Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Publicly Funded Representation in Civil and Family Courts: Briefing from Law Society of Northern Ireland

12 September 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 Tom Elliott
Mr Seán Lynch
Mr Alban Maginness
Mr Jim Wells

Witnesses:

Ms Catherine Dixon	Law Society of Northern Ireland
Mr Alan Hunter	Law Society of Northern Ireland
Mr Peter O'Brien	Law Society of Northern Ireland
Mr Michael Robinson	Law Society of Northern Ireland

The Chairperson: I formally welcome Alan Hunter, chief executive; Mr Peter O'Brien, assistant secretary; Ms Catherine Dixon; a past president; and — last but by no means least — Mr Michael Robinson, president of the Law Society. You are very welcome to the meeting. Again, this session will be reported by Hansard and published in due course. If you are content, let us move on. I will hand over to you, Michael.

Mr Michael Robinson (Law Society of Northern Ireland): Thank you, Chairman. The Law Society would like to thank the Committee for Justice for the opportunity to present to you today on the issues around the levels of representation in civil and family proceedings. We are particularly grateful that you are hearing us now after such a complicated and busy afternoon. Thank you very much for bearing with us.

At the outset, I want to take this opportunity to outline the society's basic position on securing access to justice for all in our society. The key principle for us, when it comes to securing the rights of the most vulnerable sections of society, is that of appropriate representation in each case. That means an appropriate team of skilled professionals, providing a quality service for adequate remuneration. The fundamental importance of the issues involved demands that. Vulnerability can come at the hands of state agencies or large commercial organisations in the civil justice system, whether by serious injuries or other forms of unfair treatment.

It is our firm view that the Department has not set out a case for making the proposed changes. The absence of any analysis of the sources of cost drivers in the civil justice system undermines attempts to simply abstract one issue, legal representation, and turn it into a problem.

In relation to one of the larger categories of family law, namely the Children Order cases, it is the law that places the child at the centre of this process, and if that is to change, it must come through parliamentary mechanisms. Until such a time, we have a duty to ensure that vulnerable children are represented effectively in the manner that the legislature requires.

It is up to the Department to make the case for reform before the debate over the real issues can begin, and we do not believe that that has yet been done.

I should take this time to note that we are here today to specifically discuss the representation issue, although we appreciate that that is linked to wider issues around fees and costs, which we would be happy to discuss at a later date. If one looks at Children Order proceedings, for instance, one will see that the welfare of at-risk children is paramount, and you discussed that this afternoon. We strive to protect the safety and human rights of those children and, by doing so, ensure that a principle of early intervention and protection reduces pressure on the justice system further downstream.

What you are deciding when you consider the question of representation is what value you place on the needs of vulnerable children in our society, and you ought not to lose sight of that. Indeed, the consequences of broken families and vulnerable children extend beyond the justice system and into education and pressures on caring institutions and services, and so we ought not to assume that cutting costs is a simple equation of fees and representation with no focus whatsoever on value.

Much has been said about the increasing volume of Children Order proceedings in recent years, but in many respects, that is the outworking of having a more accountable society. People no longer feel compelled to view mistreatment of a child as something that is not their business or is outside the scope of public interest. We should be thankful that we live in a society in which the most vulnerable have every chance of escaping their difficult circumstances, and affording them access to appropriate legal representation is the most effective way to secure that undoubted imperative.

The only way to ensure that justice will prevail is to accord each party to proceedings an equality of appropriate representation and to ensure that no one is disadvantaged for want of financial means. That is in keeping with the spirit of the legal aid scheme when it was first introduced during the Second World War in a context in which it was felt that access to justice was the glue that would hold society together, strengthen the weak, afford equality to all and provide the essential building block of an emerging welfare state and stable society. This strain on the social compact is evident from a close look at the relevant figures.

According to statistics produced by the Department of Health, Social Services and Public Safety (DHSSPS), referrals to children's services increased between by 18% between 2005-06 and 2010-11 and by 9% between 2009 and 2010. Similarly, between 2006 and 2011, there was a 46% increase in the number of children on the child protection register. Between 2011 and 2012, there was a 3% increase in the number of referrals concerning children in need. Although some improvement in the numbers of children on the children protection register during the same period was observed, overall, there is an upward volatility in the figures in recent years.

In such a scenario, the overriding concern ought to be to ensure that the interests of these children are protected with vigour and zeal. Like so many aspects of public welfare, there is an inverse relationship with economic security and general well-being in the population. That is unfortunate due the accompanying fiscal pressures, but it is the reality of what we must all now face. Equally, given the increasing public scrutiny of the care of and contact with children, it is of considerable importance that the ability to reunite families is preserved in order to advance the common good. The greater the difficulties in relation to abuse, and the significant challenges facing front line care workers in making assessments of welfare, the more important it is for worthy parents to be enabled to make their case also when they need to.

When the Children Order was introduced in 1995, these levels of representation were agreed by Parliament as being of the appropriate level and standard to secure the best interests of vulnerable children in keeping with our domestic and international obligations. It must be emphasised that this was not a scheme designed for lawyers by lawyers but by the legislature for the protection of the vulnerable under the order.

I feel that it is important to set out clearly and ensure that the debate is properly focused on the appropriate level of representation to protect the human rights of vulnerable people. This is an imperative that was made more pressing by the introduction of the Human Rights Act in 1998. The

emphasis on the protection of the child as a central tenet of a civilised society increased with the introduction of the Children's Charter in 1889 and, most notably, with the UN Convention on Human Rights. This is an area in which this country is rightly proud and wants to lead in.

The key issue is the level of skills and commitment that is being applied to securing these rights. Chairman and Committee members, I am pleased to say that, in Catherine Dixon, I have an example of that skill and commitment. Catherine is a very experienced practitioner in Children Order cases and knows intimately the difficult social issues involved in such litigation. Catherine reflects the fact that advocacy is a growing and skilled discipline for solicitors and, as a society, we stress the importance of our members undertaking work on behalf of clients in a wide range of civil and family proceedings. It is not the label that is applied to the practitioner that matters, but the level of specialisation that the relevant practitioner can bring to bear on the appropriate proceedings that is key.

We are keen to emphasise that, in the majority of proceedings in question, solicitors have taken full carriage of the case, such as the 92% of the cases under the Children (Northern Ireland) Order 1995 that conclude in the family proceedings court and the large number that conclude in the Family Care Centre, which account for a further 3% of the recorded cases. Provision of counsel is necessary only in a small percentage of overall cases, and the increasing specialisation of solicitors and solicitor advocates has reduced this number to a particularly complex and specialised area of advice. However, we must stress that, in our view, many proposals in the consultation are insufficiently flexible to ensure appropriate representation in all appropriate cases.

First, it must be stressed that there is not a perfect correlation between court tier and the complexity of the legal and factual issues involved. Simply stripping out the possibility of counsel in line with court tier is a blunt measure that focuses on a narrow view of cost-cutting rather than identifying appropriate representation. This is particularly so in the context in which overall pressures are to keep cases out of the High Court and to do business more effectively by disposing of cases in the lower courts.

In our consultation responses, we noted, for example, the potential for more complex cases to remain in the family proceedings court under the terms of article 5(1) of the Children (Allocation of Proceedings) Order (Northern Ireland) 1996. Thus, the issue is neither the court tier nor the title of the practitioner undertaking the work, but the fact that different types of work may arise across all court tiers and may require more than one practitioner being involved. It is a fact that, just as more complex surgery requires more than one surgeon to perform it, more complex cases require the skills and expertise of more than one practitioner to progress them. Allowance for such provisions does not make it the norm, neither does it open the floodgates to avoidable costs. It seeks to serve the interests of justice in a small number of appropriate cases.

As solicitors continue to increase in their specialisation, the level of work they undertake will naturally increase, provided that there is a proportionate relationship between remuneration and the work undertaken. This latter point concerns the importance of a solicitor balancing advocacy functions with managing a small business with multiple employees and client care issues. If we want to streamline the system and increase the proportion of work undertaken by solicitors, we must put in place appropriate remuneration to ensure that these services can be provided in a cost-effective manner to ensure that solicitors can meet their essential costs and continue to act as responsible employers in the community.

Although we appreciate that there is a real need for efficiency savings, as an organisation, we are critical of the impulse to reduce costs through the stripping out of representation in advance of an all-encompassing review of how the civil and family law system currently operates. Indeed, one part of this picture not mentioned in the consultation is the fact that the fees under discussion have not actually been increased by the legislature since they were originally set in 1996.Similarly, we emphasise that the number of cases in which multiple parties make applications for legal aid representation is limited by judicial direction to circumstances in which it is necessary because of competing interests in a particular case. To extrapolate that and to seek to portray it as a significant cost driver is clearly and palpably misleading.

We make these statements in keeping with the general principle that cost-saving reforms are often interdependent and conditional on taking a system-wide view generally. Policymaking in a fragmented, ad hoc manner risks public money in the long run by introducing the possibility of avoidable if unintended consequences. This view is not the preserve of the Law Society, nor of practitioners generally. In our consultation response, we identified that the access to justice review considered the blanket removal of discretion as a risky move, which would have implications for effective legal representation. That access to justice review recognised the holistic nature of the

justice system. One cannot make an assessment of the function of one organ without reference to its interaction with others.

The society has made representations on a number of occasions to the effect that effective forecasting of expenditure is a problem that should call into question the adequacy of the overall legal aid budget. The continuing emergence of funding pressures creates a situation in which it might be perceived that costs are suddenly rocketing year on year. In fact, an analysis of that reveals that a planned budget would have provided a better refection of social need at the earliest stage and opportunity. We are not here today to discuss the winder financial picture, but it suffices to make the point that taking certain areas in isolation is apt for misdiagnosis of the holistic problem.

The society has spoken of the possibility for interim payments and progress forecasting as one mechanism to adequately control expenditure, along with the importance of IT and processing systems. It is a bit like a patient going for a check-up in which the doctor examines only one area of the body. All organs of the civil and family justice system need to be examined to deliver effective, proper and long-lasting reform.

It is difficult to determine with any confidence from the consultation paper that the Department has an overall view of what it would like the family and civil justice system to look like. If one were to undertake such an evaluation, an analysis of court cost pressures, system-wide delays and the identification of areas of inefficiency would precede any consideration of proposals to reduce the level of service. The lack of a fundamental review, with the last review on delay carried out by Children Order practitioners in 2003, calls into question the evidence base for suggested reforms.

In its response to the consultation paper, the society has maintained that it supports complete transparency and the setting of appropriate criteria to ensure that levels of representation match the complexity of the issues. Our concern is that what is proposed is not proper filtering but, effectively, a blanket removal of representation without giving due regard to the interests of everybody who is involved the process. Our concern is that insufficient regard is being shown for the intention of Parliament when it provided for these important rights and that that, wrongly, animates the current proposals.

In summary, the society considers the single most important principle in civil and family justice to be appropriate representation in appropriate circumstances. Access to justice and a network of community legal representatives is our core belief, and that remains constant. We are seeing changes in the outworking of that in the civil and family arena, as solicitors assume more work, in accordance with the increasing specialisation and experience. However, provision for additional specialist representation is also an aspect of that principle in certain limited circumstances.

The present consultation takes an overly rigid view of the respective roles of each branch of the profession, focusing on cost without the other side of the coin, which is value. The Department appears to be working on the presumption that, by stripping out the provision for additional legal advice in exceptional cases, court costs will be reduced without any detrimental effect on the service provided to those who badly and desperately need it. We suggest that that is a grave and avoidable error.

The position of the Law Society is that the most vulnerable sections of our society should be entitled to the representation that they require in order to access the justice that they deserve in appropriate cases. We regard that as a fundamental principle of the welfare state and one that cannot be sacrificed without significant damage to social fabric. The solicitors' branch of the profession is committed to working with the Department of Justice to reduce avoidable costs and delay within the system and we recognise that those demands are more pressing than before. It is our feeling that the Department is missing a wider opportunity to achieve those objectives without harming access to justice in the process. We are here today to urge it to think again.

That concludes our presentation. I offer my representatives for questions. Thank you for the opportunity to speak.

Mr Elliott: Thank you for the presentation. I declare an interest in that I sit on the Northern Ireland board of Adoption UK. Michael, you said that there is no proper filtering — I think that that was the word that you used. Do you believe that the system could be improved if there were better filtering, and that that would cut out some of the fat in the system?

Mr M Robinson: Do you mean filtering with respect to the choice of counsel and head lawyer?

Mr Elliott: That is what I assume you meant. You used the expression.

Mr M Robinson: We are saying that we put forward proposals under the review. We said in the previous review that, in cases of this type, you just do not get counsel. Counsel, or a second or third lawyer in the case, whatever name they have, are just not given to you. You have to apply to the judge and make a case for the appropriate representation. There are proposals with regard to that filtering process at that stage and how it will be defined. We say that the suggested definitions for that filtering are far too narrow. However, there is currently a filtering process in the system. I think that there is a question as to whether that process should be filtered and defined more tightly. We say that it is entirely appropriate to have a filtering process and to decide which cases deserve which level of representation. We say that it should be appropriate representation in appropriate cases, having appropriately determined — in accordance with properly decided criteria — what that filtering should be. Perhaps some of my colleagues could elucidate more directly on the filtering criteria.

Ms Catherine Dixon (Law Society of Northern Ireland): They are all looking at me, so it must be me. *[Laughter.]* As a practitioner, what happens when a case comes in is that I look at it and try to work out whether it is something that I feel comfortable in managing myself, or whether I need additional expertise. Then, I determine what to do. If I require additional expertise, the way in which it is currently structured is that that expertise would be a barrister, but that may not be the case in the future.

Currently, I apply to legal aid and ask for authority for counsel. Throughout my entire career, I could count on the fingers of one hand the number of counsel that I have instructed in the family proceedings court. I have always run my own cases at that level. I run most of my own cases in the family care centre. Occasionally, there may be technical points, things that need drafted or that are not cost effective for me to do. It is about managing the work in relation to what you are actually doing. You look at each case as you go along.

One of the things that I worry about is that there is an assumption that the case is the same for everyone, but I extensively represent children instructed by specialist guardians and social workers. Therefore, my position is different to that of some of the other representatives. Clearly, some of them act for very vulnerable mothers who may have all sorts of problems, such as some of the things that you were talking about earlier: prostitution, drugs and all sorts of issues. Having that sort of person as a client is a different matter. I am often instructed by a specialist social worker for a young child, so I might see the child once, because I like to see my client, even if they are only wee; but I like to have seen them because I will be the only lawyer in the courtroom who has seen the child. After I go out to see the child, all my instructions are with a fellow professional. Therefore, we are able to work as a team and figure out ways of moving forward.

Working with parents is a different kettle of fish because, often, many are very vulnerable and are themselves products of the care system. We have already failed them once. Not to give them proper representation would be to fail them again. We need to decide who we need to do that work, and what level of expertise they should have.

Mr Elliott: Thank you for that. I want to ask about cooperation with social workers in particular, because I assume that they are the other professionals with whom you have a quite a lot of contact. How good is that relationship and cooperation and, if it were improved, would it help matters? In looking at the consultation, it is clear to me that the Department is looking for a financial saving, to be blunt. Could matters be improved if there were better cooperation, or do you feel that there is already a really good level of cooperation with social services?

Ms C Dixon: We need to consider where each particular case comes from. In child protection cases, they are, in effect, brought by social workers through the mechanisms that exist for their representation. On a personal level and in the courts generally, I find that I can approach social workers at any time, although I will always check with their solicitor that it is OK to speak to them. However, as a general rule, I can lift the phone to talk to them about particular points. If I see a particular need, I can ask a question such as, "What about bringing Mrs Jones in a taxi to see the specialist who will decide whether or not she has a mental health problem that prevents her from being able to parent her child?" I can ask a social worker to lay on a taxi so that we can at least guarantee that the client gets there. All those sorts of things already happen.

The pressures on the system are really immense. In the past number of years, the number of cases has increased quite significantly, and complex cases are being dealt with at a lower level. We have a

pyramid system, with ever more cases. What would have been considered a High Court case 10 years ago does not go to the High Court. Some cases are now being managed through the family proceedings court because the pressure is for only the very worst cases to go to the top. That is as it should be, but as the system has become more complex and there are ever more cases, complex cases are being pushed further down.

We are now dealing with cases in the family proceedings court that we would not have dealt with 10 years ago. That is part of the reason why we are saying that the system needs to be looked at properly. It is absolutely creaking. When you go to court, you see the pressure in respect of time frames. The length of time that it is taking to deal with cases is extending because there is only so much that can be done in court on any given day. If we are to do things properly, the current structure cannot continue as it is. It is not just a matter of legal aid. Not all social work teams are fully manned. Many of the teams that I deal with do not have the six members that they should. There are not always sufficient people to cover things.

This is only the tip of the problem, which is much bigger that just taking out some representation. Appropriate representation at each level is the important issue. I would not want to run a High Court case on my own. It is as simple as that. On occasion, out of necessity, I have had to run parts of High Court cases alone. I would not want to do that on a general basis because I could not service a client properly.

Mr Peter O'Brien (Law Society of Northern Ireland): Steps have been taken in the past number of years to bring in guidance on how these cases are dealt with and managed. That happens both on the public law side, where the state intervenes to bring children into care, and also more recently in private law disputes between parents about contact and residence. Those steps have led to the introduction of a pre-proceedings stage, which is an attempt to see whether, at a very early stage, before things get as serious as court proceedings, there can be engagement between families, lawyers, and social workers for the various trusts. That involves an exchange of information and provision of reports.

We now have the benefit of a standardised reporting system for cases. There is a standard way for information to be recorded. That evidence is shared and there are pre-proceedings efforts, before cases reach court, in which attempts are made to narrow the issues. Records of that are kept. Catherine possibly has the benefit of direct experience of that system. It has been some years since I was in practice, and these measures were introduced more recently. They are opportunities for liaison between the legal representatives of the parents in those cases and the social workers who are dealing with it in the first instance on the ground. The sort of people Catherine is referring to are the very specialist Guardian ad Litem Agency, who are there specifically as social workers. Generally, they will all have a social work background, but they are looking specifically after the interests of the child.

Mr Elliott: To sum up, you are saying that a better filtering system would improve and perhaps reduce the finances, but that, without overall reform, including social services, you are not going to make any real significant difference. Is that reasonable?

Mr M Robinson: That is absolutely right. As a lawyer who works in the system, I emphasise that we do not write our own cheque for these cases. Someone has to grant the authority for counsel or a second or third lawyer in the case. That is often misunderstood. We read in the papers about how bad we are and how we are all just writing cheques. We are not doing that. Someone has decided on an appropriate application that a second or third lawyer should be involved in the case. Those decisions are made judicially. They are made on appropriate applications following appropriate criteria.

We are saying that you cannot bring in drivers and simply decide that all of x type of serious cases are moved down to one particular court. That is why we say that the tier does not matter. The tier is some indicator of the seriousness of the case, but it is not the only indicator. Simply to force everything down into the middle tier and say that, in that tier, you are going to have x number of lawyers, is not the answer. Our contention is that you need to look at each of the cases, and you need to have the flexibility to decide that, in any particular case, there is a level of representation that is appropriate for the severity of the type of case. That could be in any number of tiers, not just in the High Court tier or wherever. All that we are saying is that, if we are stuck in that route, we need to be looking at the level of representation in a holistic way, rather than the blunt instrument of saying, "That is that tier, and you are going to get one solicitor. No one else is ever going to come into this case, no matter about the

gravity or complexity of the issues." That is wrong. That sort of inflexibility will create more problems because, ultimately, you will end up with appeals and decisions being incorrectly made. Defining it by tier is not the way to do it. You have to look at the severity of what is going on and define that correctly before you just say, "In x tier, you get x lawyer."

Mr Wells: We have been here before, gentlemen, have we not? Now let us look at the real facts. The only consolation is that the group that is more unpopular than you is us: MLAs. The Department's paper states:

> *"The legal aid costs for Children Order cases across all Court tiers increased from £8.5million in 2007/08 to £23million in 2011/12."*

That is almost a trebling in four years. Surely the Minister is absolutely right to address this. It is a steam train that is running out of control. We simply cannot tolerate that increase in expenditure in this field in a time of economic recession.

Mr M Robinson: That is predicated on the assumption that you are just writing the cheques all the time to the lawyers. You are writing the cheques for the cases that come into the system. We hear that argument all the time. It is a well-made argument. I read that argument in the press all the time. However, the point is that the money that is being spent by the Department of Justice is being spent on a justice system to deal with the number of cases in the system. I indicated in my presentation that the number of cases is increasing, year in, year out. In a demand-led system in which the fees have not altered since 1996 and the number of cases is increasing, of course there will be an increase in the budget. The sad thing is that no one has bothered to calculate what that budget is or ought to be.

Mr Wells: We see the outcomes of this. Thankfully, under freedom of information, we now see some of the fees that some of your members are accumulating in a given year.

Ms C Dixon: Not in family cases.

Mr Wells: No; we are seeing the overall solicitors' fees. Some of them are extremely high. I will quote from one example without naming the lady. That QC got by last year on £892,000. That is an adequate remuneration for that lady's work. Could she not provide first-class representation for a savage cut down to, say, £760,000?

Mr M Robinson: As president of the Law Society, I will let the Bar answer that question for you. I am not answering that question for a member of the Bar.

Mr Wells: What about some of the solicitors then? What about one solicitor's firm that got over £2 million in legal aid?

Mr M Robinson: I accept that you see that figure. That figure is put to me all the time. You tell me what it was for.

Mr Wells: What I am saying is that Kevin Winters and Madden and Finucane are doing very well.

Mr M Robinson: Kevin Winters, and Madden and Finucane, employ significant numbers of staff and take on significant numbers of cases. You throw a number at me, but you do not tell me what it is. There is no drilling into what that figure is, how much work is done, how many hours are spent and how many files are produced. It is just a number. You do not tell me how many years the fee was incurred over. You have given me a figure, but some of those cases run for three, four, five, six or seven years and then, cumulatively, the fees land in a final year. I am not here to represent others. What I am saying is that you throw that figure out, but you are not telling me what it is for. It is a great headline.

Mr Wells: Yes, it is. I am saying that I have no doubt that folk work very hard but, if I were a QC, I would feel equally motivated to provide first-class representation for £750,000 a year, rather than £900,000, and if I were a solicitor's company I would be quite happy to provide fantastic representation for a lot less than £2 million.

Mr M Robinson: I will not answer for the QC, but I will answer for the solicitor. The QC and the Bar can come up and give you the answer on the fees that they charge. As a solicitor, I charge an hourly rate. That rate, in any particular case, is checked out at the end of the case and, if it is a legal aid case, the file goes over to the Taxing Office and the taxing master takes the file. He goes through that file and applies an hourly rate. He checks it against the work that I have done on my file and then, at the end of the day, that court-appointed and government-appointed officer decides what I am entitled to. I am not, however, here to tell you how the Bar calculates its fees — I will leave it to do that — but I am saying that I have, on my file, measurable statistics, which are checked by a court officer who calculates what I am entitled to according to criteria set by law, on an hourly rate set by law, and then pays me. I cannot tell you how Bar fees are worked out.

Mr Wells: Those fees are generous. Given the fact that we are in a recession and all the government agencies and Departments are expected to make cutbacks, why should members of the Bar Council be immune from that process? Why should you not take the same haircut that many other professionals have had to take in the present recession? The reality is that, even after implementing Mr Ford's so-called savage cuts, the figures that we got for the year after that showed that, in fact, the take-home pay for many of your members had actually increased. Either you are working extremely harder or the cuts are still not adequately reducing the cost.

Mr M Robinson: I am not sure what figures you are giving, because you keep referring to me as the Bar Council, and I am the president of the Law Society, which is the representative and regulatory body of the solicitors' branch of the profession —

Mr Wells: Your members as well.

Mr M Robinson: — so I am not sure what those statistics are.

Mr Alan Hunter (Law Society of Northern Ireland): If I may, I will make a couple of points to supplement what the president has already said. There is a huge distinction in terms of the practice of solicitors. What you are seeing published is the income from the legal aid fund for a firm, so you do not know how many solicitors are, in fact, involved or how many people that is covering. More particularly, we have consistently asked for more detailed figures on a yearly basis for the number of people being helped: in other words, what is that money actually buying? We see those figures being published year on year, but they are not actually showing value for money because they are not actually showing what has been purchased. I am concerned that there appears to be a misapprehension about solicitors' firms. It seems that, because the firm is mentioned and the income is given against the firm, that is regarded as an income against one person's work, but it is not. That is the entirety of the firm. There could be any number of solicitors, any number of clients and any number of cases, as the president said, over any number of years. I just want to add that to the discussion of that particular issue.

Mr Wells: That is helpful. I took part in a family division case quite recently. For some unknown reason, three counsel were involved in that case. I frequently had to go into chambers with my constituent and receive a briefing on it. I would love to know what the junior counsel's role is — the second tier of representation. I watch those cases all the time, and I just do not see what the junior counsel is actually doing, but I do know that, if it is under legal aid, a very big bill is coming to the taxpayer for that person's work. However, you are saying that there should not be some control over the appointment; that it is all counsel.

Mr M Robinson: Again, I say that, as president of the Law Society of Northern Ireland and the representative body of the solicitors' branch of the profession, I think that you should perhaps be asking that question of someone else. What we are saying this afternoon about these cases is that there should be — it is important to understand what I am saying — a level of representation that is appropriate to the case.

Mr Wells: But it is you who applies for the extra counsel. It is you, the solicitor, who asks for it.

Mr M Robinson: If it is considered appropriate to make the make the application, an application will be made. That application —

Mr Wells: Right, you do that —

Mr M Robinson: Give me one moment.

Mr Wells: OK.

Mr M Robinson: That application is measured against statutory criteria. The judge hearing the case applies those criteria. He decides whether it is appropriate. We do not decide that. If he decides that there is no merit in the application, he will not grant the certificate. Criteria are established for that. We are saying today that it is quite correct — you are quite right to question these things — that there should be appropriate representation in appropriate cases. We need to look at the definition of that very carefully. We take issue with the definition that is coming down, but we are saying that, yes, there should be appropriate representation in appropriate cases. We are saying that, when you define what that appropriate representation is, you should not just say that this will happen in x court. There should be clearly established and understood criteria for application by the judge. However, those are judge-appointed counsel, they are not appointed by —

Mr O'Brien: I think we need to clarify the position. What the president is referring to is that the level of counsel is granted by the judiciary in criminal cases but, in respect of civil cases, it is a matter of looking at what is currently provided for by statute. There is an inherent grant under legal aid legislation in respect of civil cases at a certain tier where you will get one junior counsel, and the recommendation is that that should go. However, applications on the civil side, which is what we are talking about today, are made to the Legal Services Commission. It is the commission that decides, on the basis of the application that the solicitor makes, whether it is appropriate that junior counsel or a senior counsel should be granted, subject to the fact that there are certain provisions where there is an inherent grant under the 1965 legislation whereby you will automatically get a junior counsel.

Mr Wells: Yes, but I do not understand why you would be pushing to have dual counsel. I do not know what the second person does. Will someone tell me? I sit in court all the time watching proceedings and I do not see an awful lot of activity from the second person in the chamber. What are they doing and why are they appointed? That is leading to costs of £4·8 million a year. Why are we going down that route at all?

Ms C Dixon: You are dealing with a case with perhaps 20 lever-arch files of discoverable material. My area of court work is all to do with children, so there are contact notes, reports and all sorts of materials about what social services interaction with the family was over a period. Somebody needs to trawl through all those and pick out the bits that you need that focus on points you want to use to assist your client to continue to parent their child, or elements that might be able to demonstrate work that can be done with a person to help them better look after their child and prevent things from happening so that, hopefully, the child will be restored. All that work has to be done by somebody. That is what a junior counsel does; they go through all the discoverable material and draft documentation that relates to it. If a case gets really big, I would not have the time to do that. Junior counsel would do that while senior counsel is organising the overview of the case and getting the law sorted out.

Mr Wells: Well, I have been involved in quite a few of these cases — not personally, I am glad to say, thank goodness — but I have seen some incredibly acrimonious cases that go on and on and where, basically, there is no love lost between the various parties. Under the present system, there is no incentive for either your members or Bar Council members to try to get conciliation and get that closed, because the fees continue.

Ms C Dixon: With the greatest respect, surely the problem is that those things should never be allowed to come to court in the first place. The system needs to be different. I deal with these people coming in with matrimonial and divorce cases all the time. The first thing that I say is, "Do not expect me to go out there and fight every corner about everything. I will tell you what is fair.Any objective person looking at your case will say that it is perfectly OK for you to see your kid on a Saturday at whatever time. If that does not suit because the father is working, think of another time". A lot of stuff is allowed to grow and grow and grow, and the current system lets people who can get legal aid fight their way endlessly.

Mr Wells: Ms Dixon, I am far from convinced that all in the legal profession take the same stance as you, because the present system encourages cases to run and run and run and not to move to reconciliation.

Ms C Dixon: That is what I am saying. In private law cases, it does, and we should not enable someone receiving legal aid to run a case for ever when someone who is a millionaire would not dream of doing it. That is the system, and it is for you as legislators to do something about that. We can work only the system that is there.

Mr Wells: Often, one of the reasons that fuels that is that one party is on legal aid and the other is not. The party who is at the throat of the other knows that they can basically starve them out by letting it run.

Ms C Dixon: Yes, the person on legal aid has a long pocket.

Mr Wells: The problem is that I see a lot of barristers and solicitors who are extremely happy with that because they are not desperately trying to get the case to reconciliation, and so it will run for years.

Ms C Dixon: All I can say is that that is not what I do and not what most experienced solicitors who do this sort of work do because we have lots of people who need really important matters sorted out. We want those things dealt with quickly. We live in the community, and we meet the people in the supermarket. We do not want to have cases running and running. We want things sorted properly for people in the community. That is the benefit of being a solicitor. You meet all your people, and you cannot hide from them.

Mr Wells: Finally, even taking the worst-case scenario that you suggest, and even taking out these savings, your members will still get a very sizeable income to carry on the work that you are doing in family division. You may have to do it for 20% less, but it will still be a very attractive income in the present recession. Therefore, why can you not simply accept that you will deliver the same service but for less?

Ms C Dixon: I thought that this was not about fees at all. We are here to talk about levels of representation. If you want to have this fight, we can have it some other day.

Mr Wells: Yes, but that leads to the increase in the costs, which are becoming rampant. The costs are trebling.

Mr Hunter: With respect, we are here to talk about the protection of children in the justice system in this jurisdiction and the representation that those children need to achieve the best solution and outcome for them and their family, which is the duty of law imposed under the UN convention and in the Children Order. That is what we are here today to talk about. Our principal concern is that, in the consultation document promoted and promulgated by the Department, we see in the conclusion, as a member referred to, that this is clearly a cost-cutting exercise. That is the objective. That may be a laudable and suitable objective. That is for other people to determine. However, entirely missing is the kind of information that I have already referred to, which seems to be missing in the system generally. We have heard much said today in front of the Committee about the need, which is entirely right and entirely appropriate, to operate on an evidence-based, policy-making platform. That is entirely missing from the document.

My question for the Department is this: where is the evidence of what the cost drivers are? It is quite clear to practitioners, and it is quite clear from the court statistics, that there is an increase in court business and an increased complexity in the issues coming before the court. We have been working with the previous witnesses on identifying new and different issues, perhaps behavioural or communicational. So we constantly learn from other experiences. New areas of law are being developed, and there are new areas of expertise that need to be taken into account. Where in the Department's proposals is there any analysis of what the cost drivers are and what the impact of cutting back on representation in this way will have on the individual child in this community and in this jurisdiction?

By way of example — I hope that I am right in saying this, and colleagues and you will keep me right if I am not —I think that there was a substantial change following the Baby P and other cases. Then, it was decided, as a matter of social policy, that there required to be more direct supervision and more direct intervention and that more cases required to be brought before the court for supervision and resolution. Inevitably, that will lead to an increase in the legal aid bill. Yet again, I sit before the Committee and call on the Department to consider this: when changes are identified throughout government on a joined-up approach, can there be some joined-up thinking on the legal aid bill when

these matters reach court? I do not and have not seen anything on what the cost drivers are, nor do I see anything about what the Department wants to do other than cut fees, cut fees, cut fees. Inevitably, there will be an implication for clients when they want to see their local solicitor and that solicitor is not there.

The Chairperson: The point being made by the Department was that, if you take out the barristers, the solicitors have the capacity to do this work. What I want to know from you is whether there is the combined capacity of all solicitors' practices across the Province to do the work. We will come back to the issue of fees at some future point, but, as far as the key point is concerned, can solicitors do the work currently being done by barristers?

Mr O'Brien: There is a range of capabilities within the profession. Earlier, Catherine said that the figures show that the vast majority of these cases — 92% — are dealt with at family proceedings court level, which is the lowest tier. I think that only 18%, according to the Department's figures, involve counsel at all.

A much smaller number — the 8% that are left — are dealt with in the higher tiers. At present, a number of solicitors undertake advocacy work in the family care centre. It would be a brave solicitor, at this time, who would undertake work in the High Court. That is partly because of the lack of opportunity that solicitors have had to do that work because the current legal aid arrangements make no provision to pay them for it. When Catherine has done work in the family care centre on her own, where she would be entitled to instruct a junior counsel, she gets no extra payment.

Inevitably, the answer to your question, Chair, ties in with the provision of a fee to remunerate solicitors for that work. In fact, the Department refers to that in its response and says that it is looking at the issue in broader consultations and discussion that are going on about the rights of audience, which I am sure will come before the Committee at some stage.

The Chairperson: Thank you.

Mr M Robinson: If I may interrupt you again, in some cases, you simply need two lawyers. It is like a heart surgeon looking into an open wound. You would not want him to be standing there on his own. In some cases that are extremely complex — factually, legally and in the volume of documentation — you just need to have more than one lawyer, be it a solicitor with another solicitor advocate, with the imminent changes in legislation, junior counsel, or whatever you call them. I want to make it absolutely clear that we are not saying that this is justifiable in all cases; we are saying that, sometimes, in appropriate cases, and with an appropriate definition of when that should apply, one lawyer does not suffice, so two are needed — in the same way as you need a heart surgeon and an anaesthetist, and someone else round the bed. We are not saying that you need a solicitor at all tiers.

As Peter, rightly, pointed out, a massive number of cases are dealt with by solicitors on their own. There is a very, very small percentage in which there are two lawyers, and an even smaller percentage with three. We are not saying that those are all right; we are saying that we need to look at it. We also need to have a definition of how to decide when there should be more than one lawyer absolutely right so that injustices do not take place. We are not arguing with the thesis; we are saying that we should clarify it. We accept that.

We also say that this is nitpicking and cherry-picking when a more holistic approach should be taken. You heard from one of our members today who said that it was not good enough simply to look for savings in lawyers' fees that have not increased since 1996. Other things in the system need to be looked at to protect these vulnerable people. It is always about the headlines. We are getting the headlines with you today, and I read them every Sunday morning in the newspapers. I am sure that Kevin Winters is absolutely fed up reading —

Mr Wells: Oh, dear.

Mr M Robinson: — about his lawyers, of whom he employs many, and he puts significant money into the community. I am sure that they are fed up looking at it because the reality is that significant and good work is being done, but no one takes a holistic approach. They look at the lawyers' fees, and that is where all the focus is.

It is about the level of representation. You are talking about 2% or 3% of these cases. That is what you are talking about today. We are saying that no holistic approach is taken to that, and that is the

nitpicking. Everybody jumps on the headline, but there are bigger issues in the system. Catherine, who is experienced in that system, is saying loudly and clearly that there is no holistic approach at all.

The Chairperson: We will resist going back to that. In fairness, it will probably not be a headline at 7.00 pm. Someone will trawl through Hansard, maybe tomorrow.

Mr A Maginness: I will have to go in about five minutes.

Mr Wells: I am sure that you have an interest to declare, Mr Maginness.

Mr A Maginness: School beckons.

Thank you very much for coming. You have clarified the representation position. However, this is putting the cart before the horse. This is a cost-saving exercise and has nothing to do with refining representation and so on.

It would be simple to repeal the Children Order, but what would be the social consequences of that? This is demand-led by what I would call the deterioration of human relationships. We have to address that, and you have to try to pick up the pieces and put them together.

We know that Magistrates' Court cases involve mostly solicitors and very few barristers, so there will not be a saving there. Is that agreed?

Ms C Dixon: I cannot see there being a big saving, that is for sure.

Mr A Maginness: It would not be a big saving. A number of junior barristers are involved in the County Court family care centre. Would there be a big saving in excluding senior counsel from there?

Mr O'Brien: We do not have the figures, but, on the basis of what —

Mr A Maginness: Ms Dixon may know from her experience.

Ms C Dixon: I have rarely seen senior counsel in the family care centre, but I am down in Craigavon, which is so far away from the rest of the world that maybe they do not make it down to us.

Mr A Maginness: Yes, but in achieving some saving by excluding senior counsel from the family care centre, would there be, in your estimation —

Ms C Dixon: I cannot see that it could be that large on the basis of any of the figures.

Mr A Maginness: So there would not be a significant saving.

Ms C Dixon: No matter what way you extrapolate the figures, which we do not have, it does not look as though there are very many, that is for sure.

Mr A Maginness: Yes, and then you would require at least a senior, if not a junior, counsel in the High Court in a number of cases.

Ms C Dixon: I employ only a junior counsel because I can work with him of her as a team, the two of us. Not all of my colleagues could. Also bear in mind the nature of the cases that I do. In a case with different parties, some require a different level of representation because of the nature of their case.

Mr A Maginness: I recall Ms Keegan, a QC who gave evidence to the Committee, saying, I think, that about 44% of cases in the High Court had senior counsel.

Ms C Dixon: Yes, it would be less than half the cases in the High Court, and the cases in the High Court are between only 4% and 5% of all child protection cases.

Mr A Maginness: So, if there was to be a reform, you would exclude senior counsel from roughly half of those High Court cases.

Ms C Dixon: The figure of 44% was provided by the Bar, and that is only 4% or 5% of total cases in the system. Those cases, by their very nature, are in the High Court because they are pretty serious. That is the whole point. The High Court is quite happy to push cases down again if it does not deem them serious enough.

Mr A Maginness: My last question is this: where are the savings from the reduction in representation?

Ms C Dixon: I do not know. Legal Services, or perhaps the Department, produced those figures by working out how many barristers —

Mr M Robinson: Only between 4% and 5% of all cases ever get near the High Court. Of those, 44% have senior counsel. So less than 2% of all cases will have senior counsel in the High Court. As Catherine said, those cases are in the High Court for some reason. We say that there should be appropriate representation in appropriate cases. You cannot possibly shed all senior counsel in the High Court. There is a reason why the cases are in that court. Even if you can shave off some of that, what is the real saving? That is for the Department to extrapolate, but that is the argument taking place about levels of representation. The significant majority of these cases are dealt with by our members, who are solicitors in the community, in the court of first tier. Something like 90%-odd of these cases are dealt with by one solicitor in the first tier.

Mr A Maginness: My final, final question is this: if you removed counsel from all children's cases in the High Court or the County Court — we will leave the Magistrates' Court out of it — would solicitors really be able to handle them?

Ms C Dixon: Not the High Court cases. I have to say that there is no way that even someone like me, who is quite passionate about the subject, could run a High Court care case on their own. Just the sheer volume of material and the volume of law to check makes it impossible. I also run a small business, so I have staff, and I have to see clients across the door. All those elements are simply not conducive to doing lots of legal research.

Mr M Robinson: What Catherine is saying is that, just as counsel in the High Court does not run a case on his own, Catherine would not run a case on her own in the High Court. The sheer complexity of the High Court means that no lawyer runs a case on his own. Having been a practising barrister, you know that.

We are saying that there should be appropriate representation in appropriate cases at appropriate levels of the court system, with that level of representation being determined by appropriate criteria. Simply stripping it out is too blunt an instrument; it is the wrong thing to do. You need to measure this and be more measured than just saying that it will not happen in a certain court tier. The complexity of the issues is such that there must be a more discretionary approach. We are saying that the consultation document is far too blunt. Apart from that, it just does not take into account the other holistic issues that we suggest it should.

Ms C Dixon: We have suggested all sorts of things along the way, such as various practitioners. However, all sorts of things in the system, such as like legal aid forms, are mad. You want to see the bureaucracy in legal aid. You have never seen bureaucracy until you start doing legal aid forms. It would do your head in. *[Laughter.]* On occasions, when there have been five children in a family, I have had to fill in three sets of forms for each of them. So I fill in one set, and my secretary has a go at filling in the others. Then, we check them all before some poor soul up in legal aid has to look at all 15. If there is one mistake in the forms, they come back to us. That sort of wastage is unbelievable.

The Chairperson: That is another debate.

Mr M Robinson: It is, but the benefit of getting legal aid, as Catherine would say, is significant for those children.

Ms C Dixon: Yes.

The Chairperson: Members, Mr Maginness and Mr Dickson need to leave now, so we will have only five members, and we must sign off a report on another item.

Mr McCartney: I will stay.

Mr Wells: We must be about to set a record — *[Interruption.]*

The Chairperson: The Law Society has to finish its evidence.

Mr A Maginness: I am sorry, Chair, but I really have to go.

Mr Wells: He is off to earn some money in the courts.

Mr McCartney: When Michael outlined the scenario of the heart surgeon and the anaesthetist, I said that the time to panic was when you see a QC leaning over both their shoulders. *[Laughter.]* That is when you really know that you are in trouble.

Mr M Robinson: Mr McCartney, as I said, the Bar has to answer for itself. You keep asking me about the Bar, and I cannot answer you.

Mr McCartney: In fairness, the presentations to date have been about the levels of representation. There is no doubt that fees have an impact, and there is no point in saying that they do not. I think that, a couple of times in your opening remarks, you used the phrase, "the appropriate level of representation", and that is what we have to drill down to get. When the officials were here, they were asked whether, if there were no issues with financing these cases, they would still propose flexibility in the change of representation. They said yes, and you might say that they would say that anyway. However, it is about trying to find that out.

We discussed this when representatives of the Bar were here. It can be the headline, and we know that people deal in headlines. Similarly, when people write letters to the papers, they talk about "all politicians". It is not the case that every politician says or does the same thing. However, there is this idea of over-representation. The scenario painted by the officials is one in which everyone, down to the granny, is represented. That is not to say that grandmothers do not need to be represented in certain circumstances, but the impression given is that every case that goes to court has a glut of legal representatives and that you could nearly make up someone who needs to be represented just to get someone in the room. First, how do you dispel that, and, secondly, how you say that you are absolutely sure that there is an —

Ms C Dixon: I am very confident that that is not the case, because the only people who can be represented in court under the Children Order are those with parental responsibility, so that has to be mum and dad. They do not have to be married, but they do have to be mum and dad. If granny wants to be represented, she has to make a leave application to the judge. I have been in court when a granny has been told, "Not today, love. We'll look at it in a while and decide whether you are relevant. The fact that you care about your grandchildren is good — we want to know that — but we are not necessarily making you a party just because you want to come in." I have seen grannies sent away, and they have come back a number of times. Their legal team is not being paid to come and make those leave applications. They are coming along, trying to get her in as a party and being turned away. In other instances, I have heard judges direct that the grandparents be brought in because they want them to understand that they are in the frame because they possibly committed a non-accidental injury to the child, so they want them there to hear what is said. So the judges control the number of parties.

In my experience, a multiplicity of parties is not the case. I would be very interested if the Department or the Legal Services Commission could produce that evidence, because I do not think that you will find that they are talking about a lot of cases at all.

Mr McCartney: In another scenario that officials talked about, we were given the impression — this might be wrong, but I will tell it as I saw it — that there may be a situation in which it is appropriate for a senior counsel to come in, but it might be for a day on a particular point of law or a level of competence. I do not want to be unfair, but they gave the impression that, once in through the door, senior counsel were there until the end. They argued that, if a QC was required, it should be only for the period for which they are required. To me, that is a good definition of "appropriate level". If you need a QC for two days, once they are finished, they should leave. They were suggesting that, if you say that you need a QC and you get one, they will be there until the case ends.

Ms C Dixon: The problem is that the structure dictates that there is no option to bring them in to do one piece of work; they are in or they are not. If you were a private client and you came to me about something, I might say, " That is a really difficult bit of law, let's get an opinion", and we could go and get it. The legal aid system does not seem to be able to create the structure whereby we can say, "We just need this wee bit of help", or, "There is a new Supreme Court decision and we think that it impacts, so let's get an opinion on that. We do not need to bring somebody in for the duration of the case." There is not that flexibility in the system. The system does not allow us to do that.

Mr O'Brien: In fact, in our response, Mr McCartney, we said that the Department may wish to consider whether there should be an option for application for the use of senior counsel for various purposes. Even short of conducting the hearing of the case, which is before the scenario that you mentioned, it could be to obtain an opinion, facilitate consultation or bring heads together. As Catherine says, and without apologising for the Legal Services Commission, the existing legislation does not allow them to engineer the grant submission; it is to facilitate that. We have already recommended to them that they might want to think about.

Mr McCartney: In fairness to the official, I should quote what he said:

> *"The flexibility that we propose allows for representation to come in at a later stage or to be increased, or, indeed, for a barrister to come in for a particular piece of the proceedings and for a limited legal aid certificate to be given for that".*

You do not see that undermining your ability to present the case.

Mr M Robinson: No. It is the appropriate level and appropriate work at appropriate stages.

Mr Lynch: Michael, you quoted a figure of 40%, if I heard you correctly.

Mr M Robinson: Yes.

Mr Lynch: What were the causes of such a significant rise?

Mr M Robinson: Are you talking about the overall increase generally?

Mr Lynch: Yes.

Mr M Robinson: As an organisation, we are seeing a continuing increase in these cases. I have to say that, regrettably, in answer to your colleague's earlier question, that rise will filter through the system somewhere else. We are not sure that the legal aid budget has asked us what we see coming through the system. We could be sitting here in a year's time with another X thousand cases that have worked their way through the system when, suddenly, someone will turn round and ask where they came from.

We are telling you that any reasonable assessment of what is in the system should be able to extrapolate the future potential risk and cost. As good businessmen in the community, we do that good governance in our office daily. We make an assessment for insurance companies and other clients. It is not being done for legal aid, and you are asking whether there will be an increase in the number of these cases in the system. Catherine sees that increase.

You will be sitting here next year with statistics showing a sudden increase in legal aid when there has been none. Rather, it will be because of these cases that are working through the system. Our great concern is that such a holistic view of where we are is not being taken. A budget is set, and, suddenly, these cases are coming in, and no one is even thinking about what is in the system.

Ms C Dixon: The Health Department would be able to tell you. I used to sit on the Lord Chancellor's advisory committee, and we get statistics that show what cases are coming into the system. The Department of Health, Social Services and Public Safety also sits on that committee and is able to say, through social workers, what child protection cases are coming through. All the information is there, but no one is putting it together and asking what should be done. The issue is just getting bigger and bigger.

Mr O'Brien: I go back to the point that Mr Hunter made earlier, which was that there are changes in policy at times. There were huge changes after the Baby P case, and we had the McElhill case in Northern Ireland. Social work teams may have looked at something in a certain way. Then, because of something dramatic happening, all their procedures have to be reviewed. That clearly has knock-on effects, and it will lead to trusts, for example, changing their policies, starting proceedings and, possibly, putting more children into care.

Mr Lynch: Would the increase in sexual abuse cases give rise to that?

Ms C Dixon: In child protection, neglect is probably the biggest area, whether or not it is intentional. Abuses of various kinds, including physical abuse — I suppose that you could regard neglect as a form of abuse — and sex abuse is a factor, but sex abuse cases are rarer and generally end up in the High Court.

Mr Lynch: What is your view of the fact that the commission will have discretion to determine what are exceptional cases?

Ms C Dixon: That is what we would like to know. I would love to know what the word "norm" means. The Department's post-consultation report states that a case has to be beyond the norm. What is the norm? Even the Access to Justice review and all the reports ever produced on the issue state that these cases are peculiar unto themselves.

We all know that what goes on when you shut your front door is peculiar to your house. Even as a child visiting other people's houses, you knew that their houses were different from yours. So you cannot really sandwich it as tightly as that. I understand that we have to have boundaries, but they have to be flexible enough to enable us as solicitors assessing a case to determine whether we need help.

There is a whole area — we will not go into it now — about experts, their cost and whether the courts, under legal aid, or the health authorities should fund them. Is there a different way in which we could go about this? Could the experts be introduced in a global way so that, if we could narrow the issues down, we would not have separate experts or a multiplicity of experts? There are many areas in which money could be saved, and experts are a big cost in the family system.

The Chairperson: Members have no further quesitons, so thank you very much.

Mr M Robinson: Chairman, thank you very much for the opportunity to come here and talk to you.

The Chairperson: I thought that, at this stage of the proceedings, some members might have been more relaxed and not as clued-in.

Mr M Robinson: It is an investigatory Committee, and we are delighted to come and talk to you at any time. It is very important. These issues are significant in the community, and, as an organisation, we are delighted to engage on them.

The Chairperson: We appreciate your making yourselves available. Thank you.