



The Chairman
Alistair MacDonald QC

Shailesh Vara MP
Parliamentary Under Secretary of State
Ministry of Justice
102 Petty France
London SW1H 9AJ

16 July 2015

Dear Shailesh,

Family Advocacy

We write to bring to your attention a growing concern amongst members of the FLBA, including those who sit as recorders, and of a number of solicitor advocates. The concern is that the standard of advocacy services being provided in many publicly funded family cases is not in accordance with the requirements of Legal Aid Authority contracts¹ and the manner in which advocacy services are being provided is contrary to the regulatory objectives in the Legal Services Act 2007.²

As you know, Sir Bill Jeffrey was commissioned by the Ministry of Justice to undertake a review of the provision of independent criminal advocacy services. The findings and recommendations of Sir Bill's independent review were published in May 2104. There are parallels between the experiences of the Criminal Bar and the Family Bar, in particular the marked increase in the number of solicitors conducting advocacy and the disparity in mandatory training requirements between barristers and solicitor advocates.

¹ The LAA Standard Contract Terms 2013 require that contractors must act in the best interests of their clients and be uninfluenced by any factors other than the clients' best interests (7.2), must perform contract work with reasonable skill, care and diligence (10.1) and ensure that personnel performing contract work are allocated work according to the role they are required to fulfil and on the basis of their skills, competence and capacity (11.3).

² Section 1. See in particular Section 1(1) (d) (protecting and promoting the interests of consumers) and (1) (e) (promoting competition in the provision of legal services).

The position in the Family Court is undoubtedly worse than in the Criminal Court. Solicitors require no advocacy training in order to appear either in the County Court, where the vast majority of children cases are conducted at circuit judge level or below, or in the High Court. It is undeniable that the training undertaken by solicitors is limited compared to the extensive training undertaken by the Bar. However, until the recent funding cuts, this only had an occasional impact on the conduct of proceedings, as solicitors conventionally instructed counsel on all matters of complexity.

Since 2010, when the Family Advocacy Scheme came into being, any lawyer who conducts a hearing under a public funding certificate will be paid according to the rules of the scheme, irrespective of differentials in advocacy training, skills or experience.

There are many able and experienced solicitors representing parties in family cases. A small minority have conducted all hearings, including contested hearings, for some time. But most of them used to instruct counsel for case management hearings in evidentially difficult cases and for hearings which involve the calling of witnesses and making submissions. But since the 10% cut in representation fees was imposed in 2012, followed by the significant reduction in legally aided work brought about by LASPO, more and more solicitors have found it difficult to make a living from publicly funded work. This has led to the current position, where many more solicitors than previously had been the case are conducting hearings themselves, or using other members of their firms, so that the FAS payment can be claimed.

It is manifestly in the public interest that those in need of family legal advocacy services are entitled to the best available advocate. In far too many family cases, this is simply not happening. Such are the current arrangements that only solicitors have contracts with the LAA. Their professional code requires them to ensure that clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them. We believe that many clients are not being given that informed choice. The Bar is highly trained over a lengthy period. Sir Bill Jeffrey described the particular strengths of the English and Welsh Criminal Bar as "*A substantial national asset, which could not easily be replicated*".³ The Family Bar is no less a substantial national asset and steps need to be taken to preserve it for the benefit of the public. Already the most able and experienced advocates are moving away from publicly funded work.

Serious damage to the public interest has been caused by this situation. The standard of representation being provided in many cases is so poor that unjust outcomes have occurred. In some cases solicitors who previously would not have contemplated conducting advocacy at a contested hearing are now making appearances at such hearings even though they do not have the skills to do so. Recently qualified and employed solicitors are being required by their firms to conduct hearings even though they do not have the necessary skill or experience to carry out advocacy services effectively or efficiently. Evidence gathered from our membership

³ Independent Criminal Advocacy in England and Wales, p 10.

reveals that questions that are necessary for the proper conduct of the client's case are not being put, either adequately or at all. In addition, points of law, which ought to be raised on behalf of clients so that their cases are properly presented, are not being raised. It is, of course, the duty of the advocate to ensure that the judge is fully apprised of the law in order that his or her decision is made in accordance with the latest statutory and case law. This failure is of particular significance since, in addition to the risk of injustice, it creates a serious risk of the need for an appeal. This is highly damaging, not only to those affected by the outcome of the case, namely the parties and their children but also to the standing of the courts in the eyes of the public, and, of course, to the public purse. Finally, it prolongs proceedings when the overriding objective is that cases should be heard as quickly and expediently as possible. Whilst other advocates and judges do their best to make good the deficits, they cannot, and do not, protect all parties from the results of poor advocacy.

Of those solicitors who continue to instruct counsel for contested hearings a significant number are retaining cases for all earlier hearings and advocates' meetings before instructing counsel at the eleventh hour. A common complaint from counsel instructed in this manner is that there has been inadequate analysis of the evidence and thereby inadequate preparation. Applications for an adjournment are unlikely to be granted, particularly after April 2014, and injustice results. Where applications for adjournments are granted, delay and additional expense result.

We propose that the Ministry of Justice should commission a review of advocacy in publicly funded family cases similar to that conducted by Sir Bill Jeffrey. It is our view that the risk of injustice is now so great that an independent review is absolutely necessary in the public interest in this area of law, which has such an impact on the welfare of vulnerable children and is so vital to the maintenance of stable family relationships.

We would very much welcome the opportunity of meeting you in order to discuss these issues further.

Yours sincerely,



Alistair MacDonald QC
Chairman of the Bar



Susan Jacklin QC
Chair
Family Law Bar Association