

Reforming the Legal Aid Fee Scheme for Family Barristers: consultation

Response by the Senior District Judge, on behalf of the District Judges of the Principal Registry

We would like to make the following general points before dealing with the specific questions:

1. The District Judges of the Principal Registry of the Family Division (PRFD) undertake a large volume of family business across all categories of proceedings, including some of the most complex public law, private law and ancillary relief cases. They are well-placed to judge the impact of changes affecting legal practitioners and standards of representation.
2. It is our experience that, except in the most complex cases, there has been a reduction in the number of experienced barristers who are able and willing to undertake publicly-funded work. This is particularly true in ancillary relief cases. Although the consultation paper points to evidence suggesting that there has been no fall in availability, our experience suggests otherwise; at the very least, there has been a marked reduction in the availability of the more experienced family barristers.
3. We are gravely concerned that a reduction in fees for family barristers will have an adverse effect on the availability and quality of representation; this will have a direct impact on litigants and on the proper administration of justice. It is a false economy, since cases where one or both parties have no, or inadequate, representation take longer and are more likely to lead to an appeal.
4. We do not accept that a reduction in fees is justified in any event. There is, as far as we are aware, no evidence that the fees presently paid to family barristers are in any way excessive or inappropriate for the work undertaken; indeed, many would argue that current fees do not represent reasonable remuneration. Any reduction would result in barristers being paid less than appropriate fees for work which is often difficult and demanding.
5. In public law cases, the success of the Public Law Outline depends upon the preparation undertaken by the advocates; the Advocates' Meeting and the IRH are especially important and it is essential that this work is properly remunerated. Similar considerations apply to ancillary relief cases, particularly the FDR appointment. Any reduction in fees in these areas is likely to be especially damaging.
6. The comparison with fees payable to solicitors cannot by itself justify a reduction. The negotiations in relation to solicitors' fees were undertaken against the background of the FGFS for barristers and the arrangements made are temporary, pending fuller review; we do not believe that there is any basis for reducing barristers' fees pending the proposed revision in 2010 simply because of the resulting difference in fee structure.
7. Our experience indicates that the changes introduced for solicitors have been damaging to the family justice system, with many experienced practitioners leaving the publicly-funded sector. We believe that a reduction in fees for barristers would lead to widespread discontent and the further loss of expertise in the family justice system.
8. The responses to the specific questions below are all made against the background of our general submission that there should be no reduction in overall fees currently payable for family barristers.

The specific questions:

Q1: Is option A (across the board reductions) preferable when compared to the others? What advantages does it offer?

Comment

We consider that Option A is the least appropriate of the three options. It would represent a reduction in base fees which are already well below those paid in the private sector and would mean that, in the absence of additional features, fair remuneration is not paid. This option may lead to increased use of SIPs and SPFs, which would erode the perceived savings and make any potential saving less predictable.

Q2: Are there reasons not to pursue option A? What are they?

Comment

Yes. See under Q1

Q3: Are there ways to mitigate any disadvantages of option A?

Comment

In our view, no.

Q4: What level should such a reduction be set at? Why?

Comment

N/A. We do not believe any reduction should be made in base fees.

Q5: Is option B (reduction or abolition of SIPs) preferable when compared to the others? What advantages does it offer?

Comment

If there is to be any reduction in fees, the appropriate course, we believe, would be to modify the additional payments. This would enable some recognition to be given to particular features of a case, while retaining base fees rates at or above their present level.

The current system of SIPs allows for enhancement of fees to reflect particular complexities, but it is a somewhat blunt method and the circumstances justifying a SIP can vary greatly. However, it would not be appropriate to abolish SIPs altogether, since there would then be no way of reflecting complicating features which do not justify SPFs.

If the element of the fee which depends upon SIPs is reduced, there should be an increase in base fees to reflect the fact that some cases will be more complex ('swings and roundabouts'); this may be particularly relevant in public law cases. An element of the fees should remain dependent on SIPs, but there is scope to revise the qualifying criteria.

Q6: Are there reasons not to pursue option B? What are they?

Comment

In relation to abolition, yes. See under Q5.

Q7: Are there ways to mitigate any disadvantages of option B?

Comment

See under Q5.

Q8: To what extent should SIPs be reduced or abolished?

Comment

If there is to be a reduction in fees, we consider that the only appropriate method is by a combination of reductions or revisions of the SIP, CBP and SPF. The abolition or reduction of one element only would have a distorting effect on the overall fee

structure. Any such reduction across the additional payments should be reflected by increases in base rates.

Q9: Is option C (reduction or abolition of SPFs and/or CBPs) preferable when compared to the others? What advantages does it offer?

Comment

Again, if fees are to be reduced, there may be scope for reducing the element dependent on additional payments. However, great care is needed here to ensure that particularly complex cases are recognised by SPFs and that particularly significant hearings (eg the IRH in public law, the FDR in ancillary relief: see para 5 of general comments above) are properly remunerated.

The size of the court bundle is a less reliable guide to complexity and if there is to be a reduction, it might fall on the CBP; any particularly extensive reading could be reflected in a SPF.

Q10: Are there reasons not to pursue option C? What are they?

Comment

Again, we would oppose the abolition of the SPF and the payments for specific hearings or events

Q11: Are there ways to mitigate any disadvantages of option C?

Comment

See under Q12

Q12: To what extent should CBPs and/or SPFs be reduced or abolished?

Comment

If there is to be a reduction in fees, we consider that the only appropriate method is by a combination of reductions or revisions of the SIP, CBP and SPF. The abolition or reduction of one element only would have a distorting effect on the overall fee structure. Any such reduction across the additional payments should be reflected by increases in base rates.

Q13: Do you agree with our proposals regarding transitional arrangements? If not, please explain why.

Comment

We are concerned that the proposed implementation may lead to uncertainty and unfairness. The date of instruction may not always be easy to determine, particularly in a case which extends over several hearings. It will also lead to barristers being paid different amounts for similar work, perhaps in the same case (ie where one is instructed before implementation and the other after).

Q14: Have you any other comments or suggestions?

Comment

See general comments, above.

**Principal Registry of the Family Division
3rd September 2008**