Response by the President of the Family Division on Behalf of the Judiciary to CP12/08

1. Attached hereto (Annex A) is the response to the questionnaire contained in the Consultation Paper which should be read with this response. Please note in particular that the answers to questions 5-8 of the questionnaire are contained in paragraphs 15-24, to questions 9-12 in paragraphs 25-30 and to question 14 in paragraphs 30-34.

Introduction and General Comments

2. The Judiciary recognises that the provision of public funding is not open ended. But restriction of public funding below a level at which competent representation can be provided, and in particular restriction of funding at crucial early stages, leads, in the experience of the Judiciary, to wastage of court time and increase in expenditure.

3. There needs to be a pool of senior, experienced, committed practitioners to undertake the more difficult and complex work, in the public interest, in the interests of justice, and in the interests of the efficient administration of justice. They will not do the work unless they are properly remunerated. Experienced and competent practitioners save court time and increase efficiency. The inexperienced and less competent run cases less effectively, and are less likely to identify issues and prepare the case effectively at an early stage. Mistakes at an early stage increase the burdens on the courts (particularly in respect of adjournments and appeals). Costs paring runs a serious risk of costs wastage, and further burdens on the courts.

4. The success of the Public Law Outline depends on proper early provision of funding. The Public Law Outline was devised on the specific basis that experienced and competent representation with detailed preparation at the initial stages was essential to its success.

5. The Bar and solicitors state that experienced professionals are being driven from publicly funded work by restrictions on funding, or at any rate reducing the amount of this work undertaken, particularly, in the case of solicitors, since the changes introduced in October 2007. Local judicial experience supports this assessment. These concerns should be taken very seriously indeed.

6. The Judiciary is firmly of the view that that any scheme of payments must reflect preparation time and "weight" in complex cases, and that "flatness" of remuneration risks the outcome that the simple cases will be over remunerated and the more complex cases under remunerated. "Cherry picking" of work by solicitors is likely to occur.

7. The effect of various recent important developments on publicly funded family work has not yet been evaluated (the PLO, increased cost of issuing care proceedings) and may reduce costs in any event.

Possible Amendments to the FGFS

8. The Judiciary considers that there is scope for amendment and refinement of the present scheme.

9. There is no difficulty with features which are objectively verifiable and can be approved without argument (for instance, the number of parties represented). However it may be questioned whether all the SIPs, as presently formulated, in reality reflect increased complexity and weight. This is further referred to below.

10. The Guidance to the Family Graduated Fees Scheme, Paragraph 10, ("the FGFS Guidance") provides criteria in respect of each category of SIP, and (save in respect of the "representation" SIPs, i.e. litigant in person, more than two parties, more than one child represented) there is also an overriding test as to "substance" and "relevance to the issues in the case". There may be scope for further definition so that a judge will be able to determine such claims speedily and with ease.

11. The greatest difficulty in assessment is experienced with the "conduct" SIP and the SPF based on the "exceptional complexity" ground. These allow a considerable degree of subjective interpretation.

12. The Judiciary therefore would favour a simplified system based on criteria about which there can be no argument, or at the most very limited argument, given the very limited basis on which the Judiciary has the time or the training conduct what is in effect a summary assessment of costs. Specific suggestions are contained below.

13. It should however be noted that the criteria for SIPs and bolt-ons are strictly defined in the FGFS Guidance. Practitioners and judges need to be closely aware of the criteria, and to adhere to them.

14. The ancillary relief SIPs as they are presently defined, together with the retention of the conduct SIP relating to dissipation of assets (each criterion being subject to the overriding requirement of "substance" and of "relevance to the issues"), rightly take the case out of the ordinary and reflect complexity.

Comment on and suggestions for refinement of the present scheme

SIPs generally

15. *Litigant in person*: this factor will usually place additional burdens on the advocate and we consider that this SIP should be retained

16. *More than two parties*. This is almost inevitably the case in care proceedings and there seems little justification for its remaining a SIP in public law cases. However there is a good argument for retaining it in private law cases which are likely to be increased in complexity by the involvement of additional parties. It is unusual to have more than two parties in financial proceedings, and this element will always denote complexity, and justify an uplift. Thus this SIP should be retained in private children and ancillary relief cases.

17. *Representation of more than one child by counsel.* It is likely that in most cases there will be more than one child who is the subject of proceedings. It is difficult to see why this factor justifies additional payments to the advocate for the children and not to the advocates for the parents or other interested parties. We suggest that this SIP should be abolished.

18. *Representation of a person who has difficulty in giving instructions, or understanding advice attributable to a mental disorder or to a significant impairment of intelligence or social functioning: the "client care SIP".* This is a justifiable and limited category since it relates only to cases where the diagnosis is supported by medical opinion. Thus the criterion can be verified by the judge on an objective factual basis. This factor will usually require the advocate to expend time on the case in excess of what is usual. This SIP should be retained.

19. *Relevant foreign element.* The FGFS Guidance states that this is confined to "*a forum conveniens issue, an issue of foreign law or assets held abroad*". This element will always denote complexity and this SIP should be retained.

SIPs in Children cases

20. Representation of a parent or parents of a child who is the subject of proceedings. This in itself is not a factor that justifies an uplift. The FLBA has suggested that this SIP should be abolished, and replaced with a new "parent/perpetrator" SIP where in either public or private law children cases an allegation has been made against the parent(s) of significant harm. Allegations that a party has caused or is likely to cause significant harm denote complexity. We support such a suggestion in principle.

21. *Representation of another person including a child against whom allegations are made that he has caused or is likely to cause significant harm to a child.* This factor justifies an uplift and the SIP should be retained.

22. *In family injunction, public law and private law proceedings, more than one expert.* In general the instruction of more than one expert leads to added complexity and uplift will usually be justified. Not so however, where the expert evidence consists simply of "trichotest" hair testing or a GP's letter. The SIP should be retained but definition of "expert" may be needed.

23. *A party who has or may have been involved in conduct by virtue of which the child who is the subject of the proceedings has, or may have or might suffer very significant harm.* The FGFS Guidance states that this relates to "*significant incidents of really serious harm*", and examples are given. The "*test is higher than that contained in the Children Act 1989*." This gives rise to a considerable degree of subjective interpretation and can also generate argument in Court. This SIP may be being over-claimed and over-allowed. We would support the abolition of this SIP providing (1) that an additional uplift is to be payable where significant harm is alleged (see Paragraph 20 above), and (2) there is provision for additional payment (however this head of payment is to be categorised) in the truly exceptional case (see below).

SIPs in ancillary relief

24. In ancillary relief proceedings, the existing SIPs are (i) analysis of business accounts (ii) one or more experts (iii) relevant assets that may or not be under the exclusive control of one of the parties (iv) intentional conduct that may lead to the dissipation of assets (v) assets based abroad, issues of foreign law and forum conveniens (vi) more than two parties. These features take the case out of the ordinary and reflect complexity and these SIPs should be retained in such proceedings.

Special preparation bolt-on (the "SPF")

25. Exceptional complexity is defined in the FGFS Guidance at 10.34 as follows: "*the case must be exceptionally complex, not just exceptional, and not just "complex" or so exceptional in some other way that a payment is justified*."

26. Again this involves subjective interpretation and argument and the risk of over-claim and over-allowance. A particular problem is that the judge must decide, having heard from counsel, what the normal preparation time would be for a case of that type, and then decide how many additional hours ought to be allowed. There is no specific formula for, or guidance as to how to approach, this exercise. As already noted, such claims require in reality an informal summary assessment but have to be decided in conditions which do not enable this to be carried out properly. The judge has to make a decision on a basis which may be arbitrary and claims may be determined on a basis which either causes injustice to the claiming advocate, or permits unjustifiable overpayment. Furthermore, if conducted on anything other than the most cursory basis this issue is likely to take unjustifiable time to argue and to resolve, particularly in a busy applications list. More detail, albeit 'arbitrary' criteria are necessary.

27. There are some cases which are plainly so "exceptionally complex" that they justify additional remuneration, but by no means all.

28. The Judiciary would support a scheme which permits payments in such exceptional cases, to be claimable on clearly identified and verifiable criteria, so that the remuneration can be on a fixed and easily ascertainable basis. The Judiciary should not be asked, as at present,
    1. to assess what the "normal " preparation time for the case should be,
    2. to decide what hours in excess are claimable.

29. The existing SPF in respect of re-preparation and re-reading where four months have elapsed between two parts of a split hearing should be retained.

CPBs

30. Court bundle preparation over a certain level should be properly remunerated.

Conclusion

31. The scheme should provide payment to advocates which sufficiently remunerates conduct of cases which require special attention, preparation, or expertise in handling and presentation. However the judicial role in approving or disallowing SIPs can only be of the most summary kind. The SIPs scheme therefore requires further and "tighter" criteria which can be speedily determined on an objective basis without argument.

32. The scheme must
    a. Provide objectively verifiable criteria,
    b. Permit the claim to be evaluated in a clear, transparent and objective way, so as to obviate the risk of (1) an advocate being unfairly deprived of his/her proper fee (2) unjustified over claims,
    c. Permit the claim to be evaluated speedily and on limited information.

33. The SIPs form should bear on its face the precise basis for claiming each SIP, as provided by the FGFS Guidance, and judges and practitioners should adhere to those criteria.

34. The professions should ensure that practitioners are aware of the FGFS Guidance and claim only on the basis of the criteria contained in it.

The Right Hon. Sir Mark Potter
President of the Family Division
10 September 2008

Annex A

Ministry of JUSTICE

Reforming the Legal Aid Family Barrister Fee Scheme

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to **susan.chamberlain@justice.gsi.gov.uk**, or fax to **020 7210 8780. Thank you!**

Question 1.	Is option A (across the board reductions) preferable when compared to the others? What advantages does it offer?
Comments:	Option A is not preferable to an amended scheme which refines SIPs, SPFs and CBPs. The advantage of Option A is simplicity and retention of differentials reflecting complexity. This advantage is outweighed by the disadvantages.

Question 2.	Are there reasons not to pursue option A? What are they?
Comments:	It does not address the specific problems of the conduct SIP and SPFs, and CPBs, but perpetuates it. It is wrong in principle, and it risks distorting the scheme. It may have an unfair impact on ancillary relief fees.

Question 3.	Are there ways to mitigate any disadvantages of option A?
Comments:	No

Question 4.	What level should such a reduction be set at? Why?
Comments:	This is not a mattter for the judiciary.

Question 5.	Is option B (reduction or abolition of SIPs) preferable when compared to the others? What advantages does it offer?
Comments:	Abolition is not a preferable option unless the present scheme is replaced by a refined scheme which retains a differential between cases of differing weight and complexity and reflects elements of the case for which additional remuneration is justified. Suggestions for a reworking of the scheme are contained in paragraphs 15-24 of the accompanying paper.

Simplification of the scheme would - lead to saving of court time, - ameliorate risk of unfairness or overclaim. Any abolition or reduction of SIPs has to be considered together with amendments to the SPF/CBP scheme.

Question 6. Are there reasons not to pursue option B? What are they?
Comments: Yes. Abolition will not provide a scheme which remunerates advocates in a way which reflects complexity and necessary preparation. Refinement of the scheme is a better option.

Question 7. Are there ways to mitigate any disadvantages of option B?
Comments: Please see answers to question 5 above and paragraphs 15-24 of the accompanying paper.

Question 8. To what extent should SIPs be reduced or abolished?
Comments: Please see paragraphs 15-24 of the accompanying paper.

Question 9. Is option C (reduction or abolition of SPFs and/or CBPs) preferable when compared to the others? What advantages does it offer?
Comments: Wholesale abolition does not offer advantages and will lead to inadequate remuneration unless it is replaced by a scheme which reflects the work required in the heavier cases. The suggestion of percentage reduction perpetuates the problems with the "exceptional complexity" SPF which are outlined in the accompanying paper. There needs to be some reflection within the scheme of additional reading and preparation required by particularly large court bundles. How that it is to be achieved and the sums payable is not a matter for the judiciary. Any abolition or reduction of SPFs /CBPs has to be considered in tandem with amendments to the SIPs scheme.

Question 10. Are there reasons not to pursue option C? What are they?
Comments: Yes, unless there is an appropriate revised scheme in tandem with appropriate revisions to the SIPs scheme.

Question 11. Are there ways to mitigate any disadvantages of option C?
Comments: See paragraph 10 above and paragraphs 25-30 of the accompanying paper

Question 12.	To what extent should CBPs and/or SPFs be reduced or abolished?
Comments:	See paragraphs 22-30 of the accompanying paper.

Question 13.	Do you agree with our proposals regarding transitional arrangements? If not, please explain why.
Comments:	This is not a matter for the judiciary.

Question 14.	Have you any other comments or suggestions?
Comments:	See paragraphs 31-34 of the accompanying paper.