



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Publicly Funded Representation in Civil and
Family Courts: Bar Council Briefing

4 July 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Alex Easton
Mr Tom Elliott
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone

Witnesses:

Ms Siobhan Keegan	Bar Council of Northern Ireland
Ms Denise McBride	Bar Council of Northern Ireland

The Chairperson: I welcome Siobhan Keegan, chairman of the Family Bar Association, and Denise McBride, who is vice-chairman of the Bar Council. The meeting will be recorded by Hansard and will be published in due course. We will hand over to you to outline briefly the issues that you want to highlight to us, and then Committee members are not usually behind the door in wanting to ask questions. We are here to try to get a better understanding of what the proposed changes would mean and, from the Bar Council's point of view, the implications of that on representation and access to that representation.

Ms Denise McBride (Bar Council of Northern Ireland): Thank you for your kind invitation to attend today. The Bar welcomes the opportunity to address the Committee on the very important subject of representation. Since its introduction in 1965, civil legal aid has made an invaluable contribution to the administration of justice, especially in family cases. It has enabled members of the public who otherwise could not afford representation to be properly represented before our courts. The present scheme has worked very well in this jurisdiction. I think that it is one that we can all be proud of. To a large extent, it has been instrumental in preventing the spectre of Cleveland, where a number of parents were wrongly accused of abusing their children. At the same time, the system has continued to ensure the protection of children, and in no small measure has the system been instrumental in reducing the risk and likelihood of cases such as that of Baby P and Victoria Climbié. In the light of that, we really need to think long and hard about introducing changes to the scheme. It is a scheme that has served individuals, and society as a whole, so well.

I would like to address a couple of issues before the Committee. I would like to look at the law in Northern Ireland and to consider the Department's proposals in the light of the existing law. I will then ask Siobhan to deal with the impact of the proposals and the role that barristers play in those cases.

In Northern Ireland, the legal framework in family law is very different from that of England and Wales. England and Wales enacted the Adoption and Children Act 2002. Here, we continue to operate under the Children (Northern Ireland) Order 1995 alongside the Adoption (Northern Ireland) Order 1987. The focus of our legislation continues to be on protecting the welfare of children, but at the same time we place a heavy emphasis on affording a fair trial to everyone involved in the process. Health trusts and the courts have to act not only in accordance with domestic law but in a way that complies with the European Convention on Human Rights (ECHR). A very important right under the convention is the right to respect for family life. Parents and wider family members have a right to respect for their private and family life. Children have the same rights to respect for their family life, and they also have the right to be heard in those cases. All the parties in the legal process have the right to a fair trial. It is not contemplated that we are going to change the system, and therefore the corollary is that we need proper representation to be provided to all those who are involved in the present legal process so that they can make their case in an effective manner.

Fundamentally, we all value family, and our system seeks to do that as well. The aim is to reunite families where that is possible, but it is also to help children move away from their family if, by living in the family home or remaining with their family, they will be put at risk of harm. What we at the Bar are strongly recommending is a review of the family law system. That was proposed in the Access to Justice report. That is the area in which you can make real and meaningful reform. If you change the practical outworkings of the law, we can make efficiencies. The Minister indicated his preference for that approach. The Department has not given to that the priority that it ought to have given, and that simply does not make sense. It does not demonstrate fairness to expect individuals to navigate the same legal system without the representation that they require.

A review of family law would enable the legislature and public representatives to influence and determine what is important in that area of law. It would give a vehicle for social debate so that people could discuss the rights of individuals in the context of family life and the values that we have as a society. It would also enable the system to be streamlined and simplified.

The Department's proposals restrict the number of cases in which a legally aided person has access to representation by a barrister. In a Magistrates' Court, a solicitor is considered to provide a sufficient level of representation. In the High Court, senior barristers will be instructed only in exceptional cases. In simple terms, the proposals mean that the public are no longer entitled to representation by a barrister in cases that, until now, required the involvement of counsel. That restriction and reduction in representation will seriously adversely impact on access to justice for the general public.

We are not arguing that barristers should be involved in every case. Barristers want to be instructed only in cases in which they are needed and in which they can assist in the resolution of the case. However, we strongly question the need for the suggested reduction in barristers. Barristers are involved in only 18% of cases in Magistrates' Courts — that is the family proceedings court. That is the level at which 86% of family cases are disposed of. We already have a natural and reliable filter. Solicitors instruct counsel only when they feel that a case requires their expertise and skills.

Cases in the High Court are deemed exceptional. Around 4% to 5% of family cases are dealt with there. By their very nature, those are the most complex and difficult cases. At present, senior counsel are involved in only 44% of those cases. Therefore, most do not require senior counsel. However, parties to those difficult and complex cases deserve and need the appropriate level of representation.

There has undoubtedly been an increase in the number of children's cases in the system, and that is because society places a high value on child protection. We are more vigilant and concerned about protecting children from abuse. A recent National Society for the Prevention of Cruelty to Children (NSPCC) survey indicated that 1,000 sexual crimes were committed against children in Northern Ireland in the past year. The survey also showed that 94% of adults said that they would act on concerns about child welfare. Therefore, people are more willing to report concerns that they have about the welfare of children.

We also have a better awareness of the effects of social deprivation. We know about addiction, mental health difficulties and learning disability, and we now have a greater will to address those underlying problems.

Our experience in working with family law solicitors and engaging with specialist organisations affirms our position that barristers play an invaluable role in those cases. On the proposals, Barnardo's and

the Children's Law Centre recommended the need for senior and junior counsel in cases that involve child protection issues.

In the absence of similar organisations that represent the interests of parents, we contend that the rights of parents are no less important in those cases. Therefore, they, too, need access to representation at the present levels.

Ms Siobhan Keegan (Bar Council of Northern Ireland): I want to deal with impact and the role of barristers. First, on impact, it is not clear to us that the Department has gauged the actual societal and economic impact of the proposals. Let us be clear: we understand the need for savings, but we say that impact must be assessed alongside need — impact on members of the public who rely on our support. It seems to me that, as a result of these proposals, there will be an obvious impact on those who are entitled to public funding. They are inevitably the most vulnerable members of society, who cannot speak for themselves, and who often have additional needs because of mental health issues, addiction, a learning disability or past experience of abuse. I think that all of us would say that, if faced with a situation where we as a parent are under suspicion of causing injury or harm to a child, we would want the most experienced and skilled lawyers on our side.

Family cases are complex and serious. Let me give you one example. Freeing for adoption or forcible adoption is, without doubt, the most draconian order a court can make. It deprives a parent of parental rights and places a child for adoption without consent. Many of my clients put it like this: "I would prefer a murder charge. I could do my time, serve my sentence and be released at some stage. With freeing, my child is taken away forever".

There is often a prejudice or stereotype in family law cases that is entirely incorrect. Such cases frequently involve very serious allegations of sexual and physical abuse, multiple familial connections, complicated human and social problems, and complex and conflicting medical evidence. Fundamentally, the parties themselves can have difficulties, including issues with maturity, reasoning, learning difficulties and mental health problems.

Family law, by its very nature, can affect all of us, and it is likely to be a traumatic experience. It seems, following from this, that particular skills from professionals are needed in dealing with the range of situations that family law throws up. The answers are not clear-cut. There is no obvious solution in many cases, and, whatever happens in court, lives are affected day to day.

These cases are far from run of the mill. The stakes are very high for the individuals involved. Let me give you some examples. Findings in these courts can mean the loss of a child into care or adoption; loss of contact for parents and children; severing links between a child and its family; the breakdown of the family, and wider ramifications; and repercussions later in life for new parents or new partners. So there are lifelong and life-changing consequences.

The stakes are also very high for society. It seems to me that we have a collective interest. We do not want parents wrongly accused, and we do not want children placed at risk. We also do not want to deal with the associated costs of family breakdowns, which are borne out in our education, health and criminal justice systems. In essence, what we want is to make the right determinations for children, parents, families and our society.

Let me turn to the role of barristers in family law. Lord Neuberger, who is the new president of the Supreme Court, recently stated that good lawyers assist cases. In what he described as two specific warnings to the Government based on his past experience, the president of the Supreme Court said that good lawyers saved money, because they were less likely to waste time, be responsible for miscarriages of justice and engender appeals and retrials. They bring expertise, they narrow issues, they advise and they are robust in questioning. Think of the miscarriages of justice that would occur without the counsel when, for example, issues such as rickets or vitamin D deficiency are discovered in cases where everyone said that there was a non-accidental injury.

There will be a cost to reducing representation, in the form of appeals, mistakes, personal litigants and longer cases. That just places the cost apparently saved on paper back into the system and on to other departments involved in the administration of justice. So we need a very robust system that properly considers the facts, tests the evidence, enables individuals to voice their views and opinions, forms the correct conclusions and develops creative and practical resolutions. That is the role of a barrister. Our involvement ensures that any party, whether it is the trust or a single parent, can properly represent their case in court. That is all the more important when parents find themselves in

the position of defending themselves against allegations, because we must ultimately ensure that they have a fair trial.

Barristers are experienced in advocacy, in testing evidence, in advising the court and in focusing on the most important and salient points. They ensure that a case proceeds expeditiously, and the judiciary consistently comment, both informally and formally in judgements, on the vital role played by barristers in enabling the court to reach its determination.

I am passionate about finding the right solutions for children. This needs careful consideration and planning, because we all deal with the outworkings of damaged children in our society. There are attendant emotional and financial consequences. Fundamentally, it is too late once the restrictions are made.

The Bar understands the pressures on resources in the current economic situation. We recognise the importance that is placed on other front line public services, such as health and education. However, too often, access to support in the justice system is not considered worthy of equal protection, and it should be. The rights to family life and child protection are no less important, and they are vital for the good and health of our society as a whole.

We aim to assist the Committee in its role, which is to properly scrutinise the impact of the proposals, but, in doing so, we invite the Committee to do a number of things. First, we ask you to consider our presentation today, and we thank you again for allowing us this opportunity. Secondly, we would like you to review the consultation responses in full. We also suggest that you consult with other stakeholders, such as the judiciary and local solicitors in your constituencies who rely on the use of barristers. We extend an invitation to you all to experience these cases in practice by accompanying us at the Bar. We also are asking you to await the outcome of the consultation on introducing standardised fees in civil legal aid before you deal with the issue of representation.

As Denise said, we support the fundamental review of family law as a matter of priority and as a means of streamlining the system. That has a viable aim, which is to realise the efficiencies that would render the need to restrict access to justice unnecessary. Our collective aim is to maintain and enhance access to justice. The reality that we all face is that access to justice is a demand-led service. We appreciate that every effort should be made to control budgets and spending, but that should not be at the expense of need and proper access to justice. That is our message. Thank you for your time. We are willing to take any questions.

The Chairperson: Thank you very much for those presentations. There are a couple of points that I want to home in on. Denise mentioned the differential between our legal framework and that in the rest of GB. The evidence we have had is that barristers are not involved in the lower tiers in the rest of GB, but they are here and always have been. Can you highlight exactly where the divergence is in the legal framework that merits barristers being involved here but not in the rest of GB?

Ms McBride: In our jurisdiction, 86% of the cases are disposed of in the Family Proceedings Court. In England and Wales, a much lower percentage of cases are disposed of in the Family Proceedings Court and more of the cases are dealt with in the higher tiers of court. The figure for England and Wales is 32%.

The Chairperson: Is it 32% in the higher court?

Ms McBride: Thirty-two percent are dealt with in the lower court. So, the remainder, which is 68% if my maths is right, are dealt with in the higher court, whereas, as you can see here, the vast majority of cases are disposed of in the Magistrates' Court or the Family Proceedings Court. Also, 18% of cases merit barristers' involvement at that level, which, we say, is less overall than in England and Wales.

The Chairperson: Can you crystallise that a little bit better in my mind and give me an example of a type of case that is dealt with in our lower courts compared with a case in England?

Ms McBride: I do not practice in the lower courts myself. However, what I know is that very serious cases can be dealt with at that level. You have neglect cases. There are also cases of less serious abuse; injuries to children can be dealt with at that level. That level does not deal with cases there is adoption or when children are to be freed for adoption. However, it deals with cases in which there is, for example, alcohol abuse and domestic violence. That type of case is dealt with at that level.

The Chairperson: So, forcible adoption, which I think was the phrase that you used, could be dealt with in our lower courts?

Ms Keegan: Not at the Family Proceedings Court, but at the family care centre, which is the County Court or the High Court.

The Chairperson: The issue of multiple legal representatives at court hearings was also highlighted last week. So, the father, for example, could have his legal representatives there. Then there could be a brother or grandfather. It was indicated that if responsibility for the child could, ultimately, come to any of those different people, they are all entitled to have a barrister at that particular case. Can you elaborate on that? Is that correct?

Ms Keegan: I do not think that it is entirely correct. Put it this way; the parties who are automatically involved in cases are the parents of the children. In public-law cases, social services will be represented and the child will be represented. If there is another party — say, a grandmother, an aunt or an uncle — they have to apply to be joined to proceedings. They cannot be joined to proceedings unless they have a separate case to make. So, in other words, they cannot come into proceedings simply to say that they support the mother or the father. So, it is in limited circumstances that another party should be joined to proceedings. What happens is that you have to go through a court and make an application to a judge, who will look rigorously at the need for another party to have representation.

Ms McBride: For example, where you have parents who are presenting as a couple, they are only entitled to one representative. It is only if, in fact, a case arises where the father is accusing the mother and the mother is accusing the father that they are entitled to separate representation. Judges scrutinise when there is representation. They will not allow there to be multiple representation when there is no conflict of interest.

The Chairperson: Siobhan, you made the point that judges, both formally and informally, indicate how barristers make the process much quicker.

Ms Keegan: Yes.

The Chairperson: They home in on the key issues and they are dealt with. Last week, it was indicated that judges would indicate informally that barristers slow the process down. So, who is right?

Ms Keegan: Well, I did not really understand that representation because I, certainly, understood that a barrister coming into the case is directed by the judge to, essentially, home in on the relevant issues and argue the case efficiently. So, from my experience — certainly, judiciary-wise as well — I think that barristers are complimented for, essentially, making cases more efficient. That is part of our job. That is reflected in the decisions that you see in terms of what barristers have brought to the case. So, I have to say that I was surprised by that.

Ms McBride: It is contrary to what judges have said on the record. We have already heard what Lord Neuberger has said. The Lord Chief Justice in England and Wales has also made the same comment about the role that counsel make. I know that, informally, judges make it clear to us that when counsel are involved, very quickly the court is informed of what the issues are. Sometimes a ten-day trial can suddenly become a one-day trial, because everybody homes in on what the central issues are. There is no time-wasting on silly points, which is what you would get if you had personal litigants, because they would litigate absolutely every point, whether it is good or bad. Counsel can differentiate between what are good and strong points and what are non-points, and that is part of what we bring.

We also assist the court in coming to its decision quickly. We address the court on the law and on the medical issues, for example, in the case. The judge does not have to do that work himself, because it is presented to him. People who are not represented are unable to do that. The judiciary have commented that, if it has to do that, it will take it longer to decide cases. Therefore, cases in court will take longer. You are going to have cases dragging on for weeks, and you are going to have costs in other areas of the system, if you deny representation.

The Chairperson: I have been struck by how much barristers have to keep judges right in terms of the law. I have wondered about your complaints about personal litigants. Does that have more to do with them having to work harder? However, I am sure that there is a genuine concern there as well.

I suppose the Legal Services Commission is not saying that we are moving from barristers to personal litigants. It indicated last week that the Law Society would have 400 firms that would say that they are qualified to do this. It is probably unfair to ask the Bar to comment on the Law Society standing over 400 firms, but, Siobhan, you talked about us speaking with solicitors about what their view on this would be. Would the Bar view the solicitors' practice as being able to have the capacity and the capability to fulfil the gap that obviously would be created?

Ms McBride: In its submissions to the Department, the Law Society made it clear that, in difficult cases in the Family Proceedings Court, it felt that barristers should continue to be instructed. That was actually its view. There are family law barristers, and we work collectively with them, although we have different roles. The solicitor is very much involved in pre-proceedings work. For example, when a parent meets social services, and social services says that it wants to take the child into care, there are looked-after children (LAC) meetings and case conferences. At those, there may be 10 professional people, and the parents are sitting alone. The solicitor sometimes goes with them and deals with that. When the matter comes to court, different skills are required at that stage. That is when the solicitors say that counsel are required when issues arise that require our skills. For example, if there are issues about conflicting medical evidence, the Bar brings in expertise in cross-examining doctors. The Bar also brings an independence, for example, to say to the client, "Do you know what? You have certain difficulties in caring for your children. It may be that you have to undertake a course of work to make you a better parent". We are honest and independent. We may have to say to the parent, "This is a case where you are unlikely to be able to retain the care of your child". In that way, we can aid resolution of the case and get a solution so that the parents can get contact with their children. The Bar and solicitors have different roles: they are complementary roles, and they are different.

Mr Lynch: Thank you for the presentation. I want to go back to what the officials said last week in response to a question that I asked about exceptional cases. Their reply was:

"It is the legal issue that must be exceptional."

They seem to be ruling out some of the complex cases that you mentioned, such as physical abuse and sexual abuse. What do you have to say about that?

Ms Keegan: We think that the issue of simply restricting the criteria to legal issues misses the full panoply of the issues that we have to deal with. The people themselves are very complicated. You have very human and difficult issues, and, because of that, you cannot just restrict representation down to a legal issue. The facts may be extremely difficult. The stakes are extremely high, and the people in the system are very vulnerable. We say that the criteria are far too restrictive and do not take into account the full tapestry of family law. Every family is different and every case is different, and you have to have a more wide definition of when you need the help in these cases, so we think that it is too restrictive.

Mr Lynch: Just to follow on from that question, do you have a gender breakdown of those most impacted by family proceedings?

Ms McBride: What we do know is that, in the family courts, there is a preponderance of female counsel who do that work. I also understand that most of the applicants for legal aid are female. It is our view that it does have an impact in terms of gender. We say that we live in a society where we want to see women coming through the ranks of the profession, because, at the present time, we are very conscious that we have fewer women than we would expect to have on the bench and acting as judges. If you are going to reduce representation in family cases, that is absolutely going to have a devastating effect on the number of female professionals who are working their way up through the profession.

Mr Elliott: Thanks very much. I should declare an interest as a board member of the Northern Ireland branch of Adoption UK. The implication here is that significant savings will be made if the Department carries out what it is proposing. How do you suggest that those significant savings could be made under your proposals?

Ms Keegan: The first thing to say is that we do not necessarily say that there would be savings by cutting representation. We say that that would lead to less experienced people doing cases, personal litigants doing cases, running up costs within the administration of justice, and appeals and such like. We do not actually say that, if you break it down in terms of impact, you can definitively say that the proposal in itself can produce a saving. We say that the deficit is, of course, the effect on the people who are entitled to public funding.

Ms McBride: However, we do say that you could make savings if you have the fundamental review. In fact, we say that you must do that first. That is an area where you can streamline and simplify procedures if that fundamental review is implemented. Secondly, there is a fees consultation and, again, we say that you need to see the outworking of that before you can really make a decision on representation.

Mr Elliott: Obviously it is quite complex, given the nature of the Children (Northern Ireland) Order 1995 and different pieces of legislation. My opinion is that you are not going to have significant change until legislation is changed in that respect. I suppose that is what a number of the delays are. The section of the post-consultation report dealing with the family proceedings court and Magistrates' Court states that:

"Only those presenting as significantly more exceptional than the 'norm' in terms of gravity, seriousness or public importance for the court tier, in the opinion of the Commission, should merit consideration for Counsel".

How would you define that?

Ms McBride: It is our view that, in real terms, no one is going to get over the threshold of those criteria and, effectively, you are not going to be entitled to representation by a barrister. We say that a denial of access to justice is going to arise if those criteria are put in place.

Mr Elliott: The officials indicated last week — if I recall correctly — that there would still be senior counsel representation in the High Court where necessary. I think you said earlier that, currently, only 44% of the cases that go to the High Court actually do have that representation. Will you explain that again?

Ms McBride: Only 4% to 5% of family law cases are disposed of in the High Court. At the present time — I was a little surprised at this, because I thought that senior counsel would be involved in all of those cases — senior counsel is only involved in 44%, which is less than half of those cases. The proposal is that senior counsel will only be involved where there are exceptional circumstances, but, when one looks at the criteria that have been set out, the reality is that I cannot think of very many cases where senior counsel would pass that test and be involved. So, effectively, it means that, in those 4% or 5% of cases, about half of which have senior counsel, those people are now going to be denied the right to have representation by a senior barrister. Those are the most complicated and most difficult of cases. That is why they are in the High Court rather than the lower levels.

Mr Elliott: How do you address the issue that officials raised last week about a number of different family members, or people with potential interest in the child, having senior representation?

Ms Keegan: It has to be relevant to what they bring to the table. In other words, a party who is not a parent cannot just come in and expect automatic representation. If they have something to add, or if they are making a contrary case to a parent, that is all right, but there is no automatic right for these other interests to have representation.

My point is that the courts are particularly vigorous about this at present. You have to make an application to be joined if you are not an automatic respondent. The automatic respondents are the parents, and the child is also represented, but this idea of a whole lot of other interests is not —

Mr Elliott: So are you saying that this is not a widespread issue?

Ms Keegan: No, I do not think that it is —

Mr Elliott: Sorry for cutting across you, but do you have any idea of the numbers involved? The issue of the number of various parties who can get senior representation in one case was raised by officials.

Ms McBride: I was rather surprised at that representation being made. Historically, there may have been one or two cases with a large number of representatives, but those were exceptional cases in which different parties had very specific interests. The reality is that the judge controls this, so, unless you are a parent, trust or child, you have no automatic right to be in court. You have to apply to the judge for leave to be represented. Our judges are very careful about allowing multiple representation, so we have to justify why a party needs to have a legal representative — junior counsel, let alone senior counsel.

My experience is that fewer and fewer cases involve multiple representation. I have acted for the mother and father in a case in which the father was charged with a criminal offence against the child, but, because the parents were presenting as a couple, I acted for both parties. The court did not consider that a conflict. I think that the courts are scrupulous about preventing multiple representation in these cases.

Mr A Maginness: I was struck by your quoting Lord Neuberger, with whom the Justice Committee had afternoon tea a few months ago in London. When talking about the proposed changes in England and Wales, which we are always told are so wonderful, he said that the proposed changes demonstrated his real fear:

"we are at risk of denying access to justice and that damages the rule of law."

He also said:

"rich people can always afford legal advice and representation but unless you have access to legal advice for poorer people you have not got the rule of law."

I am not asking you to comment on the quote, but what is all this about in your opinion? It seems to me that the cart has been put before the horse: despite no resolution on the civil side, we now are discussing representation. Everybody accepts the need for economies and efficiencies, but this seems to be the wrong way to go about reforming the current system.

Ms Keegan: That is very much our message. We are committed to looking at efficiencies in the system and in the level of fees. However, first, we think that the proposal to restrict representation is a false economy. Secondly, as you pointed out, it is putting the cart before the horse. Thirdly, as Lord Neuberger and others have commented, we are back to looking at the rule of law, access to justice and justice for everyone. This should not be a luxury; it should be part of a democracy in which everyone has the same opportunity to have legal representation.

Ms McBride: Also, we should not underestimate the importance of civil legal aid, which, alongside health and education, is one of the pillars of the welfare state. If we attack representation, we attack part of the rule of law that has served us well. That is why I said that we have to think long and hard about what we do. You are absolutely right that we need to look at these other matters before trying in some way to reduce representation.

Mr A Maginness: In many such cases, the lead applicant is female. Are you aware of any assessment of the impact that this will have on female representation in the Bar and on females generally?

Ms McBride: I note that the Children's Law Centre raised that issue in the consultation and asked for an impact assessment to be carried out. I am not sure whether the Department intends to do that, but it absolutely needs to be considered.

Mr A Maginness: If barristers do not carry out the work, solicitors will have to. Of course, there will be an additional cost in advance fees for solicitors carrying out that work. I do not know what assessment has been done, whether by you or the Law Society, on reducing the level of savings. That would be interesting. Do solicitors have the capacity to take this on, given the multiplicity of small firms that exist here in Northern Ireland?

Ms McBride: You have absolutely hit the nail on the head. You go along to your local solicitor, who was involved in the conveyancing when you bought a house or when you were in a road traffic accident and suffered a neck injury. Then, social services come along. You went to the hospital because your child was ill. Social services were suspicious and concerned that you have caused injury to your child. So you go to the local solicitor whom you know and trust. Those solicitors are very good at what they do, but they are not specialists in this area.

This area is so complicated that solicitors need to draw on the resources of the Bar, the experts in this work. Barristers are in the courts day and daily, so they know how to examine and control witnesses and how to cross-examine. They know which expert witnesses are required and how to deal with social services. They know simple things, such as how to get discovery of documents to check that, for example, a trust has followed proper procedures.

Solicitors do not have that expertise. That is why solicitors and, more importantly, clients require the expert service that the Bar brings to these cases. A solicitor may practise for 20 years without ever having acted in a case in which a parent was, for example, charged with, or alleged to have been guilty of, shaken baby syndrome or cot death. Very many of us at the Bar have been involved in scores of such cases. We know exactly what needs to be done and how to approach such a case. Without that expertise, our real concern is that children will be wrongly put into care and parents will be wrongly accused.

The other side of that is that, if there is no proper representation, there will be children who are not properly protected. So this impacts not only on individuals; it affects society.

Mr A Maginness: On the decision about whether to have senior counsel in the High Court, would it be of assistance if the criteria were reviewed again to make them less onerous and even, as you said, impossible? In addition, in circumstances in which the judge is of the opinion that senior counsel is required, is it reasonable to suggest that an order could be made on foot of that?

Ms McBride: At present, that decision is made by the Legal Services Commission on foot of opinion provided by junior counsel and/or the solicitor. We welcome that because, in very many difficult cases, judges welcome the input of senior counsel. Without that, they sometimes lose direction and carry on for too long down the wrong route. However, with the engagement of a senior counsel who has that expertise, the case suddenly becomes much more focused and is resolved in a way that is to the benefit of everyone involved in the process. There may well be merit in the judiciary having an input into that because they are involved in the case and know what the issues are.

Mr A Maginness: I have two ancillary points, not on family law but on representation in the County Courts. It has been suggested that senior counsel be excluded completely from legal aid cases. It strikes me that, given the increase in the jurisdiction of the County Court up to £30,000, senior counsel, in certain circumstances in which it is reasonable, should be involved in proceedings. What is the Bar's view on that?

Ms McBride: Specifically in relation to civil cases?

Mr A Maginness: Yes.

Ms McBride: The position is now that, because of the increase in the jurisdiction, very much more complicated cases will be dealt with in the County Court. There could, for example, be cases of clinical or professional negligence. Such complex and exceptional cases would require the expertise of counsel. I think that it benefits the system by speeding up the process. Senior counsel are very good at directing which witnesses are or are not required and at seeking to agree witnesses. Without that input, because of the increase of the number of cases that will go to the County Court, the whole system could slow down and become clogged up. So I think that they have a positive role.

Mr A Maginness: In most cases, senior counsel will not be required.

Ms McBride: I think that, in most cases, they will not be required, but they will be required in cases such as those of clinical negligence.

Mr A Maginness: One other category mentioned in the report is that of junior counsel in the High Court being excluded when senior counsel have been appointed or briefed. Does that make sense?

Ms McBride: I do not think that it does. The roles of junior and senior counsel are very different, and senior counsel cannot really operate without the assistance of junior counsel. In a very lengthy trial with a number of witnesses, for example, senior counsel need the assistance of junior counsel to deal with some of the witnesses.

Secondly, very many cases involving senior counsel have voluminous documentation, and junior counsel play a vital role in going through the discovered documentation. If senior counsel were to do that, it would take much longer, and they are paid at a higher rate. Junior counsel have a role to play in assisting in preparation for trial, and they also assist greatly in all of the interlocutory matters — the pre-proceedings applications — that senior counsel do not deal with. Senior counsel come in and deal with the big issues for which their expertise is required. I think that excluding junior counsel does not make sense.

Mr A Maginness: Junior counsel also prepare the pleadings and set out the case.

Ms McBride: That is absolutely right.

Mr A Maginness: A suggestion by, I think, the National Farmers Union Mutual Insurance company was that senior counsel be excluded from the High Court, although I am subject to correction on that. Would you like to comment on what has come from that source, given that this is a leading insurance company that is looking after its own interest in reducing representation for plaintiffs?

Ms McBride: Yes. An insurance company instructs senior counsel when it is in its interest to do so. Clearly, it is not in its interest if the plaintiffs are properly represented by senior counsel. Quite often, that means that plaintiffs get the compensation that they deserve. Their cases are conducted absolutely properly, and insurance companies have no interest in securing that because, ultimately, they end up paying the compensation and the costs of legal representation. So it is understandable that the National Farmers Union Mutual Insurance company has a self-interest in reducing costs rather than an interest in preserving public representation and public access to justice.

Mr McCartney: Thank you very much for your presentation.

Other members have already asked the obvious questions. In general, we agree with what you said about legal aid being there to give people access to justice. Sometimes, there is a perception that legal aid is for other purposes, but it is to give those who are vulnerable and may be unable to afford good representation the possibility of getting it.

You outlined steps that you think the Committee should take. The presentation today was one; seeing cases in practice was another. Maybe parties will take that up individually or collectively through the Committee. You mentioned the review of the consultation document. What should we be looking for as we do that?

Ms Keegan: We want you to look at the responses from the wide range of interests, in particular from the Bar, the Law Society, the Children's Law Centre and Barnardo's. We are focusing on how they look at the impact. Collectively, the theme is that access to justice should not be restricted if that would have a negative impact on those who need it most. If you reflect on those various papers, which are from different perspectives, you will see a similar theme, which is that of who would be affected most. Children are at the heart of this, too, and that is a theme that emerges when assessing the impact. So it is from that perspective that we raise the issue.

Mr McCartney: Your last point was that in not taking any decision on representation, the fees issue was resolved. Even the way in which the Chair allowed the meeting to flow shows that we want to focus on representation rather than this becoming a discussion on fees. The approach that we want to take is that this is about representation: what is appropriate and effective, and what should take place.

Ms Keegan: We appreciate that because that is the core of our message.

Mr McCartney: When the Department presents this proposal, the automatic reaction is that, if it is about saving money, people will not be appropriately represented. I assume that, if the proposals go forward, even without resolving the fees issue, they will save the Department money.

Ms Keegan: Yes, on paper.

Mr McCartney: Yes, on paper and notwithstanding what you say about the possibility of appeals. The popular view may be that every family law case has more barristers around the table than anyone else. It would be nice to know the number of cases. I am sure that there is a table of how many cases went through the Family Law Courts and the number of counsel involved. From what you said, multiple representation is not as widespread as has been presented to the Committee. Perhaps we need evidence to support that.

Ms Keegan: I hope that, if we have an ongoing liaison with you, the Committee may come to the courts and see how that works in practice. Whether you come collectively or individually, we are very open to that. That may dispel some of those myths because you will see how things work in practice.

Mr McCartney: One proposal is to take a decision simply not to have senior counsel. Meanwhile, if a person is privately funding a divorce and decides to have senior counsel, they are automatically entitled to senior counsel. That seems contradictory. In the other situation, if someone were minded to finance senior counsel, they could do so. Therefore, it is not as though someone is saying, "Look, they are not sending in an ergonomic engineer to fix a puncture." That is not the scenario. You could simply turn round and say, "In no circumstances should an ergonomic engineer be employed to fix a puncture." In my opinion, the idea of having no senior counsel is not about over-representation; it is simply a cost-saving measure

Ms McBride: Yes.

Ms McCorley: Thanks for the presentation. My concerns and questions have already been raised, so I do not want to go on for the sake of it. My concerns lie with the people who are vulnerable and stand to end up on the wrong side of this change. It strikes me that the reform will mean a very blunt instrument being used to deal with very sensitive issues. What are your most grave concerns should this be implemented as proposed?

Ms Keegan: We think that the most vulnerable people, who do not have a voice, will be lost amidst very serious applications being made against them. They need robust lawyers, they need experienced lawyers and they need people who understand the system to make their cases for them. Essentially, they need to have fair trials, and we worry that they will not get them.

Ms McBride: Counsel have made significant contributions over the years in cases of non-accidental injury. I gave Cleveland as an example, but there have been more recent cases, such as that of Angela Cannings, which you may remember, in which lawyers were able to show that the injury was not inflicted by the parent. So we are very concerned that there will be miscarriages of justice.

We are also concerned that mistakes will be made and children such as Baby P will be missed. We need to get the right balance because, if we get it wrong, we will all have to live with the consequences. The cost of getting it wrong will move to other areas of society, so proper representation is fundamental.

Ms McCorley: The first paragraph of the Department's paper is all about costs. When we look at the figures, the increases seem astronomical. What is your opinion on that?

Ms Keegan: The costs have increased over recent years, but you have to look at that in context. First, applications have increased. Secondly, society has changed. We are dealing with a society that has more family breakdowns and a different make-up. We also have a greater awareness and consciousness of issues such as abuse. Day in, day out, you see an increasing appreciation that we have to deal with such issues. So it seems that we are more robust when it comes to child protection — in identifying the issues and protecting children. Also, quite rightly, we have a thrust in our legal system to try, if possible, to get children back into their families and then support families in looking after them. All of that has added to the costs.

We have to make efficiencies in the system in the areas of case management and fee levels. We know that, and we are committed to doing that. However, this representation paper does not hit the mark. The disadvantages outweigh any advantages. Let us look at family justice in the round and make it real and effective for everyone.

Ms McCorley: Do you see a natural progression that would throw up cases, such as the one that Raymond mentioned, in which somebody puts a senior counsel on a case that evidently does not require such representation? Do you agree that one way to go would be for such cases to arise naturally and then be queried and perhaps penalised?

Ms Keegan: I agree with you. We are not coming to the Committee saying that there should be senior counsel in every case, nor are we saying that, at the lower end, there should be junior counsel in every case in the Family Proceedings Court. There are natural checks and balances. We have case management structures as well to ensure that cases have the right level of representation. There can be abuse of the system, and we are committed to making the system fair for everyone. There should not be the abuses that you mention, but these cuts to representation do not deal with the issue.

The Chairperson: Thank you, Siobhan and Denise, for coming to the Committee. It has been much appreciated.

Ms Keegan: Thank you very much.

Ms McBride: Thank you.