PRESIDENT OF THE
FAMILY DIVISION

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FAMILY JUSTICE AT THE CROSSROADS

THE HERSHMAN / LEVY MEMORIAL LECTURE

THE ASSOCIATION OF LAWYERS FOR CHILDREN

2 JULY 2009

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

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

Those are the opening words of the Laming Report[1] issued in the wake of the case of Baby P which came forcefully to public attention in November 2008 at the conclusion of the criminal trial of those responsible for his death. One of its immediate side effects was to cause a dramatic upsurge in the number of care proceedings commenced by local authorities following a downward trend over the preceding 6 months while local authorities came to terms with the provisions of the

[1] The Protection of Children in England: A Progress Report (March 2009)

Public Law Outline[2] and the large increase in court fees payable by them as the price of issuing proceedings in the course of their child safeguarding duties.

The context of Lord Laming's report, and the matters on which it principally focussed, were failures in the local authority's safeguarding system whereby care proceedings were never instituted in a situation where clearly they should have been. Consequently, the recommendations of the report – including those requiring the Department of Children Schools and Families (DCSF) sufficiently to resource children's services so as to ensure that early intervention and preventative services have capacity to respond to all children identified as vulnerable or in need[3]. - are principally directed to improvements in local authorities' safeguarding prior to proceedings, in order to prevent repetition of such a tragedy. However, the point is well and forcefully made by Lord Laming that the duty of local authorities to commence and prosecute care proceedings in the courts is not a separate, but an integral, part of their overall duty to safeguard and promote the child's welfare, the role of the court being to decide where the truth lies in the event of dispute and what the legal consequences should be. In this context Lord Laming identified the need of the Ministry of Justice as the responsible department to take immediate action to address the length of delays in care proceedings in order (as he put it) to ensure that the Ministry is delivering its commitment to meet the timetable for the child[4]. The terms of his recommendation were that the Ministry should:

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

The Government response to this recommendation published by the DCSF and presented to Parliament in May 2009[5], was as follows:

> "the Ministry of Justice is working closely with the Department for Children Schools and Families to establish a system-wide target for reducing delays that draws in all participants within the care proceedings system. Whilst the

[2] The Public Law Outline: Guide to Case Management in Public Law Proceedings (April 2008)
[3] Recommendation 55
[4] See paragraph 8.8 of the Report.
[5] The Protection of Children in England: action plan. The Government's response to Lord Laming. (May 2009).

> detail is yet to be finalised with the relevant key partners, the intention is to have an overarching objective, related to the timetable for the completion of proceedings for an individual child, supported by a suite of Key Performance Indicators owned by individual participants in the system. This will include commitments to continuous performance improvement in order to avoid unnecessary delay by Her Majesty's Courts Service, the Legal Services Commission, and the Children and Family Court Advisory Support Service. Improvement and Success will be measured in a Balanced Forecast."

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

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

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

In my regular visits around the country, I have been hugely impressed by the good will and enthusiasm of all those involved in the Family Justice System in seeking to make the system more efficient while ensuring better outcomes for children in difficult times. Local authorities, social workers, Cafcass, children's lawyers, court staff and judiciary are flat out (literally so in some cases!) to achieve this objective.

It is the position in which the family justice system now finds itself as a result which has dictated my choice of title for this lecture. A cross-roads is something one encounters as one travels along a particular route. It requires one to pause and make a choice as to one's direction of travel. In this case, no doubt, the appropriate starting point of the road well travelled is the Children Act 1989, a ground-breaking and universally admired piece of legislation which provided for a uniform code of law and procedure governing the care and upbringing of children applicable across the board and which now operates in what has effectively become a unified family court. It also provided a uniform code of law governing the duties of local authority and social services to be provided for children in need, which laid to rest most of the defects in child protection law and practice which had previously existed and in relation to which the Family Division of the High Court, over the years, had expanded and developed its jurisdiction in wardship, in order to supplement the defects in the two main statutory schemes which had hitherto been applicable [6] and certain lacunae in law.

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

[6] Children and Young Persons Act 1969 and Child Care Act 1980.

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

It is plain from the structure of the 1989 Act, the terms of the Review of Child Care Law which preceded it,[7] and the terms of Lord Nicholls speech in the House of Lords in Re S [8] that, whereas it is the function of the court to adjudicate and to make a care or supervision order if it finds that the threshold conditions are satisfied and that such an order would be in the best interests of the child, it is the responsibility of the local authority to decide how the child should be cared for.[9] However that is not a position which it has proved possible or practical to preserve as a clear bright line since the Act was passed, for a variety of reasons. Two such reasons are built into the legal regime under which courts operate in care proceedings. The remainder are non-legal in the sense that they are the product of the various elements and resources of the child care system within which the courts operate and which inevitably affect the steps to be taken and the rate of progress made in care proceedings.

As to the legal reasons, first, the 1989 Act requires the court to treat the welfare of the child as paramount in relation to every order which it makes. Second, Articles 6 and 8 of the European Convention on Human Rights (as well as ordinary notions of justice and humanity) require the court to have regard for family life and to accord a fair hearing to parents faced with the removal of their children. Albeit European jurisprudence[10], like the Children Act, recognises the primacy of the child's welfare interests in children cases, those welfare interests require the courts to have regard to the long term as well as short term interests of the child. Thus the decision as to whether a child should be taken into care, or whether it should remain with its natural family under appropriate supervisory arrangements following expert assessments of the family situation and/or after a period of "planned and purposeful delay", inevitably involves the courts in examining the care plan proposed as well as the primary question of deciding whether or not the threshold for intervention has been established.

[7] Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party (HMSO 1985)
[8] Re S (minors) (care order: implementation of care plan) [2002} 2 AC 291
[9] See: Review of Child Care Law: paras 2.22 – 2.26. *Re, S* per Lord Nicholls at para 28.
[10] Yousef v Netherlands [2003] 1 FLR 210, ECHR.

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

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

An inevitable incident of delay in multi-party proceedings is of course increased cost, and, when I was appointed President, the question of delay and cost (with the emphasis on the cost) in public law proceedings was receiving the attention of government in the context of the Fundamental Legal Aid Review, to which I was nominated by the Lord Chief Justice as the Judicial Liaison Judge prior to my appointment to the Family Division. That review identified two particular areas of disproportionate cost to the legal aid fund as being. First and foremost, was the huge proportion of the fund expended in respect of very high cost criminal cases and, to a much lesser extent, but nonetheless requiring urgent attention, the cost of care proceedings.

In July 2005 the review published its report entitled "A Fairer Deal for Legal Aid".[11] It highlighted the need to contain the expanding cost of child care and related proceedings, in light of the fact that, while their volume had increased by 37% since 1999/2000, the cost to Legal Aid Fund had increased in real terms by 77%. It was recognised that there were a number of cost drivers causing the latter increase, in

[11] DCA "A Fairer Deal for Legal Aid",Cm 6993 (2005)

particular the proliferation of parties, the increasing use of expensive experts instructed in the course of proceedings and the number of expensive residential assessments to be paid out of the Legal Aid Fund.

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

Having also identified the inherently high cost of multi-party proceedings, the Review recommended a further, cross – government, end-to-end review of the Child Care Proceedings system. This followed in the form of the Child Care Proceedings Review, an interdepartmental review with strong judicial input.[12] The terms of reference of that review stated its first task as being to:

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

The terms of reference included the obvious requirement to:

> "Identify good/innovative practice which enables children to be diverted away from court proceedings and, instead, to be supported in their families where this is possible".

The third term of reference, much more radically, required the review to:

> "examine the extent to which the core principles of the Children Act 1989 are best met by the current overrepresented approach within the courts, and examine whether these principles could be better met by using a more inquisitorial system".

[12] DCA *Review of the Child Care Proceedings System in England and Wales* (2006).

It set out two options to consider, namely (a)

> "investigating the possibility of early low-level of judicial interventions to encourage parents to resolve problems themselves, thus avoiding the need for full court proceedings wherever possible and appropriate";
>
> and (b):
>
> "examining whether the two stages of the court process in Child Protection cases (establishing the facts and determining the care plan) could be more formally separated with different attendees, procedures and levels of legal representation, and precisely where, and in what way, lawyers should be involved".

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

In the event, the Review did not take the road, or even explore the route, towards a so-called "inquisitorial" or divided system. It limited itself to a number of unexceptionable recommendations, which aimed to

- "ensure that families and children understand proceedings and are, wherever possible, able to engage with them;
- ensure that S.31 applications are only made after all safe and appropriate alternatives to court proceedings have been explored;
- improve the consistency and quality of S.31 applications to court;
- improve case management during proceedings;
- encourage closer professional relationships".

In the wake of these recommendations and to achieve those aims so far as they lie within the power of the judiciary, once proceedings have started, a judicial team consisting of Munby J, Coleridge J and Ryder J, in close consultation with the

DCSF, produced the Public Law Outline (PLO) [13] which has now been in force for just over a year. Its provisions were coupled with the rewriting of the DCSF statutory guidance to local authorities which dovetails with the requirements of the PLO and encourages local authorities to carry out assessments; through family meetings to engage with families prior to proceedings; and to prepare cases better before issue, where agreement is not possible. Its other objective was to achieve uniform improvement in case management on the part of the judiciary, focusing upon essential issues and providing for efficient case management in stages geared to the timetable of the child.

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

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

So far, I have said nothing of the situation in Private Law children proceedings, in relation to which, so far as the courts are concerned, they are also highly dependent upon the availability of Cafcass (a) as reporting officers and providers of welfare reports in so many proceedings where difficult issues in relation to residence and contact arise, and (b) for their invaluable services in the brokering of agreement between the parties at the First Hearing Dispute Resolution Appointment (FHDRA). At the time of my appointment in 2005, that latter function was being exercised under the provisions of the Private Law Programme, recently introduced by my predecessor Dame Elizabeth Butler-Sloss. At that time a substantial number of local schemes were in place and others being extended, but they were limited at that

[13] Ministry of Justice *the Public Law Outline: Guides to Case Management in Public Law Proceedings (April 2008)*

stage to county court centres and not available in most magistrates' courts. Since then, of course, county court schemes have been put in place nationwide, and are now being made available in the Family Proceedings Courts to enable the process of "cascading" down of appropriate cases to the FPCs under the new Allocation to Judiciary Directions. It can properly be said that, without the very high success rate achieved by the FHDRA, the working of the family courts would virtually grind to a halt.

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

The statutory functions of Cafcass are to a) safeguard and promote the welfare of children's; b) give advice to any court about any application made to it in any family proceedings; c) make provision for the children to be represented in such proceedings; and d) provide information, advice and other support for their children and their families.[14] These functions are limited to family proceedings. Thus when Cafcass was originally set up as a non-departmental public body it was made answerable through its board to the Lord Chancellor, its relationship being controlled in a framework document which vested ultimate power in the Lord Chancellor's Department (now the MoJ) for controlling the range of Cafcass work and the way in which it was carried out. That position has not been maintained, however.

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

[14] S. 12 Criminal Justice and Court Services Act 2000

It is the unfortunate fact that since its inception, Cafcass has experienced considerable problems with shortages of staff, a lack of experienced guardians and consequent delay in the allocation of cases. From the outset there were difficulties in bringing about the centralisation of staff management and improving budgetary control in respect of an ungenerous budget. Upon the appointment of Anthony Douglas, its able and dedicated Chief Executive in 2004, the task of rectifying this position has been vigorously undertaken, but delays in reporting have persisted and in recent times have increased to a position which is acknowledged to be unacceptable. A number of factors have contributed to this.

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

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

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

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

Faced with these mounting delays, and in discussions with Anthony Douglas and the family judiciary, it is clear to me that, whatever the long term solution to these problems, urgent action is at once necessary to ease the position in the various "hot spots" across the country. To that end, I am currently engaged in a joint judicial exercise with Cafcass, CAFCASS CYMRU, DCSF, MoJ and HMCS for a stop-gap scheme to set out those areas in which, without compromising the interests of children, the statutory duties and requirements of Cafcass, or the provisions of the PLO, judicial restraint can properly be exercised in the requirements which judges impose upon Cafcass in all those cases where, upon proper analysis and consideration of the issues, reduced or delegated activity by Cafcass guardians and reporters can be sanctioned. This will reduce the time spent by the officers

themselves in activities which are not strictly essential to their safeguarding and advisory functions.

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

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

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

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

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

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

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

One of the principal matters I have in mind as rendering vital a review in January 2010 is the substantial and menacing shadow which hangs over the

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

This Lecture is not the occasion for detailed examination of the latest proposals of the Legal Service Commission in this respect, although I am well aware of the concerns of the Association of Lawyers for Children so impressively stated in its 'Response to the LSC Consultation on Family Legal Aid Funding from 2010'[15]. Suffice it to say that, from the point of the view of the judiciary, it is essential that the services of a pool of experienced advocates in both public and private law proceedings remain available to the judiciary. It is, of course, one of the key assumptions upon which the PLO is based and which the Ministry of Justice effectively indorsed in assisting and promoting its introduction. Furthermore, it is the feature which, together with more robust case management by judges, is beginning to achieve improved performance in reducing the length and complexity of the care cases to which it has been applied since its national launch in April 2008.

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

It is no function of mine as Head of Family Justice, to participate in negotiations between government and the professions as to the terms of their

[15] http://www.alc.org.uk/docs/LSC_Fees_Consultation_ALC_final.doc

remuneration. However, it emphatically is my concern as Head of Family Justice to bring forcibly to the attention of the government the threat to the efficient working of the system in terms of both efficiency and delay if the LSC proceeds regardless of the warnings of the profession and, in particular if those specialising in children cases abandon or cherry pick publicly funded work. Quite apart from the strain upon family judges and the courts' administration by HMCS, there will be significant further delays in the court process caused by inexperienced advocates undertaking more complex work; longer and less focussed hearings; a higher incidence of litigants in person and a greater likelihood of appeals where cases become derailed because of inadequate representation at first instance.

The judiciary have been invited to comment on the various consultation papers issued by the LSC. I have urged in response the clear view of the judiciary that representations by the professions as to the effect of the proposals and the willingness of solicitors and barristers to undertake the work if they are implemented should be taken seriously. I have warned the LSC that the family judiciary is in no doubt that:

i) Individual solicitors and solicitors firms of quality and experience are already abandoning publicly funded family work, and the rate of this process will increase if the proposals are carried into effect;

ii) Many members of the Bar have already either cut down on or abandoned publicly funded work in favour of privately paying work, and this too is likely to increase;

iii) Members of the Bar who can command privately paying work tend to be the more experienced, and their loss to this area of work will reduce a valuable pool of expertise.

iv) The less experienced and competent the representative, whether barrister or solicitor, the less efficiently is the case managed.

v) Lack of representation will lead to more and more litigants appearing in person with the effects I have described.

vi) Loss of experienced and committed advocates will undermine the Public Law Outline, which as I have emphasised is dependent on the cooperation and expertise of the dedicated specialist lawyers who will operate it.

I feel bound to observe that there is a discouraging lack of realism in the apparent determination of the LSC to disregard these warnings. Since the time of

Lord Carter's Review[16] the LSC has ignored his recommendation that in children cases a graduated fee scheme was necessary in the light of the difference in complexity of the infinite variety of such cases[17] and it has pressed ahead with its intention to propose a fixed fee scheme which, in parallel with Lord Carter's Review, the LSC had itself been devising internally to deal with the question of the mounting costs of the Legal Aid scheme. While it withdrew that scheme in the face of almost unanimous criticism, the LSC has never shifted from a mind set that the organisation nature and levels of work within firms of family solicitors and the potential for the expansion and/or rationalisation of the work of such firms to achieve economies of scale were essentially similar to those in the criminal law field, which was both the original and principal area of investigation by Lord Carter, responsible as it was for the vast proportion of the Legal Aid budget. That approach appears to have governed their thinking ever since. In particular, there is a persistent refusal to recognise that the nature of the work and the needs of the parties are wholly different.

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

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

[16] Lord Carter's Review into Legal Aid Procurement published 13 July 2006
[17] See paragraph 160 onwards

work conducted over the shortage possible period, thus allowing them to move onto the next simple case.

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

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

Again, this Lecture is not the place for a detailed consideration of those problems. Suffice it to say that High Court judges have an increasing workload, not only in relation to the heaviest care cases, but as a result of developments in other areas of family law than children, including new jurisdiction in their capacity as judges of the Court of Protection, under the Forced Marriage Act,[18] and in the steadily increasing number of Hague jurisdiction cases. Because High Court judges are only deployed in the most serious and complex of care proceedings, the burden of care work on County Court judges is increasing, thanks to the process of cascading down cases to the lowest tier of the judiciary appropriate to try them and the Public Law "surge". The capacity of the magistrates in the FPCs to handle this load is confined to the less complex cases and is hampered by a shortage of qualified legal advisers.

[18] Forced marriage (Civil Protection Act) 2007

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

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

I have long been a proponent of compulsory reference to mediation against the conventional wisdom that parties cannot be obliged to agree. The Government has never accepted this. Happily, however, the LSC has been persuaded to fund both parties in schemes being trialled in Birmingham, Milton Keynes, Plymouth, Reading and Sheffield, in the expectation that the initial costs of mediation will yield a dividend of "cracked" cases at an overall saving to the system in terms of costs and delay. Nonetheless, the high number of care proceedings and a hard core of uncracked private law cases are bound to remain in the system.

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

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