

Family Barrister Fee Scheme Consultation Paper CP 12/08

The Response of the Family Justice Council

1. The Family Justice Council does not intend to respond to the detailed questions posed in the consultation paper. It is the FJC's view that there are a number of important matters arising out of this consultation which should be given serious consideration.
2. We endorse the policy of equal remuneration in respect of equal work for those providing advocacy services and support the adoption of an integrated approach. However, it is our strong view that adequate remuneration is essential to the effective and efficient operation of the family justice system.
3. In assessing and establishing a payment regime it is essential to recognise the value of family law advocates. The nature of work undertaken by family advocates carries with it a great deal of responsibility and includes draconian orders such as the removal of a child from his/her family permanently. The human rights of litigants are actively engaged in many cases and there is a significant reliance on a large volume of documentary evidence and, so, cases are time-consuming.
4. Family proceedings affect the most vulnerable members of society. An advocate is required to be able to deal with the evidence of a wide range of experts and professionals and lay clients with multiple issues. It is frequently the case that a public law case will involve issues of drug and alcohol abuse, serious non-accidental injuries to young children, mental health problems, domestic violence and language difficulties. A single case can feature all these elements. Accordingly, specialist advocates tend to be instructed in the more difficult cases and hearings. These advocates are usually members of the Bar and representation of litigants with such complex difficulties can be demanding and challenging in the extreme and require a high degree of skill. We agree that the family Bar is likely to be most affected by any changes to the current fee structure.
5. All cases vary in complexity and, therefore, require varying degrees of experience and expertise in the advocate, from case to case, as well as in the individual hearings within a case. It is essential to ensure that there is flexibility within the structure that recognises and remunerates advocates for the more complex hearings and also for preparation. It is our view that litigants are entitled to specialist and experienced advocates in this area of law and that this represents true access to justice.
6. Failure to remunerate advocates fairly for work undertaken is likely to have major and wide-ranging repercussions for the family justice system. This will affect access to justice for the most disempowered members of society in what are some of the most serious (in terms of consequences for the litigants and their children) cases to come before the courts. The following are among the most negative

consequences that we have identified if fees do not provide fair and realistic remuneration:

- i. ***Recruitment and retention of family barristers prepared to undertake publicly funded work.*** With student debts and low initial earnings, the brightest and best entrants to the profession are likely to be deterred from pursuing a career at the family Bar or in publicly funded work. Existing family practitioners may well switch to more lucrative privately paying work. This has already been experienced when fees were reduced in private law and ancillary relief cases. This would represent a significant loss of expertise acquired over a long period of practice. There is a risk that family practitioners may leave the Bar altogether. The introduction of graduated fees in 2001 did result in a substantial number of more experienced barristers ceasing to undertake publicly funded work - either by leaving the profession or deciding to accept only privately paying work. These proposals will inevitably have a similar impact and there will, again, be difficulties for the public in accessing advocates of appropriate quality. This reduction in service providers will have profound implications for access to justice. Barristers handle the bulk of the family advocacy and that is a situation which is likely to continue. Solicitors solely undertaking advocacy are few in number. Most solicitor advocates combine advocacy with case work and are likely to continue doing so.
- ii. ***Delay and increased cost of proceedings.*** The proposals are likely to result in younger and more inexperienced advocates undertaking work beyond their abilities and, coupled with the recent reductions in eligibility and in the scope of the scheme, to an increase in Litigants In Person. In both circumstances, this is likely to lead to an increase in the length of proceedings (and hence increase costs) as well as increasing the workload of an already overstretched judiciary. The Council would urge the Ministry of Justice to fund research into the comparative costs to the courts of family hearings where the litigants are represented and those where at least one of the litigants is unrepresented. It would also be helpful to have some robust data on the number and proportion of family cases which now feature unrepresented litigants. The Council has ample anecdotal evidence from the Local Family Justice Councils to suggest that there has been a significant increase in unrepresented litigants over the last two years.
- iii. ***Serious repercussions in respect of diversity at the Bar and also in the judiciary.*** We are aware that the Family Bar has a high number of both women and Black and Minority Ethnic members. These are the advocates most likely to enter the profession with significant debt and least likely to be able to sustain a significant drop in fees. If practitioners do not take up family work, or leave in significant numbers, this has profound implications for diversity in the appointment of Queen's Counsel and judicial appointments as the pool of candidates would reduce and the diversity of that pool would reduce disproportionately.

7. The Council fails to see how these proposals fit with, let alone support, the Public Law Outline. The success of the Public Law Outline depends, in no small measure, upon family practitioners who have good case management skills - skills which really only come with experience. Of course, it is for the judiciary to take the lead in managing cases but they find that their task is much easier if they are working with able and experienced advocates who understand the principles of good case management.
8. In summary, the Council must express its concern that the proposals will undermine both the quality and quantity of experienced and competent barristers available to undertake publicly funded work at a time when the demands on the family courts are increasing. The trend for high rates of family breakdown resulting in a high proportion of lone parent (some 27% of families with children are now headed by a lone parent) and complex families is well established in England and Wales. This, in turn, will result in a greater need for the intervention of the courts to deal with the adverse consequences of family breakdown for children. The Council doubts whether the proposals contained in this consultation paper will help the family courts to meet the challenges and increasing workload that lie ahead.