

Ernst & Young's market study on family advocacy: a review by Oxera

Prepared for the Family Law Bar Association

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1 Introduction

1.1 The Legal Services Commission (LSC) is in the process of changing the system of funding for family legal aid advocacy services. In December 2008, it launched a 14-week consultation on proposals for two new funding models: the Private Family Law Representation Scheme, which excludes advocacy, and the Family Advocacy Scheme (FAS).¹ The FAS is expected to reduce average income for barristers undertaking publicly funded family advocacy work, increase income for solicitor advocates (with the objective of equalising the rates), and change the structure of payments.² The LSC commissioned Ernst & Young (E&Y) to review the market as an input to its decision on the funding model to be adopted.

1.2 In its draft impact assessment, the LSC highlights the main findings of the E&Y report as follows:

Barristers in general tend to travel further than solicitors;

Currently self-employed barristers are used in just over one third of cases;

At a 20% reduction in hourly rates for barristers and a 20% increase in hourly rates for solicitors the research indicates that after implementation of the scheme, there will be excess supply of family legal aid advocacy across England and Wales; and

Total excess supply accounts for approximately 4% of total demand in England and Wales.³

1.3 Oxera has reviewed the E&Y report, 'A Market Analysis of Family Advocacy', dated June 29th 2009, and identified a number of concerns with the analysis undertaken and the

¹ LSC (2008), 'Family Legal Aid Funding from 2010: A Consultation, Representation, Advocacy and Experts' Fees', December.

² LSC (2008), 'Family Legal Aid Funding from 2010: A Consultation—Fee Calculations and Impacts', December.

³ LSC (2009), 'Final Impact Assessment of Family Legal Aid Funding from 2010 – Response to Consultation', Draft, July.

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associated findings in the report.⁴ These concerns, as well as their potential implications, are summarised in this note. In particular:

- as stated by the House of Commons Justice Committee, the LSC has noted that the E&Y conclusion regarding supply changes is a very important input for the policy decision:

the [Legal Services] Commission did concede that an assessment of the impact on suppliers of its proposals—part of the Ernst and Young study—was very important, as a substantial drop in supply would cause a ‘significant problem’, and that the study was ‘fundamental’ to the decision on whether the new fee scheme went ahead. We agree.⁵
 - therefore a fundamentally important conclusion of the E&Y study is that the proposed change to funding of legal aid advocacy services would lead to excess supply of 4% in the market, driven by the supply response of solicitors. However, in reaching this conclusion, it appears that E&Y has mistakenly applied the supply response for solicitors to the total (estimated) number of hours worked by solicitors for family legal aid, rather than only the amount of time spent on advocacy. The hours supplied for family legal aid identified in Tables 71 and 80 of the report are 1.3m for barristers and 5.7m for solicitors (7m hours in total, with solicitors supplying around 80%). Although there does not seem to be definitive information on the current split on the supply of advocacy services by solicitors, this split on advocacy services does not seem to be consistent with other LSC data.⁶ This indicates that the supply responses may have been mistakenly applied to the entire time spent by solicitors on family legal aid, which includes all other work in addition to advocacy. While there appears to be no direct data on the time spent by solicitors on family law advocacy, the LSC has estimated that this may be only around 20% to 30% of time. Therefore there is a real danger that E&Y is not distinguishing between the supply of advocacy services and the supply of litigation services;
 - if this is the case, this surprising and fundamental error would suggest that the likely response of solicitors to a change in advocacy rates of pay identified in the E&Y report is a large overestimate. Rather than applying to 5.7m hours, the supply response would apply to only 20–30% of this. Once corrected, the outcome of the overall level of supply increase following the introduction of the FAS would be highly uncertain, and even small errors in some of the underlying assumptions would lead to the opposite conclusion, namely that the proposed changes may lead to excess demand, rather than excess supply, in the market;
 - there is a significant lack of reliable and detailed data available in relation to the market for family legal aid services. The E&Y report identifies this as an important issue and provides caveats to the results. However, given the extent of the data problems, and the consequent far-reaching and subjective assumptions which are required to be made throughout the analysis, the report does not provide a robust basis on which to test the likely implications of the proposed changes to the family legal aid funding model.
- 1.4 Important aspects of the market and the proposed changes to the funding of family legal aid have *not been addressed* by the E&Y study, including the impact of the proposals on quality of representation, how the supply of advocacy services might change in the longer term, and how the proposed change in the structure may distort the selection of cases. These important omissions suggest that the report cannot be assumed by the LSC to provide a

⁴ Ernst & Young (2009), ‘A market analysis of family advocacy’, June 29th.

⁵ House of Commons Justice Committee (2009), *op. cit.*, para. 28.

⁶ Sara Kovach-Clark of the LSC, in an email to Martin Chalkley and others dated March 31st 2009, says: ‘From the cases closed in 07/08, which are what we have used to model the fees, our total budget is £[redacted]M, broken down as £[redacted]M (43%) for solicitors and £[redacted]M (57%) for Counsel.’ This suggests that it is impossible that solicitors could be supplying 80% of total publicly funded family advocacy hours.

robust and thorough assessment of the likely effects of the proposed changes to funding family legal aid advocacy services.

- 1.5 The House of Commons Justice Committee, in its report on Family Legal Aid Reform, has identified similar concerns with the evidence base for policy change:

What clearly is significant is that the existence of flaws in the evidence base has damaged the confidence of practitioners in the process that the Legal Services Commission is conducting. At the same time, the LSC has commissioned—extremely late in the process—fundamental economic research into its supplier base where hitherto it was relying on anecdote.⁷

- 1.6 The concerns outlined in paragraph 1.3 are addressed in more detail in the remainder of this note. Many of the concerns are highly significant on their own; in total they raise fundamental questions about the findings of the E&Y report. In particular, the finding that the funding proposals will lead to excess supply in the market is based on poor data, far-reaching assumptions, likely calculation errors, and a highly incomplete examination of the effects of the proposed funding model.
- 1.7 Until such concerns have been addressed, the E&Y report does not form a reliable basis on which to assess the effects of the proposed changes to the legal aid market.

2 Absence of data or evidence on which to base findings

- 2.1 A general concern with the study is the limited availability of data on which to base any findings regarding the market. E&Y acknowledges this on a number of occasions in the report, and in many instances has been forced to make assumptions to continue with the analysis, including the following.
- An implicit assumption has been made that the price response applies to the entire current output of solicitors, even though the price rise would apply to advocacy work only (E&Y, 2009, p. 67).
 - The average number of family advocates per office of solicitors outside of London is 2.3 and 4 in London (p. 66).
 - The hourly rates earned by solicitors across all types of law are 75% of the rates earned by barristers (p. 67).
 - Barristers cannot receive revenues from other geographic regions and from other areas of law (p. 62).
 - It is assumed that a limited survey undertaken a number of years ago on the supply by solicitors of legal aid may be read across to barristers working in family law, implying that a 20% decrease in the effective hourly rate earned by barristers for family legal aid advocacy services will result in a 6.8% decrease in the volume of services supplied (p. 64).
- 2.2 While a certain number of assumptions invariably need to be made when modelling a given market, the basis of assumptions made in the report is often questionable, or at least highly uncertain. Examples of particular areas of concern in this regard include the following.

⁷ House of Commons Justice Committee (2009) 'Family Legal Aid Reform: Eighth Report of Session 2008-09', July 15th, para. 32.

- The assumption that total profit costs currently billed by solicitors for family legal aid services relate entirely to the provision of advocacy services (E&Y, 2009, p. 67).⁸
 - As noted above, this is of particular concern because it underlies E&Y's estimation of the current supply of advocacy by solicitors, and directly affects the calculation of how much additional supply of advocacy solicitors would be able to provide in response to a given change in hourly rates.
 - In reality, total profit costs are likely to remunerate a mix of services, including representation, travelling, casework and client communication. Indeed, the LSC has estimated the proportion of total profit costs billed by solicitors that is from advocacy provision to be between 20% and 30%.⁹ Allocating (whether implicitly or otherwise) 100% of profit costs for the provision of advocacy services indicates that solicitors currently provide around 80% of family advocacy services, 5.7m hours a year (compared with the estimate for barristers of 1.3m) (E&Y, 2009, Tables 80 and 71).
 - To the extent that E&Y has overestimated the supply of family advocacy by solicitors, the implications are material, in that the impact of the supply response by solicitor advocates will have been significantly overstated.
- The assumption that the average number of family advocates per office of solicitors outside London is 2.3 and 4 in London (E&Y, 2009, Tables 80 and 71); this is based on several different estimates, but only one source distinguishes between advocates and general solicitors—the latter may not have suitable qualifications or expertise to handle family advocacy. The potential implication of overestimating the number of family advocates per firm is substantial since this creates a risk that, within certain regions, a local advocate with relevant experience might not have the spare capacity to take on a particular case.
- The assumption that a 20% decrease in the effective hourly rate for family legal aid advocacy services for barristers will result in a 6.8% decrease in the volume of services supplied; this is based on analysis presented in a 2003 study by Frontier Economics, which estimates the price elasticity of supply by firms of solicitors across all legal aid work.¹⁰ Extrapolating this result—to predict the response by barristers (who have a different business model to solicitors' firms) and to predict the response to a price change as substantial as 20%—introduces considerable uncertainty. Should barristers respond more sharply than expected, the supply of advocacy might be insufficient to meet demand. The sensitivity analysis indicates that the risk of excess demand is restricted to London, but this is based on E&Y's implicit assumption that total profit costs billed by solicitors relate entirely to the provision of family advocacy. The implication would be that solicitors currently supply more than 80% of legal aid family advocacy, which conflicts with the available evidence.

2.3 While many economic studies are undertaken where data is imperfect, the extent of the data problems within E&Y's analysis raises fundamental questions as to whether any reliance may be placed on the findings. The sensitivity analysis shows that the opposite conclusion to that drawn in the study may be reached if even some individual (let alone several) assumptions made in the analysis do not actually hold. The sensitivity analysis also omits to test some key underlying assumptions; for example, E&Y does not test the assumption that total profit costs billed by solicitors relate to the provision of advocacy services.

⁸ We understand that 'profit costs' relate to the value of hours billed. These hours are charged at different rates depending on the nature of the service being provided.

⁹ Within spreadsheet, 'Proportions of Profit Costs estimated as advocacy from Claim1 File Review', provided to E&Y by LSC.

¹⁰ Frontier Economics (2003), 'A market analysis of legal aided services provided by solicitors', report for the Department for Constitutional Affairs and the Legal Services Commission, December.

- 2.4 While E&Y does set out some caveats on how the results should be interpreted, it does not adequately acknowledge the fundamental data problems faced in the study, and their implications for how the results should be treated.

3 Quality of representation

- 3.1 One important omission from the E&Y report is any investigation into quality of service provided, and how this may change after implementation of the FAS.
- 3.2 The current system, whereby solicitors refer advocacy to barristers, encourages barristers to compete for referrals from solicitors on the basis of reputation. However, the FAS is expected to encourage solicitors to retain more advocacy in-house. This creates a risk that after implementation of the FAS:
- the typical pool of expertise to which solicitors will have access is likely to fall; and
 - the impact of reputational considerations as a driver of selection will also be reduced.
- 3.3 The consequence of these effects would be a risk to the longer-term quality of representation of clients requiring legal aid advocacy services, most of whom will be in no position to assess the quality of service provided.
- 3.4 The E&Y report considers that, in response to the implementation of the FAS, barristers will reduce the volume of legal aid family advocacy supplied by almost 7%, but that the increase in the supply of advocacy by solicitors more than compensates this. Nationally, E&Y estimates that the FAS will lead to an excess supply of legal aid family advocacy services of 4% (E&Y, 2009, Table 93, p. 71).
- 3.5 Notwithstanding that this conclusion on quantity may be based on the misrepresentation of the amount of advocacy work that solicitors currently undertake, there is no analysis of whether such a change has an impact on how advocates' specialist skills are matched to the requirements of clients. There is an implicit assumption that access to the appropriate quantity of general advocacy is sufficient. In reality, the shift from a model of accessing a pool of self-employed advocates (generally barristers) to accessing the (much smaller) pool of advocates (possibly a pool of one) employed in the firm of solicitors could have a significant impact on the quality of representation, even if there were no difference in the level of quality of individual advocates between the self-employed model and the employed model.
- 3.6 It is interesting to contrast the results of the E&Y analysis with the Price and Laybourne (2009) report. From a survey of barristers, the report identifies that in response to a 13–14% cut in legal aid fees, depending on the type of advocacy, between 6% and 20% of barristers currently providing legal aid services will stop doing so entirely.¹¹ Moreover, those 'intending to stop or greatly reduce their legal aid work are disproportionately senior practitioners.'¹² This suggests that there may be a loss of expertise after implementation of the FAS.
- 3.7 The conclusion drawn by E&Y that barristers 'can easily replace each other' does not alleviate these concerns (E&Y, 2009, p. 23). This conclusion is based on the observation that firms of solicitors often refer different cases to different barristers. However, this observation is more logically consistent with the opposite conclusion—namely that barristers do not easily replace one another in relation to specific cases as their differing areas of expertise mean that individual family law barristers are not necessarily good substitutes for specific cases.

¹¹ Calculated from Price, D. and Laybourne, A. (2009), 'The work of the family bar: report of the week-at-a-glance survey 2008', King's College London, King's Institute for the Study of Public Policy, on behalf of the FLBA, Table 27, p. 38.

¹² Price, D. and Laybourne, A. (2009), *Ibid.*, p. 37.

- 3.8 The lack of emphasis on the issues concerning the quality of service is all the more important given the inherent characteristics of the family legal aid advocacy services market. The quality of representation can have an important impact on the outcome of cases and, by extension, on the lives of those involved in such cases. Currently there are no quality assurance schemes in place for advocacy, and the ability of most people, especially vulnerable people who may have the highest propensity to rely on family legal aid services, to judge the outcome of the quality of representation may be limited. Thus, the LSC has an important role in ensuring that any changes to the remuneration regime do not impair the quality of service provided.
- 3.9 In a recent speech, the President of the Family Division, Sir Mark Potter, confirmed that the family judiciary has grave concerns about the proposed FAS, including the extent to which it may reduce the quality of representation:
- i) Individual solicitors and solicitors firms of quality and experience are already abandoning publicly funded family work, and the rate of this process will increase if the proposals are carried into effect;
 - ii) Many members of the Bar have already either cut down on or abandoned publicly funded work in favour of privately paying work, and this too is likely to increase;
 - iii) Members of the Bar who can command privately paying work tend to be the more experienced, and their loss to this area of work will reduce a valuable pool of expertise.
 - iv) The less experienced and competent the representative, whether barrister or solicitor, the less efficiently is the case managed.
 - v) Lack of representation will lead to more and more litigants appearing in person with the effects I have described.
 - vi) Loss of experienced and committed advocates will undermine the Public Law Outline, which as I have emphasised is dependent on the cooperation and expertise of the dedicated specialist lawyers who will operate it.¹³
- 3.10 In summary, the fact that the E&Y report did not address the issue of quality of service in any detail would have a material impact on the reliability of the findings as a basis for understanding the likely implications of the proposed changes to the funding of family legal aid advocacy services.

4 Failure to consider the constraints faced by solicitors' firms in increasing legal aid advocacy

- 4.1 The study assumes that solicitor firms will be able to respond to an increased financial incentive to provide legal aid advocacy services. However, it does not recognise that solicitors choose to refer advocacy work for a range of reasons relating to the operational efficiency and logistics of running legal aid cases. In particular:
- due to the low margins of legal aid work, solicitors have to run large volumes of cases in order to generate adequate returns;
 - given the lack of flexibility in hearing dates, as well as competing pressures on time, it is not always possible for the solicitor running a case to commit to undertaking the advocacy themselves;
 - there is often a case for having an independent advocate in order to help reduce tension between counterparties;

¹³ Sir Mark Potter, President of the Family Division, 'Family justice at the crossroads', the Herschman Levy Memorial Lecture, The Association of Lawyers for Children, July 2nd 2009.

- given the amount of non-advocacy work required in attending to cases, and the number of cases required to maintain profitability, the need for referral to specialist advocates will remain.
- 4.2 The introduction of competitive tendering in 2010 is expected to result in further consolidation of firms of solicitors, thereby increasing the likelihood that any one firm is conflicted. The potential problem of conflicting interests was acknowledged in the Carter Review, with the proposal that:
- there should be at least four to six suppliers' working in each area to deal with potential conflicts of interest, although the exact number may be subject to local factors.¹⁴
- 4.3 While in-house advocates could, in theory, be hired to address some of the problems set out above, this approach would be problematic. First, many small solicitor firms would not be able to commit to the significant increase in fixed cost associated with employing experienced advocates (eg, barristers). Very large firms of solicitors may find this model workable, but consolidation to this scale may not be viable in less populated areas. Second, even if such consolidation were to occur, it would remove the advantage of the current approach, whereby solicitors have access to a wide range of barristers, based on required experience and expertise. The benefit of the referral process for maintaining quality is not recognised in the E&Y study. Third, by shifting more advocates in-house, the probability of any one advocate being conflicted is likely to increase, which could have a direct impact on access to justice.
- 4.4 In its base scenario, E&Y assumes that solicitors will increase their supply of legal aid advocacy services by almost 7% in response to the FAS. This is based on an estimate from Frontier Economics (2003) that the price elasticity of supply for the respondents to its survey, across all legal aid work, is -0.34 .¹⁵ There is significant uncertainty around this estimate and whether it is applicable in the context in question:¹⁶
- It relates to a relatively small sample (10%) of solicitors, and there is a risk of some selection bias in the survey since those firms that were more dependent on legal aid work were more likely to respond.
 - The analysis focused on short-term issues only, and cannot be assumed to reflect longer-term changes in the market
 - Frontier stated that the results *are valid only* for price changes of the order of 1–5%, which implies they are not valid for a change of 20%, as assumed in the E&Y report. According to Frontier:
- It should, however, be noted that these sensitivities are only valid for *small* relative price changes, in the order of 1% to 5%, the estimates would not be informative beyond this (p. 70).
- 4.5 It is also important to note that the rate of pay for legal aid advocacy is likely to remain well below that available for private work. In this case, the current levels of public work may be driven by factors other than the relative remuneration. This may reduce the extent to which a positive response by solicitors to the change in hourly rates can be relied upon to fill gaps arising from a decrease in supply by barristers.
- 4.6 The consequence of these concerns is that the conclusion reached by E&Y—that the number of hours of family legal aid advocacy supplied by firms of solicitors will increase by

¹⁴ Lord Carter (2006), 'Legal Aid: A market-based approach to reform', p. 72, para 18.

¹⁵ Frontier Economics (2003), op. cit., p. 61.

¹⁶ 303 firms responded to the survey (a response rate of 10%), but only 275 provided data on the proportion of fees attributable to public and private work. Frontier Economics (2003), op. cit., p. 128.

around 7%—may not be practical in reality, given the wider calls on solicitors' time and the logistical issues involved. It may require significant restructuring of the business models of solicitors' firms, which would take time to achieve, would not necessarily address supply in less populated areas, and would have disadvantages in terms of quality of service achieved.

5 Failure to recognise the ability of barristers to switch between public legal aid and private family law

- 5.1 A key assumption in the study is that barristers face a fixed volume of demand for private family law work:

As shown in table 75, a decrease in supplied hours of legal aid is not mitigated by an increase in supplied hours in other areas. This is due to the fact that we assumed that there is no effect of FAS on payment rates in areas other than family legal aid. Hence, there is no increase in the volumes of work and hours demanded (E&Y, 2009, p. 66).

- 5.2 Assuming that barristers face a fixed volume of demand for private family law work in turn implicitly assumes that the supply of legal aid work is not affected by barristers choosing to switch to more profitable private work. However, if legal aid pay rates were to be cut significantly for barristers, there may be a strong incentive to switch to private work. Switching to private work does not appear to have been incorporated into the modelling of the supply of advocacy services by barristers post-FAS implementation.
- 5.3 The extent of substitution between private and publicly funded work is an important factor to consider. We note here the results of the Price and Laybourne survey, which claimed that, in response to a reduction in fees of around 13%, between 24% and 45% of family law barristers would reduce greatly or stop providing such services entirely, and over 80% (disproportionately senior practitioners) would reduce the amount of legal aid work that they do to some extent.¹⁷

6 Focus on short-term effects

- 6.1 The study appears to place undue emphasis on short-run effects. This is reflected by the nature of the assumptions that E&Y implicitly makes on how advocates will respond, which include the following.
- As noted above, there would be no switching towards increased provision of private law family work or towards other areas of law.
 - There is no focus on how the structure of the solicitor market would need to change over time in order to sustain any increase in the supply of advocacy services, or to what extent this would be possible or economically viable.
- 6.2 The result is that the conclusion in the E&Y study—that the FAS would be unlikely to cause any concerns in relation to the continued supply of services—fails to address long-term changes which may affect the market. Based on this study, the LSC cannot assume that supply will remain at a sufficient level to handle the caseload. Indeed, there are many factors to suggest that the effects of the proposed changes in the longer term would be more significant than in the short term. For example, as noted above, the range of alternatives available to barristers would tend to increase with time as they identify business opportunities elsewhere, and there is a concern that the supply of new recruits to the industry may diminish in response to the falling fees.

¹⁷ Price, D. and Laybourne. A (2009), op. cit., p. 37 and Table 27, p. 38.

7 Concerns with the modelling approach

- 7.1 To examine how barristers might respond to a change in the average earnings per hour for legal aid advocacy, E&Y developed a set of econometric models. These seek to derive a relationship between the proportion of time spent on legal aid work and the hourly earnings for private and legal aid family law work. The intuition is that if barristers choose work on the basis of expected earnings, it would be anticipated that those with the largest premium in earnings for private work would spend more time on such work, and vice versa.
- 7.2 The modelling performed by E&Y does not find any statistically significant relationship between the proportion of time spent on legal aid work and the hourly rate available for either private or public work. E&Y concludes from this that: 'the insignificance of hourly rates could be interpreted as inelastic supply of family legal aid by barristers, assuming that there are no data issues which lead to this result.'
- 7.3 However, there are a number of important data issues which would be expected to affect the modelling results. These are summarised below.
- Use of 'week at a glance' data: the modelling is based on survey data from the Price and Laybourn 2009 study, which identifies for units of time billed in the 'representative week' the hours and earnings billed. From this, the proportion of time spent on public versus private law can be calculated, as well as average earnings for each. However, because the number of cases which would be expected to be billed in any given week for an individual barrister would typically be rather low, the weekly data is subject to a large variation around what they might do on average across a year. For example, if they happened to bill a large public case, including many hours from preceding weeks, the apparent share of time on public law cases would be very high. This could be very different to the overall time spent by that individual across the year. Similarly, there would be significant variation around the average rates earned, simply due to the random nature of earnings across different cases.
 - Another key issue is that the underlying relationship would be between the choice of type of work and *expected* earnings. The sample data instead calculates average *outturn* earnings for the billed cases. These might differ significantly from the initial expectations, for example, because some aspects are paid on a fixed basis, but might take more or less time depending on circumstances. This effect would introduce significant variation between any underlying relationship which the modelling is purporting to identify, and what might be observed in practice. For example, if a given barrister spent a lot of extra (unanticipated) hours on a public case in the week in question, this would increase the apparent proportion of time 'chosen' to be spent on public law cases, even while reducing the apparent hourly rates on offer in such cases. The impact of such a 'forecast error' would make the underlying relationship much more difficult to identify through the analysis of the 'week at a glance' data.
 - The fact that virtually none of the variables is significant raises further questions about the reliance that may be placed on the outcome of this analysis.
- 7.4 The implication of the above points is that the data and modelling appear to be insufficient to produce accurate and robust findings regarding the current nature of the family legal aid market, and regarding the likely effects of the proposed changes to the funding of such services.
- 7.5 The inherent weaknesses in this modelling approach appear to be acknowledged by E&Y to an extent:

We should be cautious about interpretation of this result as indicative of inelastic supply because in the data there seems to be a negative correlation between working hours and computed hourly rates, i.e., barristers appear to work longer when they are paid less. This may be simply a result of how barristers reported their working time resulting in hourly rates which do not reflect reality (E&Y, 2009, p. 56).¹⁸

- 7.6 Ultimately, E&Y chose not to base its conclusions on this modelling. It does use values for the elasticity of supply from the 2003 Frontier Economics report. However, there are a number of issues with the use of this elasticity estimate, as explained in section 4 above.

8 Failure to consider the impact of changing the structure of payments for advocacy services

- 8.1 The E&Y study focuses on the effect of the change within the FAS on the average hourly rate for barristers and solicitor advocates. It does not seek to address the potential effects of any change in the structure of payments (which was omitted from the brief). As recognised by the House of Commons Justice Committee, a key issue is ‘the need to fund the more serious and complex cases properly and in a way that reflects the real dynamics of the profession.’¹⁹ These factors cannot be evaluated without considering the structure of payments for cases.
- 8.2 Indeed, the impact of shifting to a system based more heavily on fixed fees for units of work and with reduced graduation in relation to case complexity is likely to be significant. For example, the reduced graduation creates the risk that some cases may be identified as likely to be unprofitable. Should all advocates consider a case unprofitable, such a case may go unrepresented, or quality of service on the case may be reduced in order to limit the financial impact. To the extent that quality of representation can have a significant impact on the outcome of a case, this may be of substantial cost to the client. In addition, lack of representation may impose higher costs on the wider justice system, for example if there were subsequent appeals.
- 8.3 Reduced graduation may also result in solicitors cherry-picking profitable cases, such that barristers, on average, are left with the less profitable cases to complete. Should this occur, the average earnings available to barristers for family legal aid work would reduce by more than the E&Y estimate, and barristers may reduce the supply of legal aid services by a greater amount. As these individual cases would be recognised as unprofitable, it is also unlikely that solicitor advocates would agree to take them on. The consequence may be that the supply response by solicitors would be insufficient to compensate for the reduction of supply from barristers, such that some cases will struggle to find representation.

9 Costs to the wider justice system

- 9.1 The E&Y brief was relatively narrow, relating to the market for family law and the likely impact on the supply of legal aid advocacy following the introduction of the proposed FAS. To the extent that the E&Y report does not consider the effect on the wider justice system of the proposed changes in fees, its use in helping the LSC to understand the full cost implications of the FAS is questionable.
- 9.2 As noted previously, the President of the Family Division confirmed that the family judiciary has significant concerns about the proposed FAS, including the extent to which it may increase costs to the wider justice system by reducing the experience and competence of

¹⁸ An alternative explanation of this, as set out earlier, is that it arises as a result of random forecasting errors of the likely hourly remuneration to be obtained from any specific piece of work.

¹⁹ House of Commons Justice Committee (2009), op. cit., July 15th, para. 69.

representation. In particular, the President highlighted the risk to the efficient management of cases, and the risk of increasing levels of litigants appearing in person:

Quite apart from the strain upon family judges and the courts' administration by HMCS, there will be significant further delays in the court process caused by inexperienced advocates undertaking more complex work; longer and less focussed hearings; a higher incidence of litigants in person and a greater likelihood of appeals where cases become derailed because of inadequate representation at first instance.²⁰

- 9.3 The views of the President of the Family Division clearly identify that the proposals may exert deleterious effects upon the administration of actual cases, which may in turn raise the costs of running the court service. Such costs could include, for instance, the impact of adjournments, poorly prepared cases or cases which overrun, and should therefore be taken into account in any overall assessment of the proposed funding model.

10 Conclusions on the impact of the FAS on barristers' annual earnings

- 10.1 E&Y provides two estimates for the average barrister's annual earnings post-FAS implementation. However, there are a number of concerns with these estimates, including the following.
- E&Y assumes that the effective hourly rate in other areas of law will remain unchanged by the implementation of the FAS. In response to a reduction in the average hourly rate for family legal aid work, at least some barristers are likely to seek to increase their supply of private work, thus the equilibrium rate would be expected to fall.
 - E&Y does not consider how reducing the degree of graduation in fees may affect the average annual earnings for barristers. As discussed above, the reduction in graduation creates a risk that solicitors will cherry-pick the more profitable cases, with the result that barristers will receive, on average, a greater proportion of the less profitable cases, such that the average annual earnings available to barristers will be lower than the reduction in the fees.
 - The second estimate of £132,096 indicates that barristers manage to work 35 chargeable hours a week—something E&Y acknowledges is unrealistic due to inefficiencies in the legal aid system, and the need to allocate time for training and administrative work.

11 Overall conclusion

- 11.1 The E&Y report, commissioned by the LSC to review the market for family advocacy, was published on June 29th. During the Justice Select Committee Hearing on June 16th 2009, the LSC described this report as:

a piece of economic analysis that will help inform us as to the final impact of our final proposals.²¹

- 11.2 The conclusions regarding the impact of the FAS on the supply of legal aid family advocacy were considered of particular importance:

²⁰ Sir Mark Potter, President of the Family Division, 'Family justice at the crossroads', the Herschman Levy Memorial Lecture, The Association of Lawyers for Children, July 2nd 2009.

²¹ House of Commons (2009), 'Minutes of Evidence Taken Before Justice Committee Regarding 'Family Legal Aid Reform'', June 16th, p. 23, q. 31.

One of the key things we are going to get out of the economic research is an assessment of the risk of a drop of supply. We are also going to look at the possible increase in supply because one of the implications of our proposals is that the rates we are paying solicitor advocates will rise as a result of this²²

- 11.3 On behalf of the FLBA, Oxera has reviewed the E&Y study and considers that there are a number of material concerns with the analysis undertaken which raise questions about the reliability of the findings, in particular in relation to the finding that the proposed funding scheme will lead to excess supply in the market for publicly funded family advocacy. These concerns relate to the quality of the data used and the modelling approach adopted. In particular, it is not clear why the price response by solicitors applies to their entire current output of legally aided work in family law (as E&Y seems to have implicitly assumed) when the price rise would apply to advocacy work only (E&Y, 2009, p. 67).
- 11.4 In addition to concerns about the analysis undertaken, several important aspects of the market and of the proposed funding model are not considered in the E&Y report. These omissions are fundamental to a considered analysis of the likely impact of the FAS on supply in the market. For example, the impact on quality of representation has not been considered; neither is there any investigation of how changes to the supply of legal aid family advocacy may impose costs elsewhere in the justice, or social welfare, system, or the logistics of meeting demand for family advocacy from a potentially smaller pool of advocates.
- 11.5 Until such concerns have been addressed, the E&Y report does not form a reliable basis on which to assess the effects of the proposed changes to legal aid.

²² Ibid, p. 23, q. 31.