FAMILY LEGAL AID FUNDING
FROM 2010
A CONSULTATION

Representation, Advocacy and Experts' Fees

RESPONSE OF

THE FAMILY JUSTICE COUNCIL

APRIL 2009

Family Justice Council

The Family Justice Council

1. The Family Justice Council ("FJC") was established in 2004. It is an Advisory Non Departmental Public Body ("NDPB") whose purpose is to promote better and quicker outcomes for the families and children who use the family justice system. The Council promotes an inter-disciplinary approach to the needs of family justice, bringing together experts from the worlds of the law, health and social care to support and advise Government and the family courts. It is chaired by the President of the Family Division, Sir Mark Potter.

2. Specifically, its terms of reference are

   (a) to promote an inter-disciplinary approach to family justice;

   (b) to monitor how effectively the system delivers the service the Government and the public need and,

   (c) advise on reforms necessary for continuous improvement.

3. It is specifically charged with:

   (a) Promoting improved inter-disciplinary working across the family justice system through discussion and co-ordination between all agencies;

   (b) identifying and disseminating best practice throughout the family justice system by facilitating an exchange of information between local family justice councils and the national Council, and by identifying priorities for, and encouraging the conduct of, research

   (c) providing guidance and direction to achieve consistency of practice throughout the family justice system and submitting proposals for new practice directions where appropriate, and

   (d) providing advice and making recommendations to government on changes to legislation, practice and procedure, which will improve the workings of the family justice system.

Summary of response:

4. This is the FJC's response to the Consultation Paper: Family Legal Aid Funding from 2010: A Consultation: Representation, Advocacy and Expert's Fees, which was issued in December 2008 ("the Consultation paper").

5. The FJC takes seriously the warnings from the legal profession that if the proposals of the Consultation Paper are implemented, many members of the legal profession will give up publicly funded work.

6. In our view such an outcome will have an extremely damaging effect on the family justice system as a whole in the following ways:

   (a) Significant (further) delays in the court process – caused by

      i) less experienced advocates undertaking more complex work;

      ii) longer (less focused) hearings,

      iii) more hearings (less skilled case management),

      iv) higher incidence of litigants in person;

      v) greater likelihood of appeals where cases become de-railed because of inadequate representation at first instance.

   (b) More litigants will find themselves unrepresented in family cases;

   (c) A greater risk that the outcomes for children will not be as robust or evidentially secure if advocates undertaking this work lack sufficient experience to identify, collate and examine often highly complex, and often voluminous, evidence;

   (d) There is likely to be an inequality of arms between publicly funded litigants and privately funded litigants, with corresponding article 6 implications;

   (e) The proposals contemplate legal business structures which are likely to reduce the public's access to a suitably qualified and experienced family lawyer; this thereby reduces public access to justice itself.

7. The proposals, if implemented, would represent ill-considered administration of public funds. The family justice system will struggle to withstand the destructive consequences of the proposed fee regime.

The Consultation Paper

8. The authors of the Consultation paper invite agreement from the respondents that the proposals set out within it are "balanced" and supportive of "the values that underpin legal aid – improved client access, quality services and value for money for taxpayers" (foreword page 2).

9. The FJC is unable to agree that the proposals set out in this Consultation paper achieve that balance in a number of important respects.

10. Indeed the FJC wishes to express its concern about the lack of ***true*** balance in the Consultation paper; the FJC recognises the wish of the LSC to achieve cost-control and maintain a predictable economy within the funding of legal services, but the tone of the Consultation Paper, and the proposals within it, reflect a depressing indifference to the value of quality legal representation and advocacy for those who use the family justice system – from broken marriages, and broken families, and with broken lives.

11. The Consultation paper proposals, we regret to say, are ill-thought through and too budget-driven.

12. The FJC therefore invites the LSC and the MoJ to stand back and review the pursuit of budgetary goals but with a keener and more conscientious regard to the wider implications for the promotion of family justice.

13. The FJC observes that one of the Consultation Criteria (section 11) is "Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained".

14. The FJC questions whether this principle is being conscientiously observed at present. This is the third major consultation on funding of legal services for family courts in nine months.

15. The Consultation criteria (see Section 11) further includes the following:

> "Formal consultation should take place at a stage when there is scope to influence the policy outcome".
>
> And
>
> "Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals".

16. The FJC is concerned that – in view of the fact that (a) the data on which the consultation is based is acknowledged not to be totally reliable, and (b) separate research is being commissioned upon which neither the FJC nor other stakeholders are likely to be able to comment, that the Consultation criteria are not being faithfully observed.

The context for the Consultation Paper proposals:

17. An appropriately funded legal aid system is vital for the delivery of family justice. The LSC and MoJ should not under-estimate the central role played by the legal profession, be they barristers or solicitors, in achieving and promoting the delivery of justice for those experiencing family breakdown. This is just as relevant in the private law sphere as the public law sphere:

    (a) In private law cases, there is only one thing worse for children than family breakdown, and that is badly managed family breakdown. The consequent cost to the State of poorly managed family breakdown (delayed and unduly lengthy court hearings, unduly modest financial award foisting the wife/mother into the benefits regime) is a true fiscal cost, as it is an emotional one for the parties concerned. For children, it is worse: behind every contact dispute is mismanaged parental separation. One or other of the parties feels aggrieved at the financial or other effects of the separation, war breaks out, the children get caught in the crossfire. Both sides blame the other[1].

    (b) In public law cases, children deserve swift, robust, evidence-based decision-making, corresponding with the sound principles of the Public Law Outline ("PLO"). In launching the PLO, the President of the Family Division, indicated his reliance on the "customary dedication" of legal practitioners (see 'Foreword to the PLO' – April 2008). There is now a significant doubt about the continued engagement of those "dedicated" practitioners in this vital work. It would be a double tragedy for those children whose families have failed them (by neglect or abuse) to be caught up in a justice system which fails them further.

18. The FJC has many concerns about the functioning of the Family Justice system. The system needs to be properly remunerated otherwise its current blights – delay, unrepresented litigants, the suppression of expertise – will only be exacerbated. The FJC is concerned that the family justice system is

[1] Ref Coleridge J. Resolution Conference: April 2008

overstretched to the point of breakdown; the proposals in this consultation paper are not likely to do other than to make matters worse.

19. The FJC is concerned about the impact on the legal profession (the solicitors and the self-employed advocates at the Bar) of the proposals; it believes that the public funding regime proposed – for Family Advocacy as much as for private family law representation – fails to reward cases according to their complexity. The burden on the solicitors' profession is exacerbated by the requirement (under the contracts) to do 100 matter starts over a full range of work. These budget-driven proposals individually, and certainly cumulatively, have serious knock-on effects for the public; senior practitioners in both branches of the profession will be disincentivised from undertaking the more complex publicly funded family work; it will be undertaken by less experienced practitioners. The consequent delays in the court process, not to mention the potential disadvantage to the client, are obvious to see.

20. For these reasons, it is the view of the FJC that it is essential that legal services, including advocacy services, are properly remunerated so that the public receive proper representation by suitably qualified practitioners.

21. We are concerned that these proposals give little / no attention to these wider issues.

22. The FJC is dismayed to learn of the considerable concerns surrounding the integrity of the data which underpins the consultation. It is to that important issue that we turn next.

Data / statistics:

23. The FJC is disappointed that, as an Advisory NDPB charged, *inter alia*, with advising the Government on family justice issues, the problems with the data underpinning the Consultation were not brought to its attention directly, rather than indirectly through individual members of the Council and its Committees.

24. In light of the data problems, which it is understood remain unresolved, we feel obliged to treat with caution a number of the important assertions made in the Consultation paper which are based on the LSC's data. This is very regrettable.

25. For instance, the FJC are concerned as to the accuracy of the assertion that: "Since 2001, the estimated (net cash) cost of family legal aid has almost doubled, increasing far in excess of any increase in cases." (page 2: Foreword). Is this an accurate statistic? Is it right that "all the fees in this paper have been calculated

to be cost-neutral, based on our current expenditure, and to reflect the cost of cases as they are being carried out now." (para.2.28). Can this be verified from the data?

26. When the authors write that "payments made under the Family Graduated Fee Scheme have risen by 32% in the last five years" (para.2.9) has any account been taken in that figure of the Government's re-investment of 8% into the scheme itself once it realized that the original formula had taken too much away from the practicing family Bar? There is no mention of this in the Consultation paper. If the 8% has been included in this 32% figure, should this have been made clear to the reader? Has any explicit account been taken of the fact that it is recognised that there has been an increase in the number of cases in that period?

27. Some of the raw data has been provided to independent organizations responding separately (we understand that this includes the Law Society and the FLBA). The FJC has not seen it. We are nonetheless concerned to learn, from reports received from solicitors and barristers who have undertaken comparative figures analyses of sample cases, that the actual picture presented in the consultation paper is wrong.

28. It is for example asserted in the Consultation paper that generally solicitors will be 'better off' under the new FAS (see for example what is said at para.5.16 of Annex G: "… we expect a majority of solicitor offices to benefit financially under the scheme, with a minimum of 42% of providers in all regions expected to increase their income. Overall, 56% of solicitors, responsible for 63% of cases, are expected to increase their income. In all regions, the providers who would benefit financially undertake the majority of cases": and see also para.5.20). In fact we have learned that the solicitors who had undertaken comparative analysis have discovered that they will not be better off, they will be worse off, and significantly so under the new regime. The only "actual" statistic involved in the analysis undertaken by the LSC seems to be the "claimed profit costs" figure. All other figures are based on assumptions and estimates which appear to be highly inaccurate and have distorted the outcome in favour of the Legal Services Commission's case that solicitors will be a lot better off under the new scheme.

29. The LSC itself acknowledges that, so far as the Bar is concerned, it is going to suffer losses. It is said (para.5.21 of Annex G): " … a significant majority of self-employed advocates' are expected to see a decrease in their income in all regions. Overall, 86% of self-employed advocates, working on 83% of cases, are expected to decrease their income, with a minimum of 77% in each region". And at para.5.22: "the majority of cases undertaken by counsel would see a reduction

in the fees paid, though for over 60% of cases this would be between £1-£100. At the same time the majority of cases undertaken by solicitors would see an increase in the fees paid".

30. There are questions over whether these data are accurate. But assuming for a moment that these figures are correct (and we are concerned to believe that the figures are worse than this, given the information which we have received in relation to the solicitors), it is surely inevitable that experienced members of the Bar are going to stop doing the publicly funded work.

31. The more experienced the practitioner, the greater the 'gap' in the professional market, and the more acute the problem for the numerous vulnerable members of our community who desperately needs an experienced advocates.

32. We are further concerned about the apparently inter-changeable use of 'closed cases' and 'bills paid' in the consultation. Our understanding is that this refers to two different types of data. Surely this should be made clear on the face of the consultation response, otherwise a misleading impression may be (indeed, we suggest, is) given.

33. We feel compelled to raise these issues, because, as an advisory NDPB we feel that we should highlight deficiencies in the presentation of data on which the stakeholders and other interested parties to the proper administration of family justice, will have been reporting[2]. We are very concerned about the damaging effect on the delivery of family justice.

The Legal Profession and its role in the achievement of family justice

34. Representatives of the legal profession – the Solicitors and the Bar – are appointed by the Secretary of State to sit on the national FJC. They are part of a much wider team of professionals and represented disciplines on the Council who all have an ardent interest in the administration of family justice. With this cross-section of interested stakeholders, the FJC believes that it is in a strong position to comment on the significance of the proposals made in the Consultation, and specifically on the value of effective legal representation in the delivery (and achievement) of family justice as a whole.

35. Courts depend on efficient, well-prepared, lawyers to assist in the delivery of family justice. The skills which both branches of the profession – solicitors and

[2] We note that the "LSC's Family Policy team has been engaging with the Family Representative Body and Stakeholder Groups that includes representatives" from a large cross-section of the family justice community (para.3.20). There was no independent reference to engagement with the Family Justice Council, and wonder why…

barristers – bring to their work are manifold. Lawyers do not just possess skills in court-room advocacy (though that is vital – see below); their professional lives require much much more from them than that; they need to be able to demonstrate (among other skills):

(a) Humanity in dealing with the client; many clients visit their solicitor and barrister emotionally distraught from the consequences of matrimonial breakdown;

(b) Clarity in the taking of detailed instructions on (often) highly emotive issues, and in formulating the case on the basis of those instructions;

(c) Focus in interpreting those instructions, distilling the key points from the weak points;

(d) Speed in assimilating information ;

(e) Ability to learn swiftly fields of medicine, accountancy, pathology (for instance) in order competently to understand expert evidence, and then challenge it;

(f) Efficiency in marshalling considerable volumes of documentary material;

(g) Flexibility in negotiations;

(h) Abilities to counsel their clients.

36. Advocacy is not just about standing and speaking. Hours and hours are invested in the preparation of the arguments, in the crafting of the case; in marshalling the arguments in an efficient way, in researching the most helpful precedent case-law, in preparing detailed written arguments both before and that the conclusion of the cases.

37. The good advocate saves court time, promotes clarity of judicial investigation, and assists in the resolution of cases fairly and with the minimum of delay.

38. These skills are gained by experience. Experience counts.

39. The family justice system needs to be funded in such a way that legally trained young people are attracted to the work, are prepared to (and can afford to) undertake the work, can continue to do the work for a number of years so that they garner the relevant experience to undertake the more complex work; and then are appropriately / sufficiently rewarded that they are indeed prepared to perform the complex work.

40. The FJC fears that the current re-working of the publicly funded regime is likely to deter the aspiring practitioner from entering the publicly funded field; once in the field, the practitioner is likely to feel, in the current climate (and the Kings College Survey referred to below confirms this) that there is little incentive in remaining within it. It will be crystal clear to the competent advocate that there will be no proper reward for undertaking the more complex family work. The proposals of the Consultation paper overpay the less complex work to the detriment of the proper funding of more complex work; such a scheme is destined to appeal only to those interested in (and able to conduct) the less complex cases.

41. As for complexity, the FJC wishes to dispel any suspicion (which the Consultation paper – and its proposals inherently hint at) that this is invented, or lawyer driven. The claim of complexity is not a ruse or peg on which to hang a false claim for enhanced remuneration. We highlight some of the reasons why we believe that cases are more complex now than previously:

(a) Litigants in family litigation come from wider and more diverse communities; cultural and linguistic norms need to be acknowledged understood and worked with; this takes time – both in the preparation of cases (assessments in particular) but often in the hearings themselves (English being a second language for many);

(b) There are generally more litigants in family (public law) proceedings; with the changes to the Parental Responsibility law, more fathers are automatically parties.

(c) There is an increased willingness on the part of the Courts more closely to scrutinise the practice of social work teams, and an expectation of high standards of service within the social work domain;

(d) There is a greater acknowledgement of the width of range of circumstances in which children suffer emotional harm; the explicit incorporation of the witnessing of domestic violence in the definition of significant harm is illustrative of this;

(e) Courts have a developing understanding, and a need for yet further knowledge and experience, of complex medical issues which form a central evidence of many non-accidental injury cases. Medical opinion on many types of alleged non-accidental trauma (previously believed to be 'classic' and immutable) is ever-changing: the surprisingly high incidence of 'innocent' subdural bleeding at birth is a phenomenon which was until recently relatively unknown, the multiple causes of brain injury

in infants are the subject of increasing expert review, and the genetic significances of bone density and associated vulnerability to fracture – to name but three);

(f) The impact of the Human Rights Act 1998, and the incorporation of the ECHR into domestic legislation; the family courts have been astute to recognise the valuable Article 6 and Article 8 rights of families, and of children, in the context of disputes;

(g) The growing recognition of the need to engage with children in proceedings; there is (proper) judicial recognition of the increasing autonomy of young teenagers, and an increasing willingness to allow their representation, either directly, or pursuant to the tandem model, in private law proceedings. The recognition of direct involvement by children in family law proceedings corresponds with this jurisdiction's expectation of discharging its obligations under International Treaties;

(h) The higher incidence of cross-jurisdictional disputes – both in children and money cases; some of these cases require evidence from competing foreign jurisdictions;

(i) There has been an increase in the volume of relevant case-law, Practice Directions and legislation and rules; cases often involve linked issues of housing, immigration and criminal law. There is a heavy expectation that counsel will be conversant with these linked fields – and failure to be so, will invariably sound in wasted costs[3];

(j) There is a heavy obligation to prepare detailed paperwork for most cases. Practice Directions place a heavy onus on all parties.

(k) The profile of the litigants in public law proceedings is invariably complex: lives ravaged by drug and alcohol misuse, vulnerable adults with mental health issues, personality disorders and/or learning difficulties are commonplace characteristics of the parents who face public law proceedings.

42. In relation to that lass category (para.41(k) above), we wish to remind the LSC and MoJ that in her review of child care proceedings under the Children Act 1989 in 2006, Julia Brophy (University of Oxford) observed that because of a combination of ill health and socio economic difficulties (coupled with personal vulnerability factors) the vast majority of families subject to statutory interventions

[3] See Munby J. in Re M and N [2008] EWHC 2281 (Fam)).

are "struggling on the lowest rung of the ladder"; it is those families who most desperately need quality legal representation when an incident or combination of factors arise (coupled often with a breakdown of co-operation and trust between the parents and professionals) which results in statutory intervention. It is those families who, we fear, will be left without the necessary representation under the proposed fee regime.

43. The issues set out in para.41 need to be considered, and we suggest accepted, by the LSC and MoJ in the context of understanding 'increased complexity'. These issues need to be factored in to the funding regime, so that where cases carry some or all of these factors, the advocate is remunerated commensurately.

44. Under the 'flat' Family Advocacy scheme proposed, this will not happen.

45. Proposals for the reduction in fees are unlikely to be accepted by the profession, or acceptable to the family justice community as a whole, when the actual work and the stresses associated with delivering it appropriately are increasing on all concerned.

PRIVATE FAMILY LAW REPRESENTATION SCHEME (PFLRS)

46. The Consultation Paper proposes standard fees for most private law aspects of the budget and standard advocacy fees for both public and private law. Whilst it must be accepted that the LSC need to control spending, it would be unfortunate if the proposals result in a reduction in the quality of service provided to those who are the most vulnerable in society. It is difficult to see how this will be avoided given the proposals which, effectively, will mean a reduction of fees in all areas of family law but most in the area of private law children work.

47. It is worrying that the needs of children within private law proceedings attract the lowest standard rates overall particularly given the vulnerability of children caught up in domestic violence and parental disputes. There is a disincentive for proper consideration to be given to ensure that children are safe. Whilst the standard fee may cover the average residence/contact dispute it does not cover those cases that come under the President's Direction of May 2008. The impact of this practice direction coupled with the Children and Adoption Act 2006 - namely the introduction of new powers related to the enforcement of contact orders, have not been taken into account when looking at the structure or funding of private law children cases.

48. This is particularly worrying when it is acknowledged that private law cases are often being on the cusp of public law with separate representation of the child.

49. In "Everybody's Business", the FJC brought to the attention of the judiciary and the wider legal community the importance of fact-finding hearings in child contact cases where there are allegations of domestic violence. The FJC concerns led to the President of the Family Division issuing a Practice Direction encouraging the use of fact finding hearings in such cases to establish the veracity of the allegations as the basis for the children's (and carer's) protection. The LSC funding proposals now put in jeopardy this work by creating disincentives to effective fact-finding hearings.

50. A fact finding hearing by necessity is an interim hearing, the preparation for which involves not just the filing of statements but liaison with the police, hospitals and other public bodies. Whilst in some cases injunctive relief may already have been obtained in others it will be necessary to prepare a great deal of evidence in advance of an interim hearing.

51. The fact finding hearing may well take up to two days, in which case a fee of £198 (£154 + £44 County Court interim advocacy fee + preparation) is unlikely to

attract any advocate to the role let alone one of experience. The fee equates to less than £20 per hour. This is alarming.

52. Consideration should be given to a specific fee for fact finding hearings and their preparation otherwise the incentive to ignore this very important practice direction will be too high, placing children and vulnerable adults at more risk.

53. The implementation of applications related to the enforcement of contact orders have been largely ignored in this fee structure. The introduction of the tapered fee after 5 hearings ignores that these types of cases may mean that there are a number of "quasi-enforcement" hearings for which the case worker will not receive additional payment (if the application to enforce is within three months of the final hearing) and the advocate will receive the lowest remuneration applicable for any other hearing despite these hearings often requiring the most skill.

54. Given that the escape is three times the standard fee the most difficult cases (implacable cases or those involving risk of harm) will be the most under-funded and, therefore, firms will either choose not to take them on or, perhaps more worryingly, the least experienced fee-earner will have the unenviable task of dealing with them.

55. The FJC understands the need for a fee "per hearing" rather than per day. However, the fact that most private law children cases conclude in one day is not a cogent argument for contending that the "exceptional fee provision" should only be applicable for day 3 and onwards. There is no equation with care proceedings, particularly as the advocacy rate for private law children cases is approximately 40% less than the advocacy rate for public law children cases. If 87% of private law children cases conclude in one day then the exceptional fee should apply for the 13% of cases where the case runs in to the second day. By their very nature, private law cases take less time than public law ones as there are usually fewer parties. There is an inbuilt incentive is to push the funded parties into consent orders irrespective of the risk to the children and /or their parents. The gap between the standard fee and the "escape" is too wide. The current plan risks encouraging a 'factory approach' to cases involving those who are often the most vulnerable people in society.

56. The FJC endorses effective hearings of the length necessary to secure this. Funding regimes should not be used to straight-jacket hearings; legislative clarity, judicial training and proper arrangements for listing should be supported to allow for efficient and effective hearings. Those who seek access to the family justice system should not be subjected to restricted hearings by the lack of funding.

57. **Rule 9.5 representation**; The rate for representing a child under rule 9.5 is too low and it is unlikely that lawyers who have the necessary panel experience will take on the role. It is hard to see the justification for the lawyer representing a child under 9.5 to be paid 40% less than representing a child in public law proceedings. These cases are by their very nature (reflected usually by the rule 9.5 appointment) complex and the role of the child's lawyer is often the most difficult; these, therefore, should be looked at separately or the fees aligned to the public law ones.

58. **Forced Marriage**: It is of serious concern that the LSC is contemplating that forced marriage cases should be dealt with at the same rate as a Domestic Violence injunction when even the most straight forward forced marriage cases involves many complex issues. Until the Act has been in force for a reasonable period, say 2 years, it should be excluded from the scheme.

59. **NYAS**: We take the opportunity to remind the LSC about what the FJC said in its Civil Bid Rounds response about the position of NYAS (see para.10 of that response):

> "The proposed new framework will also drive out organisations such as NYAS who have been committed to providing a service for children; it is not in their remit to provide a range of family legal services for adults. It provides specialist legal advice, support and services to vulnerable children. Its services are of high quality and great value and, consequently, the LSC should maintain a system which allows excellent organisations such as NYAS to continue their work".

60. **ISWs**; The proposal to cap ISW fees to £30 appears unfair when the other experts are not being capped. ISWs carry out a very valuable service in private law proceedings particularly in contact dispute cases. If they are no longer available (because the capped rates are too low) then there is a risk that the cases will continue to run on or other more expensive experts will be used.

61. ISWs are experts. They run their own businesses and have to cover their costs. They undertake a different role from that undertaken by CAFCASS practitioners. They operate entirely independently, providing autonomous skilled assessments which differ in type, variety and quality from CAFCASS work. ISWs bear all of the risk of independent experts in the service they provide to the courts, without any organisational support or structure. This is very different from work undertaken for CAFCASS, which now requires practitioners to work within a more prescribed framework and guidance.

62. ISWs provide courts with an expert and timely opinion often within more complex cases where an independent and balanced social work assessment is lacking. This service frequently allows courts to make better-informed and more timely decisions for children in more difficult cases. ISWs will stop doing work for courts if their fee rates are cut so drastically, and children will be more vulnerable to delay and to unfair or ill-informed decisions being made about their futures.

63. **Experts**: It is unclear why consideration should not be given to the capping of experts' fees (to say £150 per hour) now rather than waiting for the "change in policy" previously referred to. This would release the funds for a proper approach to fact finding. Since psychiatrists' fees are uncapped in civil cases (but not crime) it would seem sensible to "cap" all experts' fees.

64. **Accreditation;** It has to be deplored that the LSC has removed the incentive to specialise by removing any financial benefit to accreditation. Given these straightened times why would legal practices encourage their junior staff to improve their skills by seeking accreditation if there is no financial reward?

65. **Impact on the Solicitor Practice/ firm of the standard fee system;** The FJC notes the wish for the fees structure to be as simple as possible in the interests of the effective administration of the scheme. This was also the hope when public law fees were standardised. However, reports from solicitors are that the administration of the scheme is anything but simple.

66. The FJC understands that computer software currently on the market is not able to cope with the complexities of running time-recording alongside standard fees and differing structures for advocacy. At least one market leader in legal case management software has indicated that it is not possible to create a system that can handle the complexity of the system as it currently exists. The standardisation of advocacy fees appears unlikely to assist. In order to qualify for a franchise the LSC insisted on computer software being installed as part of the management tools of a practice. They have now changed the system thus rendering the software as a predictor of fees /costs useless.

67. Whilst the FJC can see that the LSC may by the use of standard fees feel that it is better able to control spending, solicitors may well find that their cash flow projections will become less easy to plot. Time recording will become an ineffectual tool to determine profitability. This, together with the overall reduction of fees, will encourage firms to reduce the legal aid element of their practice.

68. The logic of the proposals is that the LSC is content for the cases it funds to be managed by paralegals under supervision, with either counsel or free lance

advocates providing the advocacy. Only the most junior members of the legal profession will be able to provide legal services to LSC funded clients as it will become impossible for senior members of the profession to justify to their partners reduced profitability. (Only the most junior members of the Bar will be able to provide legal services to LSC funded clients as the 'standard' fee-rate will deter the more senior practitioners from undertaking the work).

69. There is a continued disincentive to use in-house advocates even though all agree that there is an improved service if there is continuity. The consultation paper implies that the advocacy when done "in house" is not necessarily done by the case worker but by the firm's advocate in which case additional preparation will be required but not rewarded.

70. Many, if not all, so-called "free-lance" solicitor advocates are attached to a particular firm as a "consultant". If they do the advocacy for one of the fee-earners are they classed as "in-house" and, therefore, get no preparation fee? This is ill-thought-through.

FAMILY ADVOCACY SCHEME

71. **Summary**: The FJC is not able to support the creation of the Family Advocacy Scheme in the form proposed in the Consultation Paper.

72. While the FJC sees considerable merit in the proposal that solicitors and barristers should be remunerated in the same amount for the same work, the Consultation paper proposals do not achieve this.

73. It is reasonably obvious to us that no advocate – whether they be barrister or solicitor – is going to be willing to undertake the work when the structure of the scheme appears to be that the more complex the case, the less the advocate gets paid.

74. So flawed are the proposals, and such is the level of justified disquiet among BOTH branches of the profession (and others), that the FJC contemplates a serious and irreversible exodus of talented practitioners from the field of family law. This will have devastating consequences for the delivery of family justice.

75. **Lawyers in the family justice system**: There are considerable concerns about the state of family justice. Coleridge J. made his views well-known to the solicitors at the Resolution conference in April 2008. Ryder J. in a speech delivered for the 25th Anniversary of the Butterworths Family Law Service (July 2008) similarly referred to the fact that "there has rarely been more critical comment about the [family justice] system itself".

76. Ryder J. cited, by way of example, a number of stresses/demands on the system; they included (a) confronting the argument that secret justice is not justice at all. It is said to be partial and biased; (b) the lottery and expense of ancillary relief division; (c) the over zealous and the under resourced failures of child protection provisions and their and our obsession with snapshot justice; (d) the lack of voice for the child as a person in their own right; (e) the damage caused by adversarial dogfights between former partners in their residence and contact disputes concerning their children; (f) the lack of capacity in the courts to deal with an ever increasing volume of the most serious and complex cases in a timely fashion and as a consequence the downgrading of many legitimate medium risk and need cases as if we haven't got time for them.

77. These points are, in our view, all well-made.

78. It is our view that the proposals in this Consultation paper may well represent the "straw which breaks the camel's back".

79. In the context outlined by Ryder J. the LSC and MoJ should re-consider very carefully whether it is right to undermine those advocates who represent the most disadvantaged and vulnerable in our society at a time when they are most in need of effective representation.

80. Ryder J.'s views were re-inforced by Wall LJ in his speech to our Lancashire Local FJC a little over 12 months ago; in that speech, Wall LJ observed that without any, or any appropriate or adequate reciprocal recognition by government that the system has to be properly resourced, and those who work in it adequately remunerated, the system would collapse.

81. Wall LJ continued that the family justice system:

> "… is serviced by dedicated participants, none of whom is in it for the money. Sitting as I now do in the Court of Appeal, I see only too clearly the huge dichotomy between the well–paid privately funded lawyer in commercial litigation and those struggling to make a living doing publicly funded child care work. The simple fact of the matter is that publicly funded child care work will never be, and cannot ever be, financially self supporting. It will have to be funded by the State: indeed, the State, in my judgment, owes a clear duty to the disadvantaged children of inadequate parents to protect them from harm. That is a duty which the State must fund, and in my judgment it cannot look to the social work and legal professions to subsidise it. We have all done everything we can to make the system work. We have good practice coming at us from all directions. The PLO, the latest Practice Direction on experts, the Practice Direction on domestic violence, all of which I welcome, demonstrate how far we have come. <u>The burden is now on the Government to support us. And that means providing the funding to enable us to operate the system efficiently. That in turn means paying lawyers a living decent wage and enabling courts, without undue anxiety, to take steps necessary for the protection of needy children, rather than being told that they cannot do that because there are no funds with which to do so"</u> (emphasis added).

82. Wall LJ added (in the same speech to the Lancashire FJC) that:

> Our dedication, our goodwill, our passionate belief that our function is to address the best interests of vulnerable children and families is not being recognised by a government which, however much it pays lip service to the welfare of children, is frankly indifferent to disadvantaged children and young people who are the subject of proceedings, and simply refuses properly to fund the family justice system, relying instead on the fact that we have always got by in the face of government indifference, and will continue to do so.'

83. He further added that

> …Government pays lip service to the special skills which need to be demonstrated by social workers, advocates, experts and judges required to operate care proceedings in the family justice system. But at the same time, it starves the system of the resources which are required to make it work, and, as I understand the matter, it proposes to pay fees to lawyers engaged in the work which are so low as to make it uneconomic for legal practitioners, particularly solicitors, to continue to do it.

84. **The 'harmonised' scheme – standard rates without graduation**: The LSC proposes (para.6.5) a "new harmonised Family Advocacy Scheme under which all advocates will be paid the same for advocacy". It is said (ibid) that this is "a graduated scheme" which is based on a range of base fees for different categories of family work and the type of work undertaken.

85. In truth, the FJC sees little graduation in the scheme. It is a 'flat' scheme and unashamedly so. The most graduation which is apparent is a different fee payable for interim and final hearings, with an uplift claimable for hearings in the High Court; a bolt-on is said to be claimable in care and supervision cases that resolve at the Issues Resolution Hearing. This 'graduation' will be insufficient to attract, or retain, experienced advocates into the work.

86. **Lawyers leaving family work**: The consequence, the FJC fears, will be a flight from the legal professions (employed and self-employed) on all sides. In its response to the 'Civil Bid Rounds' Consultation, the FJC made plain its concern about the proposed changes in contracting, which it believed (as it made clear to the LSC in its response) were/are likely to drive out a number of experienced practitioners from legal aid work in some areas.

87. The FJC is already deeply concerned to receive reports from local FJCs which point to an exodus of experienced care lawyers from the field. The FJC draws attention to the age profile of those on the children panel being high, with a number of practitioners reaching retirement.

88. These dedicated professionals are not being replaced with a new generation.

89. The FJC considers that the Government and the LSC should ignore these concerns at their peril.

90. The FJC further raised its concerns about the risk of the proposals specifically driving out specialist children practitioners (para.6). We said this:

> "The LSC cannot assume that those who at present focus on children work will wish or be in a financial position to develop their practices to cover all the work which will be required. A number of firms have developed expertise in children work because of a commitment to work concerning the welfare of children even in circumstances when it is not economical to do that work. The undertakings given by solicitors on the children panel to be responsible themselves for the cases both in the office and at court are not consistent with the model being developed by the LSC of a number of junior members of

staff being supervised by a more senior person. Care cases are of the utmost importance; the consequence can be the removal of a child from his or her family for ever, or leaving a child in an abusive family. The LSC must recognise the importance of maintaining access to lawyers who have the necessary skills and experience to cover these cases".

91. It is a concern that the LSC appears to attach little value to the independent referral family Bar; in the Consultation paper (per Para.2.23), it is said that

> "We recognise that barristers will still continue to undertake the most complex types of advocacy but these cases will tend to fall within the High Cost Case system, which will continue to be paid as they are now".

The number of cases which is represented by the High Cost Case System is extremely small.

92. The LSC reflects the fact that "Concern has been expressed that previous changes to the barristers' Family Graduated Fee Scheme led to a reduced availability and quality of advocates. There was no evidence as to the reduced availability of advocates." (para.2.24)

93. With respect, the FJC does not believe that this is right.

94. In 2004, a report from Frontier Economics was commissioned by the Department for Constitutional Affairs – *A market analysis of legal aided services provided by barristers* (March 2004); this report revealed that 37% of the solicitors surveyed reported that they had had experience of being unable to secure a barrister in order to undertake the family work; the implications were reported to be "a detriment to the advice received by the client" or "an unacceptable delay".

95. 54% of those solicitors seeking and failing to secure the services of a barrister reported that the lack of availability of barristers was because the barristers "had said that the fees [then paid] were unreasonable". This was properly a factor in the restoration of the fees to a level which was commensurate with the complexity of the work.

96. Moreover, in a report to the Bar in 2003, Professor Gwynn Davis described the situation as one in which the evidence showed that a sizeable proportion of the family law Bar was not prepared, following the introduction of graduated fees, to accept publicly funded work (or, would perhaps do so only with reluctance when no other work is available). Professor Gwynn Davis rightly pointed out that given that there are bound to be cases in which one party is legally aided and the other is not, this could well add to the inequalities that already exist. He concluded by

commenting then that "This evidence of barristers' 'flight from family legal aid' is most marked in London and the South-East, but is a nationwide phenomenon".

97. The FLBA recently commissioned a survey which was undertaken by the Kings Institute for the Study of Public Policy at Kings College London (Dr. Debora Price and Anne Laybourne: "The Work of the Family Bar" "A week-at-a-Glance Survey") ("the 2008 Kings College Survey").

98. The description of the work, and the stresses on the publicly-funded advocates, makes important reading. The FJC has seen the report and would wish to draw attention to some of the following 'key findings':

(a) About 22% of barristers depend on family legal aid for between 60% and 80% of their turnover, and a further 14% of barristers depend on family legal aid for more than 80% of their turnover. Female Black and Minority Ethnic (BME) Barristers have disproportionately high dependence on legal aid, with 30% depending on legal aid for between 60% and 80% of their turnover, and a further 22% more than 80% of their turnover.

(b) Since the last legal aid changes (2003), substantial proportions of experienced family barristers have stopped doing some types of legal aid work. Half of barristers exited (28%) or substantially reduced (22%) legal aid ancillary relief work, with no corresponding increases by other barristers. While private ancillary relief work reflects the greatest changes, other legal aid work has also suffered with 9% ceasing to do private law children work, and 33% reducing this greatly. Practitioners exiting or substantially reducing legal aid work were predominantly experienced practitioners with an average of 18 – 20 years in practice. The same sort of changes were not evident in public law work.

(c) In the event of no changes to the legal aid system, a quarter of family barristers are intending to change the way that they practice – mostly to reduce their reliance on legal aid. However in the event of across the board cuts of around 12% - 13%, over 80% of barristers indicated their intention to change their practices. These are predominantly senior practitioners. This is predominantly, for those practitioners who still do the work, to stop doing ancillary relief and private law children work, but barristers have indicated that in the event of cuts, they will stop doing public law work as well. For example, forty per cent of barristers over 16 years call intend to stop totally or reduce greatly the amount of legally aided public law final hearings that they undertake.

(d) On formal measures of 'emotional exhaustion' as a factor in occupational burnout, intensity feelings are very high for family barristers. The most emotionally exhausted are those 16 – 20 years' call, BME females, earning in the third quartile, doing 60% - 80% legal aid work, who worked more than 58 hours in the previous week, and public law specialists.

(e) Ten percent (10%) of cases are paid at less than £30 hour gross;

(f) Allegations of child abuse were made in 62% of family cases involving barristers.

(g) Family barristers work long hours and suffer considerable disruption to their home life. They mostly earn a reasonable but not exceptional professional living. The work of the family bar is detailed and complex often requiring skill and experience. Legal aid rates in graduated fee cases now lag far behind private client rates, and below rates paid by local authorities. Senior practitioners have left legal aid work since 2001, particularly ancillary relief and private law children work, and many more are intending to do so if further cuts are implemented. There is evidence that this exit will now affect public law work as well.

(h) The work of the family bar includes complex client handling, grasping complex cases, and responsibility for outcomes that may have very serious consequences such as a child being returned to an abuser, or permanently removed from a home. In addition, detailed preparation of advocacy in the form of the preparation of cross examination of experts, legal research, research into expert disciplines, the establishing of complex timelines and chronologies and the analysis of accounts all remain independent predictors of complexity even after other factors such as the number of files in the court bundle, the length of the case, the court, and a number of other complicating features have been taken into account. Even understanding and accounting for this, a substantial degree of variation in case complexity, and the related time needed to prepare the case for hearing, remains.

99. We wish to make clear that we have no doubt that similar evidence would represent the experiences of solicitors too.

Standard Fees

100. There is a depressing priority given to the economic driver in the Consultation Paper, without due consideration given to the administration of family justice.

Although it is proposed that "standard fees" would be designed "to be as simple as possible so that they are easier to administer" (foreword page 2), the FJC is concerned that the lack of graduation in the fees will lead

(a) to inequity within the system – with some practitioners being paid more for less work, and less for more work, and

(b) lack of incentive to practitioners to continue undertaking this vital work, leading to quality advocates leaving the profession. This has an obvious knock-on effect on clients.

101. With respect, to measure complexity by simply paying higher fees in the High Court (foreword page 2, and later at para.2.21[4]), misses the point by a wide margin. What percentage of family work is actually conducted in the High Court? A tiny fraction. In the recent survey of the Bar (referred to above), it was revealed that the percentage of cases which fall within the Very High Cost category is about 4%; yet (as mentioned above) 62 % of all cases involved allegations of child abuse and 45% of private law cases involved allegations of serious abuse.

Equal Pay for Equal work

102. The Consultation is said to be based on the proposition that the LSC "should pay the same fee for the same family advocacy work, regardless of the type of advocate carrying out the work" (Foreword page 2); this would be acceptable provided that the more complex work is paid at an appropriate level and the more straightforward advocacy work is also paid commensurately.

103. What is counter-productive, indeed unfair, is if the standard fee were to be paid across the board irrespective of complexity. Regrettably this is the trademark of the current proposals.

104. Those proposals are likely to have the following effects:

(a) They will deter able practitioners from doing the complex work

(b) They will lead to an exodus from both branches of the profession;

(c) They will lead inexorably to a situation in which more junior / less experienced advocates would be undertaking the more complex work – this has serious knock-on effects for (a) the client (who may not be

[4] Para.2.21: "The scheme proposes higher fees for more complex cases where there is an objective identifiable factor such as higher fees for hearings that take place in the High Court and different fees for different types of hearings".

receiving the appropriate level of expertise) and (b) the Court system (this would be more likely to lead to longer hearings and more delayed as the inexperienced advocate grapples with the complex issues, and additional directions hearings are required because of lack of focused preparation which ordinarily comes with experience).

105. At para.5.34 of Annex G, it is said that: "There is no provision within the legal aid budget to remunerate all advocates at current self-employed FGFS rates. Our initial analysis shows that this would cost the fund an additional £49 million a year equating to a reduction of 160,000 instances of face-to-face civil legal advice each year. The impacts are also a result of the frequency of use of self-employed advocates." Why not?

106. We note that under the Family Advocacy Scheme simple hearings will be remunerated at twice their previous level of remuneration at the expense of remunerating the more complex hearings; it seems to us that it may be difficult for the LSC MoJ to justify this approach as a proper distribution of public funds.

What impact?

107. The Consultation invites comments on the "impact" of the proposals. At para.2.3 we are invited to comment on "the impact that these proposals and the proposed changes to expert scope will have on clients and practitioners". We deal with these impacts in turn.

108. Family Advocacy scheme: Impact on the legal profession: It is noted that the Consultation purports (Annex G para.6.3) to address the "the impacts on solicitors and self employed advocates who practice at the Bar", and that the authors of the Consultation "are seeking to ensure that the proposals do not have greater impacts on the income of any particular provider group".

109. Impact on the Bar and on solicitors: There is a recognition that 85% of the self-employed Bar will experience a reduction in their fee-income under the new scheme. There will be a greater (adverse) impact on practitioners – solicitors and the Bar – in London than elsewhere in the country, and, significantly, an adverse impact on BME providers – both solicitors and the Bar – than on their white counter-parts. These adverse impacts cover both the Private Family Law Representation Scheme and the Family Advocacy Scheme.

110. Impact on the BME / women practitioners: It is obvious that the proposals are going to have a disproportionate impact on BME and women practitioners – both solicitors and the Bar. Specifically in relation to solicitors the FJC reminds the

LSC and MoJ of its comments in its response to the Civil Bid Rounds Consultation, in which the FJC made the following comments (paragraph 5) (we set it out in full for ease of reference):

> "BME solicitors are much more likely to join firms undertaking legal aid work arising out of choice/recruitment practices and patterns or a mix of both. A reduction in the number of firms will be likely to reduce the numbers of BME practitioners. This will raise issues of diversity and choice of representation, since BME litigants frequently tend to instruct BME solicitors. These tend to be in smaller practices which would be less equipped to expand areas of practice. If they merge with larger firms there is a significant risk of loss/dilution of the specific service they will be able to offer BME clients. In addition BME practitioners are only now reaching the point where sufficient progress has been made for them to be better represented on bodies such as the children panel. The proposed changes will have a negative impact on this."

111. The proposals in the current Consultation Paper will (para.6.36 Annex G) will have a greater adverse effect on BME practitioners at the Bar than on their white colleagues. The reasons for the existing impact of publicly funded regime on BME practitioners are varied and complex; they arise in part out of historical issues of discrimination before BME women even reach the profession. Whatever the background circumstance, it is not in any way an appropriate or just response to simply implement proposals which serve to compound that disadvantage in this disproportionate way.

112. Very worrying (para.6.54) is the recognition that the proposals will have a greater impact on female self-employed advocates than on their male colleagues.

113. <u>BME cases and BME parties</u>: The FJC is concerned that, by reference to the Consultation exercise itself and its impact on the lawyers, the proposals have an adverse impact on BME cases/BME clients; we note what is said at para.6.27 that: "Our analysis of the Private Family Law Representation Scheme between cases involve white clients and those involving BME clients shows that 59% of cases involving BME clients and 65% involving white clients expected to experience an increase in remuneration." For FAS – Private there is a discrepancy in remuneration (adverse to the BME clients) per case of 6% between BME and white clients (slightly lower discrepancy in FAS – Public).

114. <u>Impact on recruitment to the Judiciary</u>: The judiciary is drawn from practising solicitors and barristers. It is vital that the judiciary represents the diversity of the communities it serves. The Family Division is at least able to boast a higher

percentage of women appointments than any other division of the High Court; but the percentages are still too low. Appointments from BME backgrounds to all tiers of the judiciary are still disproportionately low. If BME legal practitioners are driven away from family work, the pool from which judicial appointments are drawn is correspondingly reduced. The potential for BME appointments wanes; this is not in the interests of the promotion of good family justice.

Access to Justice

115. The Consultation Paper rightly refers to the Government's obligation under Section 25(3) of the Access to Justice Act 1999.

116. The statutory duty under Access to Justice Act 1999 is to secure that 'individuals have access to services that effectively meet their needs' [s 4]; this requires there to be available sufficient suitably qualified and experienced lawyers to undertake the more complex work. Access to justice is an ideological and not an economically driven commitment

Section 25(3) of the Access to Justice Act 1999 provides that

> (3) When making any remuneration order the Lord Chancellor shall have regard to—
>
> (a) the need to secure the provision of services of the description to which the order relates by a sufficient number of competent persons and bodies,
>
> (b) the cost to public funds, and
>
> (c) the need to secure value for money.

117. Lord Irvine introducing the second reading of the Access to Justice Bill in 1998: said this:

> 'People value their legal rights highly. They feel deeply frustrated when they cannot secure them. A major component in deciding whether a State provides a decent quality of life for its citizens is the extent to which it secures for them access to justice'.

118. Lord Carter emphasized (2006 Review of Legal Aid Procurement) that it is essential that clients have access to good quality legal advice, and confidence in the service they are given. A diverse and sustainable supplier base is essential for clients of diverse backgrounds to have confidence in their legal services.

119. We are concerned that the proposals in the Consultation paper dilute this important feature of the professional services offered by the Family Bar.

120. Indeed in family disputes before the Courts, it is perhaps more important than in other fields of litigation that the advocate 'fits' the case. In those cases where important decisions are to be taken about the future upbringing of children (particularly where the families involved are from the most vulnerable in our society where there is a risk of permanent removal of children to substitute care), we believe that there is a strong case for absolute (or near-absolute) choice of advocate.

121. Surely the purpose of legal aid is to serve the public by enabling each of its members to have access to the kind of legal assistance that is essential for the understanding and assertion of our individual rights, obligation and freedoms under the law. Because of the awareness of 'rights' – enshrined most conspicuously in the ECHR – and society's justified expectation in being able to access the courts to assert those rights and freedoms, there is a high obligation on the Government to ensure that this is achievable. Our "laws and freedoms will only be as strong as the protection that they afford to the most vulnerable members of our community"[5].

Experts

122. We note that it is said that "The cost of disbursements in closed cases, which is mostly accounted for by the instruction of experts, has increased by 58% since 2004/05." (para.2.9).

123. We would like to know why the Experts Committee of the FJC has not been directly consulted about this figure, or about the proposals.

Business models / economic research

124. We note with interest what is said about Alternative Business Structures. This plainly raises interesting questions outwith the immediate scope of the current consultation. It is surely likely that partnerships involving the Family Bar will have the effect of reducing access to justice (particularly in the regions) as the pool of available advocates able to accept instructions will be reduced by the risk of conflicts of interest. This is not in the public interest.

125. The FJC have learned that, following the launch of the Consultation Paper in December 2008, the LSC has now (and recently) commissioned Ernst & Young to undertake significant market research into the market for family advocacy

[5] Opening of the Ontario Courts (2007), Chief Justice McMurty

services. It is said that this has been commissioned in order to evaluate the impact of the proposals on practitioners; presumably this will be fundamental to any assessment of these proposals.

126. It is very surprising (to say the least) that this research was not commissioned ***before*** the Consultation proposals were made.

127. So – the FJC asks – what is the evidence base (from existing qualitative research) which supports the proposition set out in the Consultation paper? A number of assertions about business models underpin the consultation – but are they capable of being validated? Is it right that "solicitors are increasingly using in-house advocates to provide advocacy services"?. Is it right that "the market is already over-supplied with junior self-employed advocates, firms are taking on these professionals as employed advocates"? Our information tends to show that it is solicitors who are moving to the Bar. How many of the solicitors firms have "trained staff (i.e. dedicated advocates) available to provide a seamless service for clients." (para.2.10)? From its own experience, the FJC questions the validity of these assertions, and further wonders why, if this is reliably asserted, the LSC has commissioned (after the launch of this consultation process) the independent market research in order to collect, or establish the veracity of, the evidence.

128. The FJC reads with some dismay that

> "The consolidation of legal service providers to achieve greater economies of scale, effectively using the latest developments in IT and the systemisation of more routine processes will enable legal aid services to benefit from these reforms. It is already predicted by legal commentators that, within five years, significant amounts of legal advice will be delivered online. This will bring real opportunities for innovative and creative firms, in terms of realising savings in overhead costs and achieving greater profit margins on fixed fees. It will also improve the services that they are able to offer clients" (para.2.12).

In the difficult and highly emotive field of family law, when personal contact between professional and client is so vital for a true understanding of the client's needs, it is depressing to read of the promotion of advice "on-line".

129. A worrying assumption appears also to have been made (ref the passage in the paragraph above) that the very people who most need advice will have access to (or indeed even be able to use) 'on-line' facilities.

130. It is more depressing still to read of the 'economies of scale' given the pressing need of the public to be able to have access to a choice of solicitors – a choice which will be denied them if legal services are offered on supermarket principles.

131. The Legal Services Act 2007 may spawn new legal business models. The Bar Standards Board has recently consulted on this within the Bar. The reality is that the Bar and the solicitors' profession do still need (and value) the current/existing business model; both branches of the profession recognise the value-added element which the other brings to the efficient administration of family justice. Both have worked well together in the past and propose to continue to do so.

Proposals

132. The FJC does not propose, nor does it see it as it its role, to advocate a firm or detailed alternative proposal for the funding of legal services. It does wish, however, to suggest some pointers towards the creation of a more robust family advocacy scheme:

(a) First, any proposed scheme should be founded on (and clearly illustrated by) reliable and validated data; this is the only way in which the stakeholders in the family justice community are going to draw confidence from a scheme; (*there appears to be very little confidence in the reliability of the current data and the conclusions which are drawn from them*);

(b) Any family advocacy scheme can be built on the central tenet of equal pay for equal work; that is to say, as between barristers and solicitors, complex work is paid for as complex work whether it undertaken by solicitor or barrister; simpler work paid for as simpler work in a similar way; the fee must reflect the work; (*this is likely to be agreed in principle between the branches of the profession*);

(c) There should be inherent graduation built into any advocacy scheme to ensure that the more complex work is remunerated appropriately; (*this is rightly one of the fundamental objections to the current proposals*);

(d) Graduation can still be achieved (and contained) by a set of non-discretionary (i.e. objectively verifiable) principles; (*this assists in achieving cost-control for the Government, while facilitating appropriate reward for the more complex cases*).

(e) The scheme should be created in collaboration with the professions, so as to achieve a greater level of support from them; (*there is*

unprecedented 'root and branch' opposition to the proposals from the professions and indeed from others in the family justice community; this opposition is in our view well-founded. In the circumstances, the views cannot safely be ignored. If a scheme is imposed on the professions which they validly object strongly, there is a real risk that they will cease doing the work and young aspirants to the legal profession will be deterred from joining; this is not in the interests of family justice).

Conclusion

133. Many of the proposals set out in the 'Family Justice in View' document (December 2008) are about to be implemented nationally; some are to be the subject of 'pilot' testing

134. The principles underlying 'transparent' justice in the family courts are of course laudable, and the FJC supports them. The specific proposals when implemented are undoubtedly going to place additional strains on the family justice system: the issues in family cases are not going to contract as a consequence of this initiative; indeed additional issues – around media access, reporting restrictions, jigsaw identification of children the subject of proceedings – may actually lead to greater complexity and delay in the progress of hearings, and in resolving family disputes.

135. Those are issues we may need to debate elsewhere.

136. But it may be prudent for the LSC and MoJ to ponder on the irony of inviting wider scrutiny of the family courts at the very point when its fees proposals are likely to have the effect of reducing the quality and availability of legal services to vulnerable families and children.

ANSWERS TO CONSULTATION QUESTIONS

The FJC proposes only to answer the Questions on which it has a particular view / interest.

PRIVATE FAMILY LAW REPRESENTATION FEE STRUCTURE

Q.8 Do you agree with our proposals on the payment of enforcement proceedings in children cases?

The FJC disagrees: The implementation of applications related to the enforcement of contact orders has been largely ignored in this fee structure, and in light of the change to the law introduced by the Children and Adoption Act 2006 this is even more of a concern.

The enforcement application under the new regime will result in the case "going off" on a new tangent and result in other hearings. It is unlikely to be a one off return to Court to enforce as the court will keep the contact under review. Given the "escape" is proposed to be set at three times this means an important part of the case will, effectively, go unfunded.

Q.9 Do you agree with the time period proposed for when an additional half a Level 3 fee may be claimed for enforcement proceedings in children matters? If not what would you suggest?

No. The half fee should be payable upon the need to make any application to enforce in the children cases save the lodging of the "warning" in a contact case. It is difficult to cost at this stage as the new enforcement options for contact disputes have only just come into force. Enforcing the breach of a residence order should be seen as either attracting a half fee or as a new application due to the work involved.

Q 10 Do you agree that rule 9.5 cases should be included in the fee scheme? If not, please provide evidence as to why they should not.

Whilst, in principle, this should be right, the reality makes the situation very different, so the answer must be "no".

Under the rules a particular solicitor is appointed to represent the child with a Guardian. This is the same as in public law. There is no justification for the lawyer

representing a child under 9.5 to be paid 40% less than representing a child in public law proceedings. These cases and the role of the child's lawyer are often the most difficult and, therefore, should be looked at separately or the fees aligned to the public law ones.

Sometimes the child is the only one who has legal representation, with both parents in person. Their role is then invaluable to the court but extremely demanding on the advocate. The courts reliance on the child's legal representation to ensure that the evidence is properly presented and to ensure the Court has the information required predicates against its inclusion in standard fees. Particularly where the escape is three times the standard fee. Rule 9.5 cases are even less predictable than care cases. Sometimes all that is required is the instruction of an expert but other cases can be complex and difficult.

There are circumstances where the parents are paying privately for senior counsel (or even leading counsel) and whilst it may be appropriate for the solicitor to do the advocacy it would be inequitable to expect them to receive £28 per hour or less for their work in this circumstance. The temptation would be to seek leading counsel for the child. This also militates against the panel solicitor's obligations to the child and would breach undertakings.

Q 11 Do you agree with our proposals on multiple parties? If not, on what basis should a higher fee be paid and which fee should be reduced to accommodate that?

Multiplicity of parties extends hearing times. Therefore, this can only be acceptable if the hearing fee is "per day" rather than "per hearing".

Q.12 Do you agree with the proposed exceptional case threshold?

No. Certainly not in relation to private law children.

The majority of cases will be covered adequately by the standard fee. However, given that cases when difficult in this arena are challenging and involve fact finding hearings, potential implacable hostility and sanctions etc, the exceptional threshold should be twice and not three times. The gap between the standard fee and the exceptional threshold is far too great. These cases can involve social services and even turn into care cases. Unless there is an appropriate threshold the difficult cases (i.e. those involving complex issues) will not be taken on by lawyers as it will not be cost effective. The risk then to the children involved is extremely concerning. If the

cases are taken on with the threshold as it is, the incentive to ignore concerns relating to safety is too great.

To ensure that the safety of children is not ignored both arising from domestic abuse (physical safety) and from the emotional harm of false allegations, and implacable hostility, the threshold should be as it is in public law - twice the standard fee.

Q.14 Do you agree with our proposal that enforcement proceedings in children matters can be exceptional?

See above. It is agreed it should be included in the calculation of the exceptional threshold but that the exceptional threshold is set too high at three times the standard fee.

Q.15 Do you agree with our preferred approach to calculating whether a case is exceptional when multiple proceedings are involved?

No. The approach is illogical. Often one side of the case is complex whilst the other is not. It should be possible to finish one matter and bill it and move on to deal with the other case. Often it is not possible to deal with the finances until a complex residence dispute has been resolved. It would be inequitable to have carried out the residence dispute having "escaped" only to slip back into standard fees because agreement is reached over finances. There would be a disincentive to settle the money aspect (and vice versa). The two should be calculated separately to ensure that issues are dealt with properly. It is inequitable for a firm to have to wait until the end of a case to see if the standard fee has been escaped.

Q.18 Do you agree with the proposed reduction to how long a previous negative assessment of mediation can be relied on?

This makes no sense; four months should be the minimum.

FAMILY ADVOCACY SCHEME (FAS) – PUBLIC LAW

Q.20 Do you think that public law and private law should be harmonised at the same time? If not, which do you think should be harmonised first and why?

We do not have a strong view about the timing of implementation save that we are of the view that the proposals for the scheme are flawed. We can only support a scheme that provides proper graduation to fairly reflect and reward the work undertaken.

Q.21 Do you agree with the scope of the Family Advocacy Scheme? Should any of the above exclusions be included in the Scheme? Are there any other cases that should be excluded from the Scheme?

The FJC does agree; forced marriage cases should be in any proposed scheme.

Q.22 Do you agree that Queen's Counsel should be excluded from the scheme?

No. It seems to us that – other than those cases in which the SCU become involved in agreeing instruction for a Very High Cost case – Queen's Counsel should not be excluded from the scheme; an appropriate multiplier can be adopted for the level of remuneration (as with the FGFS at present).

Q.23 Do you think there are specific types of case, other than child abduction, that require the instruction of Queen's Counsel?

Yes. All types of cases have the potential to justify the instruction of Queen's counsel. A check of the Guidance criteria applied when the LSC grants an application for Leading Counsel to be instructed makes that clear

Q.24 Do you agree that the advocacy scheme should be national? If not, what regional fees should there be, and why?

Yes. There should be an uplift for London

Q.25 Do you agree with the proposed approach to panel uplifts? If not, which fees would you reduce in order to pay for panel uplifts?

There should be maximum scope for uplifts and graduation within the scheme.

Q.30 Do you think there should be different fees for the PLO hearings? The fees are designed to be cost neutral and therefore any increase for some hearing fees will mean a reduction to others.

The FJC agrees, this makes good sense.

Q.40 Do you agree with the approach of paying a 33% uplift for public law work undertaken in the High Court?

The FJC agrees.

Q.42 Do you agree with the proposal to pay the same fees for advocacy, irrespective of the party represented in public law cases? If not, which clients should attract the higher fee and which the lower?

The FJC suggests that the party who carries out the burden of the work should receive the greater remuneration..

Q.43 Do you agree with the proposals to pay the same fees for advocacy, irrespective of the number of parties represented in public law cases?

Yes.

FAMILY ADVOCACY SCHEME (FAS) – PRIVATE LAW

Q.44 Do you agree with the proposed approach to panel uplifts? If not, which fees would you reduce in order to pay for panel uplifts?

No.

Q.45 Do you agree with this approach for paying for self-employed advocates' opinions and attendance at conferences in domestic abuse cases?

Yes.

Q.49 Do you agree with the proposal of paying a "per hearing" fee? If not would it be more appropriate to pay a standard fee for all hearings up to one day with additional payments for hearings going over one day? What other options would you suggest?

No . The "per hearing" fee is inappropriate in private law children cases.
Interim hearings should be "per day" to take in to account the potential need for interim finding of fact hearings.

Q.50 Do you think there should be different fees for different types of hearing? If so, which hearings should attract a higher fee? The fees are designed to be cost neutral and therefore any increase for some hearing fees will mean a reduction to others.

Yes. In relation to private law children – for example, fact finding hearing would be appropriate for attracting higher fees

Q.51 Do you agree with our proposal to pay a tapered per hearing fee for interim hearings? Would it be preferable to pay a fixed amount for all hearings lasting up to one day with additional payments for hearings going above that time?

Not in relation to private law children cases as they rarely go beyond five hearings unless they are exceptionally difficult or there have been breaches of orders and then it is unfair for the advocate to be penalised.

The implementation of applications related to the enforcement of contact orders have been largely ignored in this fee structure. The introduction of the tapered fee after 5 hearings fails to recognise that these types of cases may mean that there are a number of "quasi-enforcement" hearings for which the case worker will not receive additional payment (if the application to enforce is within three months of the final hearing) and the advocate will receive the lowest remuneration applicable for any other hearing despite these hearings often requiring the most skill. We strongly disagree.

Q.52 Do you agree with the proposed approach of paying a "per hearing" fee for the final hearing?

No. The final hearing should attract a higher fee payable on day one and then in the rare circumstance the case goes over to day two an extra fee should be payable. The Council can see the attractions of a "per hearing" fee rather than per day, but the fact that most private law children cases conclude in one day is not a sufficient argument for saying that the "exceptional fee provision" should only be applicable for day 3 and onwards. There is no equation with care proceedings, particularly as the advocacy rate for private law children is, approximately, 40% less than the advocacy rate for public law children. If the vast majority of private law children cases conclude in one day then the exceptional fee should apply for the rest of cases where the case runs in to the second day. By their very nature, private law cases take less time than public law cases as there are usually fewer parties. A "per day" fee would be preferable.

Q.53 Do you agree that in private law cases the exceptional threshold should be when a final hearing exceeds two days?

No. The exceptional threshold should be after day one. See response to Q. 52

Q.54 Do you think there be exceptional fee payable for interim hearings?

Yes, exceptional fees should be payable for interim hearings when applicable otherwise the advocate is working pro bono in the rare circumstances that cases go over. The reduction of overall fees must not apply to the proposed fees for private law children as the fee cannot be any lower. It is in any event not appropriate to reduce the base fee to cover 2% of the hearings that go over to another day. There is a risk that a fact finding hearing can go beyond the exceptional threshold.

Q.55 Do you agree with the proposed approach to exceptional cases?

No. It is not appropriate to reduce feel levels by not paying for day 2 of a trial

Q.56 Are there any specific bolt-ons in private family law that you think we should consider?

The following should be considered in relation to private law children:-

a) 9.5 representation

b) Social Services once a s.47 investigation commences.

c) Domestic abuse – fact finding

d) Implacable hostility

e) International elements

Q.57 Do you think there should be an early resolution fee in private law and/or finance cases.

The principle is fine; however the concern is an early resolution fee could detract from ensuring that the orders agreed are safe for the children and families involved. Therefore, an early resolution fee should only be payable if at the same time the penalties currently attracted to the complex case (the three times threshold; the fee tapering; non payment for day 2 of a trial) are removed.

Q.58 Do you agree with the approach of paying a 33% uplift for private law work undertaken in the High Court?

Yes

Q.59 Do you think that there should be different fees payable for hearings in private

law cases in the Family Proceedings Court and the County Courts?

This is difficult as there are often delays in the FPC which militate against the fee there being less.

HARMONISATION OF PUBLIC AND PRIVATE LAW ADVOCACY

Q.60 Do you agree with our approach to paying for exceptional travel time?

Not in the form proposed. It actually leads to another reduction in fees that will increasingly make the work less economic to undertake

Q.61 Do you agree with the proposed approach of continuing to pay self-employed advocates practising at the Bar separately for advocacy?

Yes. The payment system could be the same for both branches of the profession.

FAMILY FUNDING SCOPE CHANGES

Q.65 Do you agree that the funding of solicitors and others as guardians in rule 9.5 cases should be removed from scope?

No. This proposal puts at risk the effective representation of children which will directly impact on their Art 6 rights. Organisations including NYAS are vital for the effective representation of children, and the FJC is concerned that NYAS will 'go under' if this proposal is implemented.
If this is to be taken out of the scheme, it is essential that a corresponding ring-fenced budget is made available for CAFCASS.

Q.66 Do you think that where CAFCASS does not fulfil its statutory obligations to appoint a guardian the legal aid fund should pay for independent social work expertise in rule 9.5 cases? If yes, in what circumstances and why?

Yes. The current system is intended to avoid delay that is inimical to the welfare of the child. How does the LSC propose to support this key objective?

Q.67 Do you think that if this work remains in scope there should be a fixed fee payable?

It is unclear exactly what is meant by this fixed fee.

Q.68 Do you agree with the proposal to cap rates for independent social work expertise at CAFCASS/CAFCASS Cymru rates?

No. The proposal to cap ISW fees to £30 is unfair when the other experts are not being capped (se above). ISW's carry out a very valuable service in private law proceedings particularly in contact dispute cases. If they were to become unavailable (because the capped rates are too low) then there is a risk that the cases will continue to run on or other more expensive experts will be used.

Q.69 Do you agree with the proposal to remove from scope the costs and expenses of CAFCASS officers and Guardians and all other independent social work enquiries and expertise outside of England and Wales?

No, sometimes the work is essential to reach resolution. It is a matter for the Judge dealing with the case, rather than the LSC, to determine on the particular facts of the case. There is discrete guidance on this issue from CAFCASS so that it is not misused.

Q.70 Do you consider that the impacts on solicitor providers and self-employed advocates are justifiable in ensuring sustainable access to legal services for clients?

No.

Q.71 Do you consider that the impacts on NfPs are justifiable in ensuring sustainable access to legal services for clients?

No. In respect of NYAS, see our comments above.

Q.74 Do you consider that the impacts on experts are justifiable in ensuring sustainable access to legal services for clients?

We have no difficulty with the proposals, set out at paragraphs 8.9 to 8.12 of the consultation. Such reforms are long overdue.

74.1 Insofar as "experts" includes independent social workers then we do not consider the impact will be justifiable. These cases are not frequent, the overall amount involved is

not significant, but the detriment to the children and families involved will be great.

Q.75 What will be the impacts on your organisation if these proposals are implemented?

The impact on the Family Justice System will be devastating.

Q.75a How do you think these impacts (could) be mitigated?

By re-working the proposed scheme.

Q.78 Do you have any comments on prospective impacts on clients, providers and self-employed advocates on the basis of ethnicity, gender, age or disability?

There is a risk that BME clients and lawyers, and women lawyers will be particularly and disproportionately affected for the worse by the LSC's proposals.

Q.79 Do you have any comments on any prospective impacts on small firms and self-employed advocates?

It is likely that small firms will close, and self-employed advocates will drift away from the work – particularly at the more senior end of the profession.

Q.80 Do you consider there to be any direct or indirect discrimination against people in rural communities in the proposals outlined in the consultation paper?

Yes; they are likely to be most badly affected by the advice deserts which have already emerged, and which are likely to get worse. These proposals will effectively remove the provision of effective family justice advice from a number of vulnerable communities in urban and rural areas.