisions and their and our obsession with snapshot justice
- The lack of voice for the child as a person in their own right
- The damage caused by adversarial dogfights between former partners in their residence and contact disputes concerning their children
- The lack of capacity in the courts to deal with an ever increasing volume of the most serious and complex cases in a timely fashion and as a consequence the downgrading of many legitimate medium risk and need cases as if we haven't got time for them.

These are the stresses in which the Bar currently works.

46. EXPECTATIONS ON THE BAR:

The Bar has played a full part in seeking to make the system efficient. It has participated enthusiastically in the development and introduction of the Public Law Outline (PLO); it has taken on board new Government and judicial led practice guidance, new practice directions and will rise to the challenges of the impending changes in the rules from the regime under the Family Proceedings Rules 1991 to the new regime under the Family Procedure Rules (currently in draft). Many of these changes and added responsibilities have been absorbed by the profession with no additional payment.

47. This is done, as Wall LJ pointed out in his speech to the Lancashire FJC (Reported at Family Law [2008]), without any, or any appropriate or adequate reciprocal recognition by government that the system has to be properly resourced, and those who work in it adequately remunerated. Wall LJ continued that the family justice system:

"... is serviced by dedicated participants, none of whom is in it for the money. Sitting as I now do in the Court of Appeal, I see only too clearly the huge dichotomy between the well-paid privately funded lawyer in commercial litigation and those struggling to make a living doing publicly funded child care work. The simple fact of the matter is that publicly funded child care work will never be, and cannot ever be, financially self supporting. It will have to be funded by the State: indeed, the State, in my judgment, owes a clear duty to the disadvantaged children of inadequate parents to protect them from harm. That is a duty which the State must fund, and in my judgment it cannot look to the social work and legal professions to subsidise it. We have all done everything we can to make the system work. We have good practice coming at us from all directions. The PLO, the latest Practice Direction on experts, the Practice

Direction on domestic violence, all of which I welcome, demonstrate how far we have come. The burden is now on the Government to support us. And that means providing the funding to enable us to operate the system efficiently. That in turn means paying lawyers a living decent wage and enabling courts, without undue anxiety, to take steps necessary for the protection of needy children, rather than being told that they cannot do that because there are no funds with which to do so" (emphasis added).

48. The Public Law Outline has been rightly described as providing root and branch reform of the case management processes in public law proceedings. 'Ownership' of the initiative belongs to Government and the Judiciary. It's promotion and promulgation is designed to achieve swifter and better outcomes for children. But it needs to be operated, serviced and maintained. Those responsible at the 'sharp end' are the barristers who engage in considerable out-of-court and in-court industry. As McFarlane J. said in his speech to the ALC Conference in November 2007 (shortly before the PLO was rolled out nationally): Even a cursory read of the proposed PLO will see that, for it to function, parents and children require skilled and effective legal representation from experienced professionals who are adequately resourced. The PLO cannot, on any view, work without it.

Remunerating the Family Bar

49. Given the harsh realities of the social context in which the Family Bar operates, it is absolutely essential for the Government to fund representation appropriately for those whose cases come before the family courts. Failure to do so only serves to compound their plight.

50. As Tim Dutton QC (Remuneration Conference 21.6.08) stated:

By 2005-2006 Ministers had voiced their concerns about the increase in legal aid spending. The facts and figures that I have just recited indicate that if spending on legal aid had not increased the Government would have been in serious dereliction of duty in failing to comply with Section 25 of the Access to Justice Act by making sufficient legal representation available to the children and families of those suffering from family breakdown and to those charged with the offences which were resulting in prison sentences. The fact that the increase was only of the order of 34%, far from being alarming in the sense that Government had described, is no more, and probably less, than should be expected given the dangerous lack of cohesion within society

51. The Code of Conduct under which the Family Bar operates includes "requirements" in the interests of justice "to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice". The constant funding squeeze by the Government makes it more and more difficult for Barristers to operate within its Code.

52. And this is because, as Coleridge J. pointed out, the justice system is being "mismanaged and neglected by government" (Resolution: 4.4.08).

53. Wall LJ recently (speech to Lancashire FJC) commented on the fact that:

Our dedication, our goodwill, our passionate belief that our function is to address the best interests of vulnerable children and families is not being recognised by a government which, however much it pays lip service to the welfare of children, is frankly indifferent to disadvantaged children and young people who are the subject of proceedings, and simply refuses properly to fund the family justice system, relying instead on the fact that we have always got by in the face of government indifference, and will continue to do so.'

54. He added that

...Government pays lip service to the special skills which need to be demonstrated by social workers, advocates, experts and judges required to operate care proceedings in the family justice system. But at the same time, it starves the system of the resources which are required to make it work, and, as I understand the matter, it proposes to pay fees to lawyers engaged in the work which are so low as to make it uneconomic for legal practitioners, particularly solicitors, to continue to do it.

55. We share the view of Coleridge J. that the Government is doing little to recognise and face up to the emerging situation. We further share his views that

"In this situation there has never been a greater need for the public to have access to a lawyer with specialist family law and family justice experience than now. They are as vital a commodity in our national life as the local GP. Indeed their tasks are not dissimilar. When a family is going through crisis whether it be medical or psychological or legal, caused by family collapse the first port of call is and should be the local GP, if it is medical, and the local family lawyer, solicitor and barrister, if it legal. These are not the fat cats much beloved or hated by the media. They are a vital front line social service serving the community at local level, sorting out the problems of local people when their families fall apart or the social services move in to rescue a child at risk. They are just about making a living but precious little else."

56. And what we say is supported by Lord Justice Wall (speaking on "Unreliable evidence": BBC Radio 4 10th May 2008), when he said this:

"...in my experience in family work people, certainly lawyers, do not get rich. People who do public law, family, children work, don't do it for the money, and one of the things that deeply troubles me and one of the reasons I think we're getting more and more litigants in person is that increasingly lawyers are simply not doing publicly funded children work because they can't make a living out of it, and that will mean if they... if the litigant can't get a lawyer because even though they qualify for a lawyer under legal aid, then we will have more litigants in person. And as has already been said, that'll take more time, it'll be more difficult and more complex."

57. In the Impact Assessment, the Authors of the Consultation say (page 38) that:

In order to begin to fully calculate the effect of family fee changes, we would need to know the monetary value of the family legal aid work that individual barristers conduct and we would also need to know how much additional income individual barristers earned from both other types of legal aid work (e.g. civil non-family or criminal), and from privately-earned income. Understanding these factors would give an indication of the proportion of barristers' income which would be affected by the proposed reductions. While the LSC holds some data on legal aid payments, we do not hold information on the privately-earned income of individual family barristers. We encourage representative bodies and other stakeholders to provide relevant data that they hold that would assist in quantifying the effect of the changes.

It is regrettable that the authors of the Consultation paper propose such wide-reaching reforms of an established scheme without this knowledge, and without having undertaken this important impact assessment.

Consequences of under-funding:

58. The MoJ and LSC acknowledge (reference the Impact Assessment @ page 38 Consultation Paper) that it has not been possible "to accurately assess (sic.) the financial impact of the proposed changes on family barristers who conduct this legal aid work". The MoJ has a statutory duty to measure impact generally and specifically in relation to gender, race and disability effects (see in combination: Race Relations (Amendment) Act 2000, the Disability Discrimination Act 2005), the Equality Act 2006).

59. That is obvious from the proposals themselves, which appear to have been made without reference to the probable impact on the current practitioners, and the profile of the Family Bar over the next few years. In this respect, we have identified that there are at least seven respects in which there will be an adverse impact on the family justice system:

- (a) Discouraging talented advocates (paragraph 60 to 80 below);
- (b) Deterring young aspirants – the next generation of advocates (paragraph 81 to 83 below);
- (c) Reducing the Quality of Representation (paragraph 84 to 87 below);
- (d) Increasing discrimination within the Bar, and in promotion to the judiciary (paragraph 88 to 96 below);
- (e) Increasing the population of litigants in person in the courts (paragraph 97 to 100 below).
- (f) Provoking Article 6 challenges (paragraph 101 to 104 below);
- (g) Causing increased imbalance within ancillary relief (paragraph 105 to 107 below)

60. Discouraging talented advocates:

If any of the proposals are implemented, practitioners at the family Bar who undertake predominately publicly funded work will look elsewhere for their sources of income; some will leave the Bar, others will shun publicly funded work for privately funded work. An exodus of quality practitioners, particularly senior practitioners, who are currently able and prepared to do the work will surely follow. We, as Officers of the FLBA, hear the concerns daily.

61. Once members of the family Bar have left they will not return. It seems to us that those who have responsibility for funding of the legal profession have failed to recognise that the supply of the specialist family bar cannot be turned on and off like a tap. Expertise of the senior practitioners is built up over 20 + years; if experienced practitioners leave they do not return. It is an irrevocable decision. This factor, coupled with the reduction in those coming in at the junior end, will mean decisions now in relation to funding of the FGFS will have long term irreversible consequences to the detriment of those who are most vulnerable. We believe that this is a very high risk strategy, with those most at risk being the most vulnerable in society, often children.

62. It is simply no good to answer these concerns by purporting to assure us that the situation "will be kept under review". Once the damage is done, it will not be undone.

63. If the Family Bar and the system of justice designed to protect and help families are destroyed by short-sighted measures to make short-term costs savings, it will take many years and much more money to reconstruct them. The next generation of Judges will have to be drawn from a depleted pool of talent; the implications for the delivery of justice in the long-term is obvious.

64. In 2001, when the FGFS was first introduced, a number of barristers stopped doing publicly funded work. The solicitors noted the difficulties in obtaining Counsel. We are not sure why the Consultation Paper refers merely to a "perception" (Consultation Paper para.3.6) amongst solicitors of the difficulties in

obtaining counsel for family cases; it was not merely a 'perception'; this was the evidence (see the report from Frontier Economics (commissioned by the Department for Constitutional Affairs) – A market analysis of legal aided services provided by barristers (March 2004) in which 37% of the solicitors surveyed reported that they had experience of being unable to secure a barrister; the implications were said to be "a detriment to the advice received by the client" or "an unacceptable delay". For those solicitors seeking and failing to secure the services of a barrister, 54% reported that the lack of availability of barristers was because the barristers "had said that the fees [then paid] were unreasonable". This was properly a factor in the restoration of the fees to a level which was commensurate with the complexity of the work.

65. In a report to the Bar Professor Gwynn Davis (January 2003) described the situation as follows:

"As for barristers, the evidence of the survey is that a sizeable proportion of the family law Bar is not prepared, following the introduction of graduated fees, to accept publicly funded work - or, perhaps, they will only do so with reluctance when no other work is available. Given that there are bound to be cases in which one party is legally aided and the other is not, this could well add to the inequalities that already exist. This evidence of barristers' 'flight from family legal aid' is most marked in London and the South-East, but is a nationwide phenomenon."

66. In its own survey at the Bar in 2002, the information obtained showed that a significant number of the family Bar had already ceased to accept Family Graduated Fees work. The impact was more pronounced the more experienced and specialised the practitioner. It also showed a very significant fall off in those who were prepared to do certain areas of work such as ancillary relief work, once again more marked amongst the skilled and experienced. By way of example, by the time of the survey, 42% of ancillary relief specialists had already ceased to accept work under Family Graduated Fees. Members of the Bar also showed a reluctance to have conferences, advise and attend directions hearings; once again this was more pronounced amongst the most skilled and experienced. It demonstrated poor levels of remuneration for these categories of work. Further, many were reluctant to undertake interim hearings in child care cases for the same reason.

67. Lord Carter of Coles in his report on legal aid procurement acknowledged that the review (and re-financing) of the FGFS in 2003-2005 following this haemorrhage of expertise had only "largely" been accepted by the family Bar (see para.73 on page 31). There were plainly some (many) acknowledged who did not accept it.

68. As we discuss further (below), the contrast between public and private fee regimes was (and is) particularly acute in publicly funded ancillary relief work where it is perfectly possible for a barrister undertaking FGF work to earn three or four times less than a privately funded advocate for work on the same set of papers in the same case. This has direct 'access to justice' implications for the litigants; the privately paying client (likely to be the husband) will be much more likely to be in a position to instruct experienced counsel, compared with the publicly funded wife who will not. The disadvantage for the wife may be significant; the implications for her and potentially the children of the family may be disastrous.

69. As in previous consultations there seems to be no recognition that within the area of ancillary relief in particular a very large proportion of the LSC costs expenditure is ultimately repaid to the State, together with interest.

70. Although the Consultation Paper relies on the Fenn report as indicating that "barristers were increasingly taking on this work, even at the lower rates", before the 8% was put back into the system, we do not accept that this is so. In 2001, neither the government nor the LSC accepted that the flight from the profession was a likely consequence of their proposals. Once the scheme was introduced, the comprehensive survey undertaken by the FLBA (95% of the FLBA membership responded) showed that one year after the introduction of FGFS 10% of all practitioners had stopped doing all publicly funded work due to FGFS. Among more experienced practitioners, 13.5% of those between 16-20 years call and 17.2% of those over 20 years, call had ceased to do the work. Among ancillary relief specialists 42% stopped doing publicly funded work at all.

71. In her letter to Baroness Scotland of Asthal in 2003 Pamela Scriven QC, then Chairman of the FLBA, quoted from a number of judicial sources about the state of representation in the Courts. She cited the Justices Clerks Society who reported to the Department on 13 June 2002 that:

"...there is evidence that more junior members of the Bar are now dealing with complex public law cases at FPC level. Moreover once the SIPs have been taken by one barrister others do not wish to accept the case. Linked to this there is a move for some experienced barristers to move away from publicly funded work. This is unfortunate in view of the move within the courts and Law Society to encourage specialization and a high degree of competence. This work must be properly rewarded in order to encourage able and experienced practitioners to deal with family cases at FPC level".

72. It is our view that the proposals of this Consultation paper will replicate these problems.

73. We do not share the confidence of the authors of the consultation that the proposals set out in the consultation will

"help to control the expenditure of public funds, achieve value for money while ensuring that services continue to be provided to clients by a sufficient number of competent advocates" (para.3.9 Consultation

Paper)

74. Instead of endeavouring to promote a system in which excellence in the professional service, and true access to justice, is achieved, the quality of the service offered is at risk of reduction to the lowest common denominator. There is an assertion in the Consultation Paper that the use of counsel has risen in recent years. Indeed, the Consultation paper reports that "the use of, and expenditure on, counsel for family cases actually rose well before the fees were increased in 2005" (para.3.9). The reality nonetheless is that:

(a) There has been an increase in the number of cases;

(b) Cases have become more complex;

(c) (Anecdotally) legal aid firms are having to take on so many cases to 'get by' that they simply cannot act as advocates in all of them.

75. We contend that there is a direct relationship in public law cases under the Children Act in particular between on the one hand, the quality of the lawyers, social workers, guardian's and experts in a given case, and, on the other, the efficiency with which the case is managed and the clarity with which the issues in the case emerge for decision. The process of decision making is rendered clearer, swifter and less costly in emotional and financial terms by competent advocacy and preparation.

76. We firmly believe that when in October 2007, the standard fee schemes were introduced for solicitors for civil advice, child care proceedings work, and family help (private) (advice and negotiation only), a large number of solicitors stopped doing the work. Wall L.J. speaking recently on Radio 4 (10th May 2008: "Unreliable evidence") said this:

... colleagues and friends whom I greatly respect in the solicitor profession are leaving because they can't make a living out of it, and young people are not going into it. And the result of that is that the needy, very needy people, particularly if they're parents who need proper, sensible, good legal advice, are simply not going to get it, and this is a very worrying phenomenon.

77. This view is not unique among the judiciary. Far from it:

"In the public law field, we find a government determined to pay the publicly funded family lawyers so little that they are just giving up and turning elsewhere. In time they will disappear from the high street and they will never come back. And don't let me hear from Government that the statistics do not back this up. Of course they don't today. Family lawyers are not going to pack up as one overnight. But talk to anyone who knows what is happening and what is going to happen in London or the provinces. They will tell you that their departments are being shunned by their partners, that they will for the time being limp along and operate in cheaper premises. But they will not recruit or be able to recruit new comers or pay the trainees. These are tomorrow's family legal specialists. And if there are no specialist lawyers where will the specialist judges come from in ten or twenty years. There simply will not be the reservoir from which the judiciary at all levels can be drawn." (Coleridge J.: Speech to Resolution 4.4.08)

78. Among the many accounts which we have received of our solicitor colleagues giving up this work, we cite the following accounts recently supplied to us:

Western Circuit: There can be no doubt that at all levels the family justice system is stretched to breaking. As this goes to press I am in a month long High Court care case representing the mother accused of fabricating illness in the child. At a preliminary hearing my instructing solicitor was very upset as she had just been told of her redundancy from the firm at the end of this case. She is an experienced and talented child care solicitor. The reason for the redundancy was clear: the traditional West Country firm employing her had decided that public funding in family cases was not sufficiently profitable and the department was to be closed down. It was not pulling its weight. All West Country firms are in much the same position. The overwhelming majority of solicitors to whom I speak are employed by similar firms and tell the same message: the partners are tolerating the family department for the time being and awaiting developments in public funding. The ethos of these firms (cover the bases in order to offer an all round service) will go so far: any further cuts threaten meltdown. Most firms in this region are in this position. The big players have moved out of public funding in family cases already. We have few specialist firms and none who could adopt a 'swift high turnover of work' approach (dare I say 'pile it high and sell it cheap'). Geography and the volume of work do not permit this.

Midlands Circuit: I spoke to Jonathan Brew, one of the senior partners at Harrison Clark, this afternoon. He confirmed that the firm is ceasing to undertake any publicly funded children work on the basis that their accountant had advised them that they were losing money on each file they opened. Accordingly the partners would not support the continuation of that department.

Midlands Circuit: I have spoken this morning to Julie Burn a family solicitor with a large firm in Shropshire, FBC Manby & Bowdler. She was admitted in 1981 and joined the Children's Panel in 1989. The firm merged recently. The partner firm, FBC, stopped undertaking publicly funded children's work 4 years ago. Julie still undertakes publicly funded work but:

(i) she is the only person in the firm now to do so;
(ii) she now only has 6 active cases which are coming to an end (as opposed to 20-25 cases in the recent past);
(iii) no new work is coming through;
(iv) it is only a matter of time before her fellow partners pull the plug on publicly funded children's work – the department is not financially viable;
(v) those cases she does have, the firm have probably lost money or just broken even;
(vi) she is re-training to undertake wills and probate work; and
(vii) there were 16 solicitors on the course she has undertaken at Manchester, 8 of whom were publicly funded family lawyers re-training.
Julie says that she knows her experience is far from unique ... she knows of many solicitors in her area in the very same position.

North-Eastern Circuit: One of our North-Eastern Circuit representatives commented that the following firms have stopped undertaking publicly funded family work, or substantially cut the amount of such work (leading to redundancies):-

(a) Archers (Middlesbrough)
(b) Harland & co (York)
(c) Harrowell Shaftoe (York)
(d) Fox Hayes (Leeds)
(e) Andrew Jackson (Hull)
(f) Gosschalks (Hull)
(g) Martin & Haigh (Scunthorpe)
(h) Wake Smith (Sheffield)

(i) Newstead & Walker (Otley) It is notable that there is only one other public funding family solicitor in Otley and you would struggle to get to another firm within the 45 minute travel time.

It is pointed out to us that these were all firms that had significant family practices.
North-Eastern Circuit: The number of solicitors firms maintaining a family franchise has reduced significantly since the introduction of the Unified Contract; this presents a particularly acute problem in the far North of this circuit where solicitor representation is often difficult to obtain. This is of concern for care clients who often do not have the means to travel to their nearest provider or are limited in other ways.

79. The same comments, the same outcome, appears likely to be ordained for the Bar.

80. And insofar as this problem is not one-dimensional or even two-dimensional, it is to be noted that under s 3(6) of the Constitutional Reform Act 2005, the Lord Chancellor is required to provide the requisite support to the judiciary to perform their functions. Arguably this includes the assistance of counsel of such experience and expertise as the nature of the case requires.

81. Deterring young aspirants – the next generation of advocates:

And will the young aspirants to the Bar be attracted to the work of the public funded family Bar, as it will be stripped of talent, demoralised, impoverished of talent and resource? Of course not. The next generation will be attracted to the more lucrative fields of privately funded litigation. This position is replicated in the solicitor's profession where it appears that the grant given by the LSC to fund/encourage training contracts for solicitors in public funded practices has not worked. The reality is that it is taken up as there is a current shortage of training contracts; as soon as opportunity presents, the solicitors transfer into privately funded practice (see Lisa Webley's Research presented to the LRSC conference).

82. There is a significant risk that talented entrants to the Bar will not choose family work; many of those who come to the Bar from 2010 onwards will be those who began university in 2006, when university fees increased. Students who complete their BVC incur costs of around £25,000 in addition to the £30,000 debt which most graduates accumulate whilst studying for their first degree. Good sense will dictate that on the figures proposed they will not attempt to build a practice in public law, where the work is predominately public funded.

83. It is worth noting that there are only 27 members of the solicitor's family panel under 30 years of age in the whole of England and Wales . This startling and deeply troubling statistic is likely to be in part if not in whole, the consequence of funding cuts to the solicitor's profession. There is no reason to suppose that the profile of the Bar in the years to come will be very different.

84. Reducing the Quality of Representation:

We are concerned about the effect of these proposed cuts on 'quality' of representation. The reality is that if the cases are not going to be remunerated adequately then they will only be attractive to the younger, inexperienced advocates. This member of the Bar will not be acting contrary to the Bar Council Code of Conduct , but at a junior 'call' and with relatively little expertise will not be the best equipped to

manage the particular demands of the client or the case.

85. It is pointless, and with respect, we believe misleading, to assert that budgetary control of the manner advised can be associated with:

"...ensuring the provision of services by sufficient numbers of competent advocates" (see for example, para.3.9, 4.4, 4.14, page 35, 36, 40 Consultation Paper).

This mantra is incorporated repeatedly in the Consultation paper in an endeavour to give the impression that the Government will indeed necessarily fulfill its statutory obligation under the AJA 1999, and to lead the reader to the impression that there will indeed invariably be 'competent' advocates available. We challenge this assumption.

86. It has been suggested to the Family Bar at meetings with the LSC that the government has no responsibility to provide a career structure for lawyers. Whilst this may be correct, this assertion fails to acknowledge the fact that unless there is a perceived career path, the aspiring practitioner is unlikely to enter the publicly funded field and therefore there will be no development of experience upon which to call in the more and more complex cases.

87. Experience and expertise brings with it the ability to give clients sound advice; this in turn enables clients and their legal advisers to focus on the issues, and where appropriate to settle cases. This brings with it a considerable saving to the public purse. It will be the inexperienced, the junior, the less able who contest cases to the bitter end (it is paradoxically often much easier to do so); this brings with it obvious impact to the public purse.

88. Increasing discrimination within the Bar, and in promotion to the judiciary:

We note that in the recently published LSC Annual report 2007-2008 (12th August 2008), the LSC makes this claim (page 29):

The LSC is committed to equality of opportunity in all areas of the legal aid system, including within the organisation, within the providers it funds and for the clients that require publicly funded legal services. We have a diverse provider base that we want to sustain and develop so that it better reflects the communities it serves. We aim to work with our providers and partners to promote diversity within the legal profession so that services take account of the diversity of local populations, without compromising quality.

89. We believe that the proposals set out in this consultation paper will have the contrary effect from that sought by the LSC, and will impact upon female and BME practitioners the hardest. There is a statutory duty on the authors of the Consultation Paper to carry out an impact assessment (see above) which they have yet to do.

90. The Bar has made great progress in terms of access. It is a much more open profession at the stage of entry than ever before. The real problem continues to lie with retention and progression. The anecdotal evidence from our membership strongly indicates that female and BME barristers frequently earn significantly less than white male barristers and are much more reliant on public funding. Any reduction in public funding is likely to increase this divide between these groups yet further and will surely discourage women and BME barristers from staying in the profession. This is at the very least indirectly discriminatory and possibly directly discriminatory.

91. There are longer-term ramifications too. There has been much media, and Governmental concern, about the lack of diversity in the judiciary. The Bar is still the main pool from which judges are selected. Unless women and BME barristers are able to maintain a sustainable practice at the publicly funded bar, the lack of diversity within the judiciary is likely to get worse. This is likely to make worse the problems encountered by women in seeking promotion to senior roles – which the Equality and Human Rights Commission refer to as the 'concrete ceiling'.

92. At a time when the Government ought to be (and indeed is believed to be) encouraging women to stay in the workplace, and return to work, these proposals set out to cripple an area of law which are likely to have the greatest impact on female lawyers.

93. Lord Carter emphasized (2006 Review of Legal Aid Procurement) that

"It is essential that clients have access to good quality legal advice, and confidence in the service they are given. A diverse and sustainable supplier base is essential for clients of diverse backgrounds to have confidence in their legal services. The Legal Services Commission should use its procurement power through its contracting terms to promote diversity within firms and their use of counsel and referral services, especially where they serve diverse communities."

This laudable objective is surely in jeopardy if the funding for the family Bar is reduced as proposed.

94. The discriminatory effects of the scheme are brought into sharp relief when one considers the Bar Council figures which suggest that a little over twice as many women as men leave the bar between 6 and 10 years call. The reality of the situation for most women is that a reduction in fee income will mean that the type of childcare needed in order to do their job effectively will be out of their reach. The average cost of a nursery placement in England is £149 per child per week and for a childminder £144 per child per week. A nanny working 8 hours per day at the minimum wage would cost £18,753 per annum. These amounts must be paid out of net income following deductions for chambers expenses, tax, travel and hopefully a pension. There is no assistance with childcare costs available for self employed women. The effect of this reduction is discriminatory and will reduce the pool of highly qualified women who are available for appointment in a judicial capacity in the future.

95. One therefore cannot assume that the simple fact that there is now a greater number (and proportion) of women entering the profession will necessarily result in a greater number, or at least a corresponding increase in the number, (or proportion) of women practicing at senior levels in future decades.

96. As we mentioned earlier, the impact on the Government's stated aim for diversity in the judiciary at the higher levels is obvious.

97. Increasing the population of litigants in person in the courts:

There has been a noticeable upsurge in litigants in person representing themselves in the courts, desperately seeking to cope with the stress of family breakdown exacerbated by the trauma of representing themselves in court proceedings. This inevitably leads directly to the lengthening of cases, the reduction in the number of negotiated out of court settlements and so delay. Delay drives up cost.

98. The difficulties caused by the increase in the number of litigants in person is a direct consequence of the reduction in funding – a widely recognized phenomenon for some years. Butler Sloss P. said in 2003 that:

.... there has been a significant increase in the percentage of family cases in which one of other of the parties is unrepresented for all or part of the proceedings. There are no statistics to substantiate that assertion but it is universally recognised as the reality by all specialists in this field. The provision of legal aid in family proceedings is a shrinking rather than an expanding welfare service. (Re G (Litigants in Person) [2003] EWCA Civ 1055, para. 32)

See also para 14.4 (page 62) of 'The Lord Chief Justice's Review of the Administration of Justice in the Courts',

Development of our common law as well as authoritative interpretation of the huge flow of new statute law requires a High Court Judiciary of the highest calibre, the best of which will be promoted to the Court of Appeal and the House of Lords/Supreme Court. The majority of the High Court Bench is, and is likely to continue to be, drawn from the practising bar. We rely on advocates of high calibre not merely as a source of the judiciary but because our legal system depends on the assistance that advocates provide to the court. I view with concern the increasing numbers of litigants in person due in part to difficulties of getting legal aid. This problem is particularly acute in relation to the family jurisdiction. I am also concerned that the increasing use of 'in house' advocates by the Crown Prosecution Service and concerns about legal aid remuneration have reduced the number of those who are starting at the criminal bar.

99. The Government is well aware of the difficulties for the court process brought about by litigants in person; they know the story for themselves: note the DCA study in 2005, Litigants in Person – Unrepresented Litigants in First Instance Proceedings, DCA Research Series 2/05 (Professor Richard Moorhead and Mark Sefton) in which they concluded (inter alia):

Although sometimes less serious and less heavily contested than cases involved in represented litigants, what was at stake for litigants was nevertheless significant. Parties go unrepresented for a range of reasons including choice and the lack of free or affordable representation.

There was at best only modest evidence that cases involving unrepresented litigants took longer, though cases with unrepresented parties were less likely to be settled.

Problems faced by unrepresented litigants demonstrated struggles with substantive law and procedure. There was other evidence of prejudice to their interests.

100. McFarlane J. sounded this warning at the ALC Conference in November 2007:

It is not an infrequent occurrence for a judge to encounter both sides in a private law dispute who are acting in person. ... Before he can begin to determine such issues as there may be, he has to coax out of the litigants the necessary information and advise them as to the procedures and progress of their dispute, without appearing *parti pris*. This all takes time and runs the risk that the judge may remain ignorant of some very important information. The court is often obliged to grant adjournments or afford other indulgences which would not usually arise were the parties to be represented. This aggravates delays within the system. The situation where one party is represented and the other is not, is an improvement, but is not free from the difficulties that I have described.

We have not yet got to that situation in public law proceedings, but may well do so if the already reducing number of firms and barristers willing to do legal aid work decide to quit the field in the face of the new rates being offered. Were that to happen, with the result that parents and children were regularly before the family courts in care and adoption cases without any legal representation and without the funds to commission expert evidence to question the case put forward by the state, the potential for injustice or for lifelong decisions to be made on an erroneous basis is, to my eyes, all too clear.

Now that the death penalty is no more, the most Draconian order that an English court can make is one for the adoption of a young child without the consent of the birth parent, with the effect that he or she is permanently removed, for life, from his family of origin. To contemplate a situation where such orders may be made, when, because there are no lawyers who are able to run a practice at the rates payable under legal aid, the parents and children in such cases are unrepresented and cannot access a second expert opinion, is to contemplate the unacceptable.

101. Provoking Article 6 Challenges:

The Government cannot take a strictly fiscal approach to reform when it is compromising constitutional democratic principles, which include European Convention of Human Rights and Fundamental Freedoms 1950 and judicial independence. Many of the cases in which the family Bar specialize involve life/death type decisions; these cases involve what for many of us would be the unimaginable prospect of permanent separation from one's own child; since the abolition of the death penalty, there is no more draconian order for a Judge to make than to order the permanent removal of a child from their natural family. Article 6 of the European Convention of Human Rights and Fundamental Freedoms guarantees that "everyone is entitled to a fair and public hearing within a reasonable time". We firmly believe that cuts in funding for those who are the most vulnerable of our society particularly in cases with such grave consequences will have the effect of denying "effective" rights of access to the Courts; it is "effective" access which Article 6 guarantees.

102. We suspect that it is only a matter of time before a litigant successfully claims a breach of Article 6 on account of the Government's failure to provide due access to justice. Note that in *Golder v UK* (1975) 1 EHRR 524 the Court held that where there had been a prevention of access to a solicitor, this was tantamount to prevention of access to a court, and therefore a breach of Article 6. In *Steel & Morris v. UK* (2005) EMLR 314, the ECHR held that the denial of legal aid to the defendants in the complex libel action deprived them of the opportunity to present their case effectively and gave rise to an inequality of arms which breached art.6. It was as a result of this case that for the first time a scheme of limited legal aid for complex libel cases was introduced in order to ensure compliance with our Treaty obligations. It is clear that the Court treats proceedings which are determinative of important family rights and relationships as especially sensitive: see para. 63 of the judgment, and *Airey v. Ireland* (1979) 2 EHRR 305.

103. In *Re Webster* [2007] 1 FLR 1146, Munby J. made clear that Article 6 is intended, amongst other things, to promote confidence in the judicial process. This is a point that has repeatedly been stressed by the Strasbourg court (see also *Prager and Oberschlick v Austria* (1996) 21 EHRR 1, at para 34). 'Regard must ... be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties.'

104. We operate in a professional system which engenders frequent criticism in the broadcast and print media for its lack of openness and unfairness (note for example even during this consultation process the series of articles, and leaders in *The Times* for the week of the 7th July 2008). We have to confront the assertions of some MPs that the goal of public law proceedings is to procure children for adoption in order to meet government targets. In the circumstances, it would be highly damaging to produce a situation in which the family justice system becomes less open, less fair, and less able to challenge the decisions of social workers than this one. It is particularly ironic that the Government's aims will be likely to compromise that confidence yet further.

105. Causing increased imbalance within ancillary relief:

The already considerable disparity between publicly-funded family fees and privately funded fees has had the effect of threatening equality of arms at the present rates. The premise that there is room to cut family fees still further is therefore rejected. The effect of the fees' differential can be seen most obviously in the field of ancillary relief. It is common for senior members of the Bar to be instructed by a husband (often where he has a high income or complicated asset base) with far more junior members of the Bar instructed for the wife. The risk is that wives, and the children who live with them, suffer the impact excessively. Given the Government's supposed commitment to reducing child poverty and lessening the impact of family breakdown, this seems to be a failing in their logic. There is an imbalance of arms in such cases.

106. Before the introduction of the current scheme, it was common for all abilities and seniorities to undertake publicly funded work; this is no longer the case. In many areas, there are specialist ancillary relief practitioners who refuse to do any substantial publicly funded work because of the levels of current remuneration. This has created a huge inequality of arms between the rich husband and the poor wife, the same inequality will now spread throughout the family court system.

107. Those who still do such work are generally those, who, out of principle and public-spiritedness, have taken the view that they ought to continue to do some publicly-funded work. This means that there are still some who have taken the view that access to justice for all is so important that they will continue to act for publicly funded clients, while they can, because the publicly-funded litigants deserve good quality representation. The proposed fees under the new 'regime' will make that approach wholly uneconomic bearing in mind the work required and the responsibility and stress of conducting such cases; if the current proposals are implemented, there will be a further reduction in the pool of good quality practitioners who do this work. The reserves of goodwill upon which the system is just surviving at the current time are not inexhaustible.

Swings and roundabouts?

108. In the context of public funded litigation, it is neither fair nor appropriate to apply the principle that "What one loses on the swings one gains on the roundabouts" – a proposition to which the Government repeatedly reverts when debating potential inequalities in the fixed fee environment.

109. The current FGFS – crafted through years of discussion between the bodies affected – represents a reasonable, and durable, business-model, and one which reduces the incidents of unjust gain or shortfall; its integrity is tried and tested. It is sufficiently predictable, and produces results which properly reflect the endeavour of the advocate and the complexity of the case. While wholesale 'across the board' cuts in principle preserve the landscape of the scheme, this represents wholesale disincentive to participate in publicly-funded work.

110. The only acceptable trade-off with which graduated fees present practitioners is a gain in terms of speedy and predictable payment against a loss in terms of a failure to match payment to the precise requirements of the case. Whilst we note that the Annual Report claims that 100% of FGFS bills are paid within 8 weeks, this is not the experience on the ground, and the 8 week period is in fact calculated from the time when the LSC commences the work on processing a claim rather than from the date the claim was received.

111. Cuts in any single quarter of the scheme will inevitably create imbalances in the scheme which will promote the 'swings and roundabouts' effect.

112. We should not be resorting to inherently unpredictable arrangement or scheme where the winners and the losers randomly emerge.

113. In any event, with the cuts proposed, we see this as a scheme in which there are or will be (predictably) far too many 'swings' for the Family Bar – invariably instructed in the more complex cases for which there will be insufficient remuneration – and far too few 'roundabouts'.

Access to Justice

114. There is a statutory duty under Access to Justice Act 1999 to secure that 'individuals have access to services that effectively meet their needs' [s 4]; this requires there to be available sufficient suitably qualified and experienced counsel to undertake the more complex work. Access to justice is an ideological and not an economically driven commitment.

115. The experience of the practitioners at the Family Bar in 2002, supported by the FLBA survey and the Solicitors survey, showed that in private law children cases and ancillary relief cases the availability of suitably qualified and experienced counsel had been very substantially reduced by the Family Graduated Fee regime. The reason why this decrease had occurred was clearly demonstrated to be the level of fees paid before and under Family Graduated Fees.

116. Section 25(3) of the Access to Justice Act 1999 provides that

(3) When making any remuneration order the Lord Chancellor shall have regard to—

- (a) the need to secure the provision of services of the description to which the order relates by a sufficient number of competent persons and bodies,
- (b) the cost to public funds, and
- (c) the need to secure value for money.

117. Lord Irvine introducing the second reading of the Access to Justice Bill in 1998: said this: 'People value their legal rights highly. They feel deeply frustrated when they cannot secure them. A major component in deciding whether a State provides a decent quality of life for its citizens is the extent to which it secures for them access to justice'.

118. The Government had better prepare itself for the levels of 'deep frustration' which will be felt by people who do not have the access to justice which they seek.

119. Litigants, and potential litigants, need not only access to justice, but effective access to justice; as Article 47 of the European Charter of Fundamental Rights 2000 makes clear: "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice." (emphasis added).

120. The UN Basic Principles on the Role of Lawyers 1990 (Article 3) indicates: "Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons." (emphasis added).

121. Geographic access: The LSC have recently proclaimed that 95% to 97% of the eligible population have access to a family legal aid provider (or child care solicitor contracted with the LSC to undertake legal aid work) within 45 minutes travel on public transport. We find this assertion extremely hard to accept, and have sought better information against which we can gauge the assertion. It is of note that the earlier announced declaration that the same proportion of the population lived within 5 miles of a service provider is no longer made (correctly). On any view, we contend that the current claim is based on out-of-date figures (i.e. obtained in April 2007) in an ever-changing landscape; the claim is not, in any

event, borne out by what the practitioners are experiencing on the ground.

122. We believe that this is a meaningless statistic, as it fails to recognize or take account of the essential features of family cases. In any event, we wonder whether this adequately reflects the fact that all but the most exceptional care cases involve more than one Respondent – the 'automatic' respondents (Appendix 3 FPR 1991) include every person whom the Local Authority believes to have parental responsibility for the child (hence mother, often father, indeed more than one father may be involved in the proceedings concerning a 'sibling' group, other person with residence order); the child is an automatic respondent; other respondents/intervenors often include grandparents, and persons against whom serious allegations are made. Notice is also required to be given to every person whom the Local Authority believes to be a parent without parental responsibility for a child. Within this grouping of respondents (or potential respondents) it is obvious that the child has to be separately represented from other parties; the mother and father may require separate representation (particularly if they are separated). So if we end up with a situation in which there is one 'family provider' in an area – or even a limited number of 'family providers' – many of these parties will have to travel much further to get legal advice. There are only limited travel costs allowed, and practical difficulties involving childcare. This is particularly difficult in non-urban areas. This group of people identified above is invariably among the most vulnerable of our society.

Total spend on the Family Bar

123. Table 1 (para.4.8 of the Consultation paper) gives us the figure for the 'total spend' on the Family Bar.

124. This figure includes VAT.

125. Insofar as it is contended that there has been a disproportionate increase in the total spend on the Bar, we suggest that this may be attributable to...

- i. Increasing volume and factual complexity of the cases;
- ii. Greater use of counsel, given the increasingly onerous case management demands placed on counsel by the judiciary and the courts;
- iii. Increasing use of experts: interestingly after the decision of the Court of Appeal in *W v Oldham MBC* [2006] 1 FLR 543 (in which the Court of Appeal permitted the instruction of a second expert on an issue which is felt to be 'pivotal' to the issue being tried), the Courts have been more inclined to accede to applications for the instruction of second opinion experts; this almost always leads to complexity and delay .
- iv. Greater awareness of Human Rights issues through the process as a whole;
- v. Greater recognition of kinship and wider family placement options; this often (appropriately) involves wider family parties, and closer consideration to placements which are non-parental, but not non-adoptive placements.

Overall, as Tim Dutton QC observed (Remuneration Conference 21.6.08): "the root causes of the increase in volumes of work for the family and criminal Bar over the past decade are societal, not professional."

Evidence-based policy? - Advocates fees an appropriate instrument of policy?

126. One of the potential benefits of a graduated fees scheme is that it generates data that constitutes a potentially valuable evidence-base for the formulation of policy. It is, therefore, of concern to the FLBA that the LSC continues to make proposals that are inadequately supported by rigorous analysis of the current graduated fees scheme data and that appear to be based on a fundamental misunderstanding of the role and benefits of the FGFS .

127. Lord Carter had cause to comment in his letter of 13th July 2006:

"The biggest challenge I have faced is the inadequacy of the management information available. The complexity and opaqueness of the numbers, their components, the inability to forecast change, and the lack of a comprehensive understanding of the whole system, all contributed greatly to the difficulties I have encountered."

128. Those challenges would still seem to bedevil the LSC.

129. Table 1 of the Consultation Paper is presented, presumably, to show that the increase in total expenditure on FGFS presents a problem which needs to be resolved. The authors of the consultation document clearly realise, but do not state that, in the absence of relevant volume figures, the Table is essentially meaningless. Hence, the subsequent paragraph states that,

"...We have not broken down bills paid figures into average per case because the proportion of a case billed in a given year fluctuates due to various factors ...,"

130. Table 2 is then presented and apparently shows that that cost per case is increasing, for example in Public Law from £1576 per case in 2003-2004 to £2837 per case in 2006-2007. However, no allowance is made for the fact that cases that close in later years are typically longer running cases than those that close in early years and in many instances are paid under different versions of the FGF scheme. The Table

is not comparing like with like. These points regarding the interpretation of closed cases are made by Professor Paul Fenn in his report to LSC (henceforth, the Fenn Report) that is referenced and quoted in passing in the Consultation Paper, but is otherwise ignored.

131. In paragraph 4.11 the statement is made:

"Table 2 shows that total expenditure for both Public and Private law has increased significantly in the last 4 years, doubling over that period...."

If that were indeed the case it would be cause for great concern. It is however not the case. Expenditure on the cases that close in any one year represent work that has been done over a number of previous years. Thus a large part of the increase in "Total FGFS expenditure" assigned to a year row in Table 2 actually relates to FGFS expenditure and incurred and paid in earlier years

132. There is, thus, confounding in the data presented as between overall expenditure (the product of the number of cases paid and the cost of each case) and the components of that expenditure especially the cost of a given case.

133. It is this confounding that so added to Lord Carter's difficulties and which makes the underlying basis of the present consultation flawed.

134. In paragraphs 3.2 and 3.5 the term expenditure is used without qualification whilst in 4.13 and 4.14 the target for the proposals is expressed in terms of overall expenditure. The implication is that the LSC perceives the FGFS as a means of achieving a reduction in overall expenditure

135. It is worth noting that the architects of the FGFS – which includes the Government and the LSC – never envisaged that it would control overall expenditure. To do that it would have to limit the number and complexity of cases that were to be funded: variables which depend amongst other things the extent of family breakdown, developments in legislation, the rules of eligibility for Legal Aid, the current status of eligibility for Legal Aid (which may depend on the overall state of the economy) – surely matters outside the control of lawyers or the LSC. FGFS is a means for achieving accountability and control over the cost per case of given complexity, not overall expenditure.

136. Thus it is our view that the proper and reasonable target of any proposals concerning FGFS are to be specified in terms of the cost per case.

137. It would be essential to gather evidence and to analyse that evidence in respect of how the FGFS has performed in terms of controlling the cost of a case of given complexity, and to understand what factors drive case complexity, prior to reforming or worse cutting wholesale the FGFS.

138. The Fenn Report sets out a methodology and presents some preliminary analysis of data with a view to establishing the extent to which cost per case has changed under various stages of the FGFS. Once an attempt is made to compare like with like, by restricting attention to cases of a limited duration, much of the apparent increase in cost per case is eliminated. In considering the remaining increase in cost per case in Public Law (Category 2 cases) Professor Fenn notes (p18. Main finding 1)

"The mean payment per case also increased over the same period, and the evidence suggests that this was due to an increase in the number of secondary hearings for which claims were made. These changes in FGF payments to barristers were matched by similar increase in the level of profit costs and disbursements made to solicitors .."

The fact that the increase in cost per case for advocacy under FGFS is mirrored by an equivalent increase in the cost per case in terms of both solicitors and disbursements suggests that the source of increasing expenditure under FGFS is a mixture of increasing case complexity and increasing volume of work.

139. Professor Fenn is careful to note the possible limitations of his analysis particularly in respect of ignoring the longest and most complex cases. Nevertheless, its implications for the present consultation seem to us too important to ignore: the LSC is proposing to cut advocacy fees under the FGFS in order to reduce overall expenditure when overall expenditure is being driven by increasing volume and complexity of cases. For the reasons set out earlier in this response we believe that such a reduction is unsustainable and against the public interest.

140. The FLBA, however, remains committed to developing and improving the FGFS so as better to achieve a good 'fit' between fees and the work required to deliver high quality advocacy services. We would also welcome engagement is a full and considered analysis of the cost drivers of both FGFS and other contributions to overall expenditure on Family Legal Aid. It may therefore be useful at this stage for Professor Chalkley to share with you the software and the methodology that he has developed; the data and the data systems are much improved from 3 years ago and now may be a good time to re-establish regular dialogue. Indeed rather than FLBA and LSC commissioning their own respective reports there may be considerable economies in the LSC and the FLBA collaborating in identifying issues that need to be informed by analysis and using our combined resources and expertise to address those issues.

Why £13m?

141. We question why the MoJ and LSC have proposed the figure of £13m over two years.

"The Department's budgetary projections had taken into account this capping of expenditure, and reduced expenditure of approximately £13m was anticipated over the next two years, as set out in Table 3." (para.4.13 Consultation Paper)

142. The Consultation paper provides no rationale for the selection of this figure of £13m over two years

as the amount of the proposed cuts. There is no justification or analysis to provide the foundation for this calculation. We wrote in relation to the assertion in the paragraph above requesting
(a) An explanation, breakdown and calculation of how the figure of £13m is arrived at
(b) An explanation and breakdown of why in Table 3 the expenditure reduction is £1m in 2009 – 10 and £12m in 2010 – 11
(See Letter Lucy Theis QC to Sara Kovach Clark: Head of Civil Policy Development – Family Civil Policy Team [LSC] dated 6.8.08)

On 2nd September Crispin Passmore (Acting Executive Director Policy [LSC]) responded as follows:
With respect to the £13m calculation, LSC budgetary projections are carried out by the Commission in conjunction with Ministry of Justice colleagues and they depend on a variety of complex factors. These projections are shared with the Bar as other key stakeholders on a quarterly basis.

On 5th September a letter was written asking for a response to the explanations and breakdowns requested.

143. On 9th September 2008 (14:55hs) Sara Kovach Clark sent an e-mail to Ms Theis QC in which she said that "I don't think there is anything that we can add to what we have already said". In the brief explanation which follows Ms Kovach Clark comments that "the £13m was a balanced estimate as to what we might be likely to save is we introduced a scheme in 2008". This comment starkly reveals that all that the LSC is trying to achieve by these proposals is a 'catch-up' with the savings it was hoping to make by an earlier introduction of the Scheme. We do not accept that it is reasonable to attempt to recover the budgeted savings that have been lost through the LSC's failure to implement its reforms earlier in the manner proposed or at all. In reality, a missed deadline can never be recovered, and the proposals which the LSC are aiming at are far too draconian.

144. It appears to be acknowledged in the Consultation paper that the original FGFS had achieved a much more radical reduction in the 'spend' than had been envisaged. And that approximately 13% had been slashed from the budget rather than approximately 5% as anticipated. Quite properly, as is further acknowledged in the Consultation Paper, the then Lord Chancellor agreed to further revisions to the scheme, including an increase in some fees, to increase FGFS expenditure by approximately 8% from February 2005. That 8% figure is now to be completely wiped out – returning the family Bar to the fee levels of 2001 which the Government felt then were insufficient.

145. That acknowledgement reflected the concerns expressed from the wide-ranging consultation at that time (para.3.3). It is surprising that the evidence from that time is dismissed as lightly as it is. This increase must have resulted from significant concerns from those involved at the LSC and the MOJ.

146. A similar cut in spending today will inevitably have the same deleterious effect on barristers working in the system as in 2001.

147. We would like to point out, as those in the LSC who were around then will recall, the changes in 2003 (to incorporate the Protocol) and the changes in 2005 (to reverse the massive unforeseen reductions in remuneration and to improve the targeting of SIPs) were produced as a result of lengthy negotiation. The 2005 changes were achieved following 18 months of meetings, analysis on both sides, discussion and negotiation. We are dismayed that the current proposals and the atmosphere in which they are made seems to seek to sweep aside what has been hitherto productive working together. We may not have always agreed but at least proposals were then put on an informed basis by the LSC.

148. We would like to make a further point about proportionality. From Table 1 it is apparent that the spend is approximately £100m a year. A saving of £12m in 2010-2011 is therefore essentially the same as a 12% cut. That is a 12% cut in nominal terms. FGFS is inflation proof in the sense that the fee rates are not adjusted by RPI, CPI or anything else. Thus 12% nominal is probably nearer 16% real. Is there any example where a 16% real cut has been implemented on a fees system of indeed in any area of public procurement? Does LSC really believe that at a time of increasing inflation it can impose 12% nominal pay cuts and not wreck family justice system? In so on what basis does it have such a belief?

Naturally occurring savings:

149. Fewer applications: All those with an interest or connection with the field of public law work are aware of the significant reduction in the number of applications being made for Public Law (Part IV CA 1989) orders following:

- i. the introduction of the PLO (1.4.08);
- ii. the introduction of the higher application fee (1.5.08).

In some areas of the country, this is reported to be as much as a one-third reduction. Whether this is, in part, because Local Authorities have been required to work more collaboratively with families in the pre-proceedings stage at a level which has reduced the need to bring care proceedings, or some other factor, it is difficult to know at this stage with confidence.

150. What needs to be borne in mind is that if this picture continues, then the 'spend' on publicly funded work is going to reduce naturally without changes to the scheme.

151. On the Northern Circuit, there was a 62% reduction in the number of cases transferred from the FPC

to the Care Centre between April and June 2008 compared with the same period in 2007. This will have the inevitable effect of reducing the number of people requiring public funding for care cases.

152. Fewer hearings: There will be naturally occurring savings to the spend on public law cases by virtue of the Public Law Outline in any event. Under previous case management directive (the 'Protocol for Judicial Case Management') there were [6] steps in the process; there are now [4]. Importantly, one interim hearing before the Court is dispensed with.

153. Moreover, the purpose of the IRH is for the parties, assisted by the Judge, to endeavour to reach agreement or at the very least narrow the 'live' issues; it follows that even if there is a final hearing, the issues may well have been 'stripped out' and the hearing shorter (and accordingly cheaper).

154. If, for the purposes of considering the 'spend' we assume (maybe too generously) that there may be [5] steps overall (i.e. occasional adjourned CMC) and we therefore remove one F3 payment across the board in all public law cases where there is already more than one F3 in the course of the year this will, on the data supplied, produce a saving of approximately £2.5m.

155. Private Law children: In private law children work, the emphasis on conciliation and the ADRs means that counsel will be involved in fewer cases. The Private Law Pathway Plan is nationally applied; this emphasises the involvement of CAFCASS away from the court setting with a view to diverting cases away from the court system.

156. Recovery of funds through legal charges. A linked point arises for mention here. We believe that the LSC admits that the sum of the legal fees charged against the homes of previous recipients of Public Funding was now so substantial that an element of 'profit' arose when the charges were realized. The LSC have never quantified that investment. This investment is never accounted for when the LSC or the MoJ quote the cost of Public Funding for family work. Therefore, the LSC and the MoJ have never been able to calculate the true net cost of Publicly Funding family cases. Bearing in mind the interest charged by the LSC on these outstanding fees, the Treasury has a 'blue chip' investment that presumably feeds back into central government bypassing the LSC. In a letter from Crispin Passmore to Lucy Theis QC on 2nd September 2008 he confirmed that the estimated net cash income attributable to the statutory charge in 2007-2008 in relation to family proceedings was £68.2m (a figure confirmed by Ms Kovach Clark in her e-mail of 9.9.08).

The FGFS: the essential principles:

157. Family Graduated Fees were introduced in May 2001 and cover all publicly funded family work where cases are listed to last 10 days or less (the vast majority of family work). Before their introduction, the Bar worked with Government to construct a scheme that would reflect complexity and so provide a fair system of remuneration and encourage practitioners to continue to do the work. The Bar scheme included a range of 'complexity' features that would trigger uplift payments and give the scheme a true gradient – it was also intended by both sides that it would cover both barristers and solicitor advocates doing the same work

158. The creation of the FGFS was to achieve cost control for the Government, together with fixed fees with graduation for the practitioners. The essential benefits for each were obvious.

159. Graduation within a fixed fee regime is not just 'academically' attractive. It is actually vitally important to the success of the scheme. It is right that practitioners should be paid proportionately more for the more complex work. It is right that the more experienced practitioner undertaking more complex work is remunerated at an appropriately higher rate.

160. The Family Graduated Fees Scheme provides a means of properly accounting for, and controlling, expenditure on counsel in Family Legal Aid work. We believe it to be the case that, to date, graduated fees are the only successful mechanism for achieving accountability and control over expenditure on publicly funded legal services. Areas of work where graduated fees are not in place are characterised by large year on year percentage increases in unit cost, which cannot be explained in terms of changes in the pattern of work. Where, as in the criminal advocacy in the Crown Courts, graduated fees are in place any variation in unit costs is capable of explanation and analysis. Furthermore graduated fees provide a set of straightforward instruments – fee rates – for controlling costs.

161. We note that the LSC currently claims that the FGFS works alongside its existing arrangements for paying solicitors' profit costs and disbursements, and boasts the following benefits (ref: the LSC Website):

- it provides payment as work is done
- there is usually no assessment of costs at the end of the case
- the amount paid is final and predictable, subject only to a review on the assessment of costs at the conclusion of the case
- it provides certainty to both providers and clients.

162. It has always been acknowledged that for a graduated fees scheme to succeed it must reward suppliers of services reasonably and fairly i.e. must take account, through the 'graduation elements' of the variety and complexity of legal work. A scheme that does not satisfy the requirements of reasonableness and fairness will fail and the manifestations of that failure will be seen in a reluctance of practitioners of

appropriate skill and experience to undertake graduated fees.

163. We do not accept that the FGFS is "a complex" payment scheme (para.3.12 Consultation paper); it is certainly not unnecessarily 'complex', and insofar as it is multi-featured, this is necessary to ensure that remuneration – to some extent at least – properly reflects the infinite variables of the work.

164. We pause here to respond to the comment at para.3.11, namely that:

"By remunerating these video-conferences as if they were face-to-face meetings, these changes help the PLO to achieve its aims of reducing delay and bringing better outcomes for children and families."

This is a reference to a change in the remuneration scheme introduced in early 2008 by the Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2008. In reality, not many sets of chambers which operate in the publicly funded field will have the requisite technology for video-conferencing; the hire of video-conferencing facilities will more than extinguish the one-half fee which would otherwise be paid if participation is not by telephone. To penalise those who participate by phone with a one-half fee is petty and does not reflect the reality of practice 'on the ground', particularly for those who practice in the regions.

165. None of the proposals is acceptable; it is hard to identify one of the options as preferable. They are budget-led and not designed to improve the quality of service for the poor and vulnerable.

166. Lord Carter's Review made no recommendation to change the way barristers are remunerated. The DCA/LSC response to Lord Carter's report, Legal Aid: a Sustainable Future, Section 7 deals with Family work. Paragraph 7.1 states:

"We do not have any current plans to amend the Family Graduated Fees Scheme for the Bar."

167. The drafting of the questions asked does not make it easy for us to provide a meaningful response. In the circumstances, we propose to deal with the Options outlined, and then to set out our own proposals.

Option A

168. Q.1: Is Option A (across the board reductions) preferable when compared to the others? What advantages does it offer? This is the least attractive option in our view and would present the family bar with significant recruitment and retention problems. We wish to highlight that if the base fee is reduced crudely across the board, the SIPS, settlement uplifts, and High Court uplifts will inevitably be affected as they are calculated as 'multipliers'. The effect is direct, not "indirect" (para.5.2 Consultation Paper).

169. The only obvious advantage of Option A is that it preserves the differential between complex and simple cases. We note that the Ministry accepts that this "sensible discrimination" was introduced following extensive consultation with the Bar Council in May 2001 (paragraph 3.1.) and again in February 2005. We note that no explanation has been given as to why this principle should be abolished.

170. However, the signal which will be sent out to the profession by an 'across-the-board' reduction in the fees payable under the FGFS is that the Government puts cost above quality of representation; it will be the biggest deterrent to practitioners.

171. Q.2: Are there reasons not to pursue Option A? What are they? The principal rationale for this approach is to harmonise solicitor and barrister family advocacy payments. For reasons developed elsewhere in this response (see paragraphs 239 - 260 below), we do not consider this to be a sound or proper basis for making radical changes.

172. Overall, of the three Options, this is the least well thought through, least equitable and most likely to hurt the junior and part time members of the profession. Most part-time members of the family Bar are female or junior or both. These practitioners will be the hardest hit and will not have the ability to make up the shortfall on more complex cases. In this sense the Option appears to be discriminatory.

173. The base fees for family cases are already far short of those paid in privately funded work. For example: a one hour road traffic small claims track case where the issues are straightforward will be paid at least £150 and often £250. This compares unfavourably with the base fee for an interim family injunction of £115 for a hearing of up to two and a half hours, which includes preparation. These are GROSS figures before the payment of chambers expenses and Tax.

174. Q.3: Are there ways to mitigate any disadvantages of Option A? No.

175. Q.4: What level should such a reduction be set at? Why? We do not believe that there should be a reduction across the board.

176. It is apparent from our consideration of the data recently made available that there is a lack of clarity in the presentation of the figures such that CBPs and SPF are covered under a number of categories making any analysis extremely difficult. Further, it is plain from the data that there does not seem to be any clear distinction between SPF paid by way of exceptional complexity and SPF paid by reason of the volume of the papers. It may be that there is conflation of the concepts of SPF and CBPs. We will be happy to expand upon this point in a meeting between statisticians and the authors so that it is clear.

Option B

177. Q.5: Is option B (reduction or abolition of SIPs) preferable when compared to the others? What advantages does it offer? This option is not "preferable". The SIPs regime has at least ensured an element of controlled graduation of the fixed fee scheme of payment for advocates, and this has been appropriate, and welcome. SIPs are effective at reflecting complexity and largely remunerating fairly.

178. Q.6: Are there reasons not to pursue option B? What are they? The current system was, according to the Ministry's own consultation document, carefully designed to do justice to the advocate in each case. It should therefore be preserved.

179. This option would have a severe effect on counsel involved in more complex cases, and would be likely to create significantly more instances in which the level of preparation required by a case bore no resemblance to the payment which was made (a familiar occurrence for the Private Law practitioner working on a case where there are no claimable SIPs). To remove SIPs from the scheme or to place them at a level where they have minimal impact will leave advocates seeking the straight forward cases. The more complex cases may suffer from under-preparation or by being conducted by practitioners with less experience.

180. We find it surprising that "Stakeholders including the professions and judiciary have indicated that the current payment scheme is too complicated, and that the role of SIPs should be reconsidered." As far as the profession is concerned the SIP form has been devised in collaboration between the FLBA and the MoJ in a manner with which the profession is now utterly familiar. It is a nonsense to assert (at para.5.10) that the abolition of SIPs "could also make the FGFS much simpler, removing the need to calculate the effect of the relevant SIPs on the fee". The system of processing and calculating SIPs is now largely computerized.

181. We believe that the Judiciary's main complaint is or has been the indignity of having to sign forms in front of the clients at the conclusion of a case. It is perhaps regrettable that no training was offered to the Judiciary at the time of the implementation of the scheme about the operation of the scheme, or their responsibility within it.

182. Q.7: Are there ways to mitigate any disadvantage of option B? There are no obvious ways to mitigate the disadvantage. However, it may be that one or more of the SIPs can be eliminated or modified (see below).

183. Q.8: To what extent should SIPs be reduced or abolished? As we indicate above, we believe that it may be possible to eliminate or modify some of the SIPs.

Option C

184. General Comment: We note the comment that expenditure on Special Preparation Fees (SPFs) is running at a figure eight times higher than that originally planned for in 2005. The Consultation Paper suggests that in 2007-08 SPF spend was modelled to be approximately £700k, but was in fact £5.5m – this overspend increased FGFS expenditure by £4.8m. It is not of course possible to tell in what ways this was spent, as the way the data is collected there is no breakdown of the various heads under which it can be claimed.

185. It appears that the LSC prediction has always been wrong. The forecast spend should never have been modelled to be c. £700k; the spend on SPF has been consistently higher; this is not a new development for 2007-8. The previous four years have shown figures well in excess of £700k (£4.6m to £6m). In 2005, when the scheme was reviewed, this was not adjusted. We question whether is also a data adequacy issue here.

186. The 50% reduction in SPFs and CBP is said to be likely to reduce FGFS expenditure by approximately £7m (RAB) per annum (or £14m over two years).

187. Q.9: Is option C (reduction or abolition of SPFs and/or CBPs) preferable when compared with the others? What advantages does it offer? We recognize that the spend on CBPs has probably been greater than forecast, and that therefore it would be sensible to consider a scheme which maintains these under greater control.

188. Q.10: Are there reasons not to pursue option C? What are they? In the most complex cases, removing Special Preparation would remove the economic argument for doing the case. This will necessarily lead to a reduction in available Counsel or a reduction in the quality of Counsel prepared to undertake the complex cases. It seems to us that the MoJ / LSC seems intent on squeezing the supply of barristers until the evidence of supply problems (at paragraph 3.8) is so clear that it will not be necessary to commission any more surveys. We note, also, that despite the clear findings of the MoJ's own study the MoJ seeks to distance itself from those findings. No good evidence is given to support that attempt.

189. Special prep is there to allegedly reflect the complexity of the case. By removing it and not replacing it with anything, leaving just a base fee is unfair - all cases are different.

190. Q.11: Are there ways to mitigate any disadvantage of option C? We shall propose a remodeling of Special Preparation as 'Exceptional Preparation'. We shall also propose that CBPs are payable separately from SPFs in three 'bands', paid (for those cases where the bundles exceed 700 pages) according to the size of the bundles. Under the Public Law Outline, there is a great deal of early preparation work, and it is likely therefore that in care cases reading will be heavy from the outset. Therefore bundle uplifts may become more important in terms of the remuneration of public care work - that may affect the response to the question of which we would prefer to be reduced.

191. Q.12: To what extent should CBPs and/or SPFs be reduced or abolished? We accept that if there is to be some reduction in the spend for the Bar, then these aspects of the FGFS should be reduced.

FLBA Proposals

192. EXPLANATORY INTRODUCTION: There are two key propositions which underpin this Consultation:

(a) a stated desire on the part of the LSC/MoJ to equalise payments for barristers and solicitors undertaking the same work

and

(b) a stated need to make savings from the FGFS prior to the introduction of anticipated major reform.

193. Both propositions are fundamentally flawed.

194. In respect of (a), we believe that the LSC makes two fatal errors. First it fails to recognise the difference between paying different rates and paying on a different basis (see 1.6). Secondly it fails to demonstrate an understanding of the fact that even when there are two hearings in the same case different work may be required, and that will need to be reflected in the remuneration of the advocate (be they solicitor or barrister).

195. In respect of (b) the LSC has failed to heed a fundamental guide to good policy "bygones are bygones" and is trying to recoup savings that have been lost through a failure to implement a single advocacy scheme in April 2008. They are thus seeking to give effect to proposals which will decrease the rates paid for advocacy work by more than 15% in real terms.

196. The FLBA has long accepted (even argued) that graduated fees are the appropriate way to remunerate publicly funded legal services and that in family work, given the possibilities for each branch of the profession to undertake some of the same functions, an integrated approach is required. There has also been a long and considered case made for the requirements of a GFS to work: payment needs to match the complexity of the work (i.e. sufficient graduation) objectively verifiable criteria that reflect complexity of work (etc).

197. Thus the FLBA prepares its response on the basis that it is fundamentally opposed to any cuts to the funding of publicly funded work of the family bar, as proposed by the consultation paper, or at all.

Insofar as there is change, the FGFS should be improved and refined, utilising the evidence that the operation of the current scheme naturally gives rise to reasoned and rational proposals for reform.

198. It is regrettable that the evidence base has never been fully or properly exploited (reference to section on Data above). Nevertheless, marshalling all of the available evidence, the following would seem to mark out areas for improvement /reform

(a) Not all of the SIPS are working as they were intended. Some apply too frequently, and some of the SIPS are a blunt instrument where they identify features of a case rather than the particular functions (or instances of functions) where extra work and expertise is required.

(b) Special preparation is not being properly monitored in the data and at the very least the forms need amending to clarify the basis on which special preparation is paid, which is not apparent from the way in which the data is being collected.

(c) If the scheme is to be successfully broadened to bring solicitors under it, it is essential that straightforward advocacy in simple circumstances is not over-remunerated (as there is a real danger it will be given the current definition and application of SIPS);

199. This evidence suggests that not only is the basis for the consultation flawed but that the specific proposals on which the LSC are consulting on are at best misguided and at worst will cause serious harm to the FGFS.

200. Rather than remove graduation, (i.e. by removing SIPS) the scheme needs to be enhanced and better focussed.

201. The specific proposals which are made below will achieve that focus and at the same time result in some modest and sustainable savings, brought about by moving the practice of FGFS closer to the theory upon which the scheme was formulated.

202. Those savings when coupled with the naturally occurring savings (reference section of same name above) will deliver all that it is feasible to deliver whilst maintaining the integrity of the Family Justice System (refer to sections that deal with arguments in relation to the same).

203. Although the Consultation Paper states that the FGFS is "complex", we do not accept that it is unnecessarily or unhelpfully so. We submit that this is essentially an acceptable scheme for remuneration of advocacy in the field of family law, currently just adequately funded.

204. If the Government intends to make the cuts in the face of this opposition, we wish to resist the proposals outlined in the Consultation, and advance in alternative regime which we believe:

(a) achieves greater cost control than at present;

(b) is simple and more stream-lined for the practitioner and for the LSC;

(c) administratively and technologically consistent with the current scheme;

(d) remunerates the practitioner appropriately for different types and complexities of a case, and within a case.

205. We propose that the basic structure and integrity of the scheme is justifiable and should be maintained. Graduation is important. Our proposals seek to ensure that there remains TRUE graduation.

206. The FLBA is commissioning a survey of its members which is designed to providing statistical

evidence about the workings of the FGFS. We expect to be better informed as to the impact of the current set of proposals (and the working of the scheme more generally) once the information from that survey is available to us.

207. FLBA PROPOSALS: At this stage, notwithstanding the absence of evidence from any impact assessment (and based only on the feedback and information we have received from our members), we are able to propose that consideration be given to dismantling two of the 'larger' SIPs (which do not either in themselves or in context achieve graduation), and if that were the case we would propose some re-distribution of some of the funds. We would also propose a tighter regime for the claiming of some special (exceptional) preparation which we believe will go some way to controlling the spend in that respect.

208. In outline, therefore, we propose the following

i. The SIP payable for "more than 2 parties" in public law cases should be abolished; this is almost always claimable (and claimed) in public law cases, where there are commonly three, if not more, parties; this SIP does not therefore achieve or promote any element of graduation.

The abolition of this SIP is likely to achieve savings of £6.36m p.a.

ii. The SIP payable for "conduct" in private law cases should be abolished; we believe that this SIP may be being inappropriately overclaimed in this category. The 'conduct' SIP was intended to remunerate counsel where the issue in the case was really serious significant harm, which we believe would arise in private law cases only very rarely; such serious conduct which would/should be caught by this definition would almost certainly be conduct in the public law sphere;

The abolition of this SIP is likely to achieve savings of £3.2m p.a.

iii. The SIP for "more than one child" shall be removed from the SIP form and from the scheme (we do not believe that this in fact remains in the scheme, but it continues to appear on the SIP form;

The abolition of this SIP will achieve modest savings of £0.003m p.a.

209. We make these proposals against the background of a number of naturally occurring savings (see generally paragraph 149 – 156 above). All of the areas identified in that section will produce a saving; in terms of 'valuing' those savings, we suggest that there will be a naturally occurring saving of £2.5m per annum from the reduction in the number of F3s in public law cases (see in particular paragraphs 152-154 above), the overall savings per annum will be

2.5

6.36

3.2

0.003

£12.063m p.a.

OR

£24.126m over two years.

210. Of course, even on the LSC proposals (which we do not accept, and now know that there is no rational basis underlying them, see paragraphs 142-143 above), only £6.5m needs to be saved per annum over the next two years (£13m over 2 years).

211. We wish to make clear that the proposals which we set out above are conditional upon the re-investment back into FGFS the sum of not less than £11.12m over the next two years.

212. We would welcome the opportunity to discuss with the LSC precisely how that is done.

213. We propose, however, that some of the money can be re-invested into the scheme in a newly defined 'parent/perpetrator' SIP. This will be claimable by counsel appearing for the "parent/perpetrator by or against whom allegations of are made that he/she has caused or is likely to cause significant harm to a child"

214. The LSC should note that this re-defined 'parent/perpetrator' SIP imports an inherent saving in that – at present – the 'parent' SIP is paid in public law proceedings in relation to representatives of ALL parents; this will now be targeted to the parent who is the centre of a relevant factual dispute in relation to causation of significant harm to a child.

215. However, we propose that for the future this SIP is paid not only in public law (as at present) but also now in private law (reflecting that the 'conduct' SIP in private law has gone, but reflecting the fact that serious allegations are sometimes made in the private law sphere which needs to be addressed). We estimate that there are probably 25-33% of cases in which a parent in public law cases does not have serious allegations of harm made against them;

216. We are likely to propose that this SIP is increased (from 25%) to a figure in the region of 40%.

217. Special Preparation: Payments for special preparation at present represent a significant proportion of the current budget; we recognize that payments for Special Preparation are not working as was intended, and therefore probably ought to be re-modelled. We have already drawn attention to the difficulties in the way the data for this is currently being collected in that it does not give a breakdown of the different basis upon which it is claimed.

218. We take the view that remuneration for particularly onerous preparation in the course of a case is vital to reward exceptional diligence, and is equally vital to reward industry in the most complex of cases. It is one of the most (if not the most) appropriate way (together with CBPs reflecting the volume of papers in the case) of remunerating for true complexity in the case; if such payments are removed, the incentive for the experienced senior practitioners to take on the exceptionally complex cases will be removed.

219. Under the re-modelled version, we propose a new definition of the scheme which rewards for the work done by the individual counsel who has demonstrated particular skill or advocacy (rather than paid by reference to the nature of the case), and could/should require a detailed account of that work done in order to mount a claim. Accordingly, we propose that hereafter, Special Preparation shall be entitled "Exceptional Preparation"; it shall not be payable (as at present) where the case involves "exceptionally complex issues of law or fact or was otherwise and exceptional case of its nature", it shall be payable only for "Demonstration (to the satisfaction of the judge) of exceptional skill or industry in the preparation or conduct of a case".

220. We shall further propose that it is retained as a payment for Split trials in public law (as at present).

221. We also propose that in each case, any claim for Exceptional preparation will have to be supported by a detailed schedule of the hours spent preparing, and the hours of 'exceptional preparation' claimed; this will be attached to the proforma SIPs form.

222. We propose further changes to the SIPS form to provide for (a) Judicial / Court verification of the size of the hearing bundle (b) the removal from the form of aspects that remain from the 2001 scheme that are no longer applicable such as the "more than one child" SIP (which was removed in 2005).

223. Court Bundle Payments; We propose that CBPs should be paid by way of fixed bolt-ons (and separately from 'Exceptional Preparation') on the following basis:

(a) 700 – 1000 pages: £XXXX;

(b) 1000 – 1500 pages: £YYYY;

(c) More than 1500 pages; £ZZZZ

[The precise figures to be a matter of further discussion between the FLBA and the LSC]

224. We believe that this will achieve important and enhanced self-regulation in a way which has never previously been attempted / achieved.

225. We propose to revise the SIP form itself so that the key advice from the LSC Guidance is reproduced on the form itself; this is to emphasise for the practitioner and the Judge the appropriateness of the claim in any given case. This guidance will be the subject of focused training for the practitioners, and for the judiciary.

Future monitoring of the Scheme

226. In the early years of the operation of the scheme, the FLBA and the LSC held regular meetings to monitor the progress of the scheme. There have been few meetings since 2005. This is regrettable, and we believe had the monitoring continued, we may not now be in the situation of having to address cuts to the spend.

227. We propose that the operation of the scheme and in particular the application of SIPS is once again monitored and reported jointly by the FLBA and the LSC on a regular basis.

228. Substantial progress has been made in terms of data collection. The LSC is now in a position to be able to produce monthly reports on the bills that are paid under FGFS and analysts have the ability to produce summaries of these data. Now that the FGFS is an established payment system, previous concerns that data would not reflect the overall structure of cases are diminished.

229. We, therefore, propose that FLBA and LSC establish an FGFS monitoring group which should liaise with statisticians to determine data requirements and should meet every three months and publish a brief summary report on the operation of the FGFS. We will then be able jointly to monitor the effectiveness of our proposals.

Transition:

230. Q.13: Do you agree with our proposals regarding transitional arrangements? If not please explain why? We are concerned to note the timing of the sequential consultations. When the single family advocacy scheme comes up for consultation in September 2008 (para.5.24 Consultation Paper), the outcome and results of this Consultation will not be known.

231. The LSC proposal is driven by budgetary expedience not logic. The LSC appears to be suggesting an unprecedented approach; in all Graduated fee schemes, not only FGFS, funding orders apply to new cases entering the system, NOT work done on cases already within the system. This may, therefore, may have many unanticipated pitfalls.

232. The proposal to change fees overnight on existing cases (see para.25 Consultation Paper – "immediate implementation") seems highly likely to produce confusion. It also means that people will be committed to cases which are ongoing on a fee structure which would not be the same as when the case was taken on. This is not how any of the previous reforms have been approached nor how the solicitors' scheme has been approached.

233. We would be heading into uncharted professional waters; to our knowledge, this has not been done before within the profession. Barristers may be unwilling to accept instructions in a case where there is a

risk that during the case the fees will reduce part-way through the case, and could even reduce part way through a hearing, on the current unprecedented transitional proposals.

234. Changing the trigger point for the rate of remuneration from the date of the certificate to the date of the work done will require many Chambers' software to be re-programmed. We believe that this will have significant implications for many Chambers, particularly those who use the Meridian system. Meridian is not developing its prevalent system further.

235. Each software company should be asked for their views on this and their lead times.

236. If the MoJ/LSC opt for the implementation of the proposed changes on new certificates only (which would lead to "significantly greater" cuts than those heralded by this Consultation Paper) this will surely disrupt the plan for 'harmonisation'.

237. Q.14: have you any other comments or suggestions? We would like to add this. To save £12m in RAB terms in 2010-2011 probably means that the LSC would need to reduce FGFS by £15m (about 15%) in annual cash terms or about a 20% real cut. This is unacceptable.

238. Please see generally in this response.

The Future: Paying the same for advocacy services

239. The aspiration of the government to reduce the difference in the fees between barristers and solicitors does neither side of the profession justice.

240. Any remuneration system needs to match payment to the nature of the work being undertaken. The Bar in its representations and discussions going right back to the introduction of FGFS recognised that there were some aspects of work that might be undertaken by either branch of the profession and that "matching remuneration to the work" required account to be taken of this

241. The Bar proposed an "Integrated Graduated Fees Scheme" in which the key functions that might be performed by the different branches of the profession were identified and equal payment would be made for performance of that function regardless of which lawyer undertook it.

242. Had the MoJ (then Department of Constitutional Affairs) adopted the Bar's suggested approach there would be no need consider 'harmonisation' – it would have been an inherent part of the FGFS. As it is, the integrated scheme was rejected and FGFS was designed on the assumption that there would remain separate hourly rates for solicitors. The FGFS was therefore designed to reflect appropriate fees ONLY for that work which solicitors would be expected to require the barrister to do.

243. Lord Carter proposed a graduated fee scheme for solicitors doing family work. As mentioned above, we have supported the idea for a long time, and still do. Between 1996 and July 2000, we devoted much time and energy to devising an integrated scheme for barristers and solicitors with the Lord Chancellor's Department. The LSC has never given a reason for not introducing an integrated graduated fee scheme, but has instead proposed (and currently hints at) a system of standard fees, which is the most unsatisfactory system of remuneration that might be devised. It actively discourages practitioners from devoting the time necessary to this sensitive and difficult work, and from taking on any but the most straightforward cases

244. Cutting fees for solicitors: Solicitors doing publicly funded work family work are not adequately remunerated. This is borne out by what has happened in many areas of the country where we are aware that the number of solicitors prepared to do publicly-funded work (even in many large conurbations) has dropped to only a handful of practices.

245. This, in itself, has reduced access to justice for the most vulnerable in society.

246. The lack of data regarding solicitors' remuneration makes it impossible to consider (at least from any informed position) the Government's intention to harmonise advocacy rates. Until this data is available, progress down this route ought to be careful and necessarily provisional.

247. Referral profession: should the Bar be paid the same for different work under different operating conditions? Moreover, a reduction in fees would ignore that we are a referral profession. Reduction of fees is tantamount to ignoring the fact that solicitors refer many of their most difficult cases to the Bar. Is it really being suggested that a solicitor would refer a matter to a barrister for an opinion at the similar rate of remuneration as if the solicitor had done it themselves? In what other line of work does a specialist get paid the same as a non-specialist for the benefit of their expertise?

248. We note that this Consultation paper takes the first steps toward paying the same for advocacy services regardless of whether the advocate has a background as a solicitor or a barrister (see for example Para.4.2 and Page 39 Consultation) – this is repeatedly referred to in the Consultation Paper as the "harmonised advocacy scheme" (see para.1.11, 2.1, 5.3, 5.4, 5.8, 5.22, page 34, 45, 37 and 39).

249. While we accept that different legal services providers (i.e. solicitors' firms, barristers and Not for Profit organisations) have historically been remunerated at different rates (para.1.6 Consultation), we do not accept – as is contended – that the remuneration has been "for the delivery of some of the same services."

250. There is no convincing evidence that "barristers continue to be paid more than solicitors for the same advocacy work" (para.1.13 Consultation paper).

251. In particular, we do not accept that it is possible or helpful to undertake a blunt comparison of the two payment arrangements given that they are very different; we question the contention that:

"barristers can be paid between 50% to 75% more for advocacy under the FGFS than solicitors are for advocacy remunerated at their hourly rates". (para.4.3 Consultation Paper).

While a number of points can be made about this discrepancy (including the self-selecting nature of the work which the solicitor undertakes, and the lack of any allowance in the solicitor figure for any preparation of the case for court hearing), in fact the exercise which the LSC has undertaken here is to attempt to infer what has been paid under one system of work which was in fact paid under another. The problem is that the work that has been undertaken under the system (for solicitors) is different work than that under the other (for barristers). The resultant bald statistic is misleading and flawed.

252. That said, the LSC claims concerning the additional cost of barristers doing hearings under FGFS (compared with solicitors on hourly rates) are based upon a survey of hearings undertaken by solicitors in Public Law Children cases. The methodology is to compare the actual cost of the solicitor doing the hearing (based upon solicitor billed profit cost) with the imputed graduated fee for the same hearing.

253. One issue that has previously been discussed is that it is not possible to know which SIPS / uplifts would have applied on a hearing by hearing basis. The approach that has been taken to this is to suppose that SIPS / uplifts would have applied to solicitor conducted hearings in the same proportions as they applied to barrister conducted hearings. This is clearly a controversial assumption in that solicitors would presumably choose to do only the simpler hearings and using this method would thus overstate the cost of barristers under GFS.

254. In any event, the proposition that barristers are paid more than solicitors needs to take account of the following:

i. This is not a comparison of like with like. In general, Counsel are instructed in the more complex and time consuming cases. The solicitor is likely to do the simpler, easier, quicker hearings. If a solicitor were doing his own advocacy in the more complex and time-consuming cases then his/her fees would be likely to be higher.

ii. The manner in which solicitors prepare for cases is markedly different from that of barristers, not least because they generally have a working knowledge of the papers before preparing for the hearing. A solicitor who had been involved in a case from the outset would inevitably need less time to prepare.

iii. The Paper expressed no understanding that solicitor advocates, unlike counsel, have considerable opportunities to earn money in cases at other stages in the case preparation process

iv. It is reasonably unusual indeed for solicitors to represent parents in contested proceedings, particularly at final hearing; this difficult, sensitive and important role is almost exclusively briefed to Counsel; again this affects the need for particular preparation.

v. Barristers, as individuals, also have to cover the cost of providing themselves with pensions and illness insurance; solicitors' firms can cover more economically as an entity. In the past, figures used by the Ministry of Justice have undervalued or disregarded these expenses when comparing the earnings of barristers with other professions for whom such benefits are provided. Without having had access to the Ministry's source data it is impossible to tell whether this historic error has been carried into the Ministry's present "reasoning". It seems likely that it has.

vi. The case fee is paid for each start up. There is likely to be a significant number of cases that go through with relatively less time spent on them; these effectively subsidise others. This distorts apparent advocacy rates for solicitors;

255. Even taking the figures within the Consultation Paper, it is plain that only 18% of case payments are made for barrister advocacy and that 82% is therefore spent elsewhere. It seems that there has been a rough and ready attempt to introduce a false yardstick to drive down fees and that, if this measure was applied at stage two of the reform process, there would be devastating consequences for the profession on the pay differentials relied upon by the LSC. Discussions with solicitors also indicate that there is still very strong support for the proposition that they should have the option to instruct experienced counsel in complex or difficult cases. Experienced counsel do not exist in a vacuum : to operate effectively the family justice system needs talented entrants who will remain in practice in this important area of work and build up the required expertise and experience over a number of years.

256. A potentially more important issue has emerged. The solicitors' costs in the survey do not include preparation for the hearings. Typically solicitors bill for a lot of preparation during a case but this is not easily assigned to any particular hearing. Hence, there is a purely practical problem in inferring how much preparation should be associated with a particular hearing. The approach underpinning the LSC figures is to assume no extra preparation is required on account of a solicitor doing a hearing. Our understanding is that no account was made of the time solicitors spent in preparation for individual hearings. This may be because the amount of preparation done by a solicitor does not seem to be affected by whether they are conducting the advocacy or employing counsel to do it on their behalf.

257. This is clearly going to impact on the 'estimated' difference in cost between barristers and solicitors very significantly. The precise amount depends upon what one assumes as an alternative to the LSC 'zero preparation' assumption. If one assumes that 30 minutes preparation is allowed for every hearing, that increases the estimated solicitors' costs for hearings by about 18% and thus reduces the GFS premium over solicitors' costs to about 40%. If one assumes each hearing minute requires 1 preparation minute this increases the estimates solicitors' costs by about 30% (and the GFS premium is about 28%)

258. While we see the seductive attraction for the Government in endeavouring to achieve such an objective, we nonetheless consider that such an outcome is not straightforward, nor fair to the Bar. The

Consultation Paper fails to address the different functions of the each branch of the profession. It also fails, when commenting that the Bar earns more for its advocacy, to recognise that the solicitor also receives a case fee which encompasses the conduct of the case as well as the preparation time. We would be surprised if a like for like comparison supported this proposition.

259. We note (para.4.6 Consultation Paper) with considerable interest that the cut back in funding discussed in the Consultation Paper is designed to be a prelude to "further harmonization" of the payment scheme for solicitors and barristers "if that is the outcome following the consultation beginning in the autumn of this year".

260. If the radical cuts in the 'spend' proposed by this Consultation Paper are effected now, then we will suffer no delusions about the outcome of the Autumn 2008 consultation. Even tentative steps towards 'harmonisation' would be premature before the results of the future consultation on a unified scheme are known.

Conclusions

261. The relative cost to the public purse of a properly funded family Bar is a bargain compared to the overall cost to the country of unresolved family conflict; it is astounding that the proposed review does not look beyond immediate savings to the LSC's budget to the expense of dealing with damaged adults and children to other public services in due course. This is no exception.

262. We are sure that the President of the Family Division, and the Judiciary at High Court, County Court and District Judge level will respond separately to this Consultation. We would nonetheless like to draw to your attention the President's comments to the Family Bar in its quarterly magazine 'Family Affairs' (July 2008):

It was the position of the judiciary, expressed and emphasized during the discussion and consultations relating to the Government's 'Fairer deal for Legal Aid' proposals that there should be no cut in the legal aid funding available for access to family justice and that it was essential to have a recognition in any new fees scheme that there are minimum advocacy and litigation functions or tasks which should be ring fenced by way of remuneration to ensure that the moneys are not diverted elsewhere. We understood that Lord Carter accepted those propositions; hence his stated acceptance that, if anything, family legal aid might need to be funded from the savings made in other legal aid sectors and that there should be a common graduated fee scheme for all family lawyers. In simple terms, if the court's essential case management functions were unsupported because of a lack of funding, the expense to Government in the increased cost of ineffective hearings and the consequent harm to children and families would be very damaging. It was on this basis that the judiciary was largely instrumental in causing Government to revisit its first proposals for family legal aid reform.

Unhappily these important considerations seem to have been lost in the development of the present and predicted consultation exercises. Unless there is an acknowledgment of the nature and extent of the tasks which are undertaken by family lawyers and that a reasonable rate of remuneration is required for these tasks, I have the utmost concern for the future quality of family justice. I am aware that many children's panel solicitors are currently considering whether they or their firms can continue practicing in family law and that a number have already taken a decision that they will be unable to do so. Similarly, the proposed reduction in the Bar's fees so as to provide a lower base line for future negotiations is likely to drive many barristers whose experience is essential to the system from practice, leaving the field to the young and inexperienced. It all comes at a particularly unfortunate time, given that a key aspect of the success of the PLO is the reliance of the court upon the (properly remunerated) skills of experienced advocates, both in relation to case management and in managing, supporting and advising highly disadvantaged parties. (emphasis added)

263. We believe that the legacy of the proposed funding reforms will be an underpaid, undervalued, and de-motivated Family Bar. The legacy for families who have been directly affected by the proposals will be far worse.

264. Perhaps a lesson is to be learned from the principles espoused in another common law jurisdiction, Canada. At the recent Opening of the Ontario Courts (2007), Chief Justice McMurty commented in his Report that legal aid is the "most important foundation stone of a humane and just society": he added: The basic purpose of legal aid is to serve the public by enabling each of its members to have access to the kind of legal assistance that is essential for the understanding and assertion of our individual rights, obligation and freedoms under the law.

We live in a highly sophisticated society with a highly developed sense of the need for positive intervention to protect the basic rights and freedoms of the disadvantaged, and to ensure continuing access to the rights and freedoms which we proclaim as fundamental to a civil, humane and just society. Legal aid is perhaps the single most important mechanism we have to turn the dream of equal rights into a reality. Indeed, our laws and freedoms will only be as strong as the protection that they afford to the most vulnerable members of our community. In affording this protection, legal aid does make a deep and essential contribution to our social fabric and indeed to our very way of life.

265. This Consultation paper sadly demonstrates that this Government is being driven by budgets and cost-control, at the expense of the essential protection and assertion of the individual rights and freedoms – fundamental to a civil, humane and just society under the law.

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10th September 2008.