FAMILY FEE SCHEMES

RESPONSE BY THE FAMILY JUSTICE COUNCIL

1. The Family Justice Council made a response to the initial proposals from the Legal Services Commission which followed the Carter review of legal aid. A copy of that submission is attached.

2. Annexed to the original submission were detailed comments from some Local Family Justice Councils highlighting the acute concern in a number of areas that experienced family law solicitors were leaving legally aided family work and that younger practitioners were not available to take their place. The downward pressure on fees has had the effect of contracting the supply of solicitors in this field. The annual meeting of the national FJC with the local FJCs took place on 26th March 2007 and such was the concern about this issue that a press release was issued expressing the view of the conference. The press release is attached to this submission.

3. In preparing this submission we have drawn on observations by Judith Masson who has been commissioned by the DCA and DfES to conduct a study profiling care proceedings.

Fixed fees

4. The Council remains concerned about the imposition of fixed fees, and its impact on the Government's statutory objectives in section 25(3) Access to Justice Act 1999. Before dealing with the substance of the proposals, we first express our surprise at the statistical evidence on which the proposed changes are based, and question its reliability. Doubtless the specialist professional organisations will wish to have the opportunity to verify the statistics, but given the claims about the

increases in legal costs in recent years, and the assertion that the proposals will be 'cost neutral' it is plainly important that the Commission is able to substantiate the data relied on. In this respect we recall Lord Carter's comment, letter dated 13.7.06 accompanying his report, that the biggest challenge he faced was the inadequacy of the management information available. The complexity and opaqueness of the numbers, their components, and the inability to forecast change all contributed greatly to the difficulties which he indicated he had encountered. Secondly, the Regulatory Impact Analysis suggests that a majority overall will see their fees increase under the new scheme, a very substantial minority will see a decrease in their fees both in private family proceedings and in care proceedings.

5. In circumstances in which there is a flight from publicly funded family work, clear to those working in the field, and in the Otterburn research, a new regime which leads to a reduction in the fees of a significant number of the practitioners is likely to lead to a further reduction in services. It is also likely to lead to the work being done by less well qualified practitioners and there will be an unavoidable deterioration in the service provided. Narrowing the pool of lawyers is particularly problematic in public law proceedings because of the number of parties and repeated involvement in proceedings. It is likely that there will be more cases where those remaining with LSC contracts will have to decline to act because of a conflict of interest having represented another party in previous proceedings.

6. The LSC points to the disproportionate rise in the cost of family legal aid. There is no analysis of the explanation for the rises and nothing at all to suggest that solicitors have been working less efficiently than before or doing unnecessary tasks. The suggestion that fixed fees will increase efficiency is not supported by any evidence of the kind of inefficiency which will be squeezed out of the system. If solicitors are to survive financially in the face, for many of them, of a reduction in fee income there is bound to be a reduction in the service provided.

7. The Council is extremely concerned at the likelihood that solicitors will leave legally aided work or that less qualified practitioners will do the work. The effects of these changes are likely to be felt both by clients seeking advice and representation and in the Courts where the experience of practitioners is very important in the efficient dispatch of cases.

8. It is clear that the changes the LSC has made will result in a much higher proportion of cases being paid under the current system, an hourly rate. The changes to the level for escape from fixed fees will mean that the financial risks to practitioners of doing this work are reduced. However, the LSC scheme will continue to over-remunerate solicitors in some cases and under-remunerate them in others. It is far from clear that the system will operate to ensure that those who lose on one case will gain on another. Risks to solicitors will be particularly high where they are instructed by someone who is not a party to the proceedings initially or where parents effectively drop out by failing to give instructions.

9. The LSC has not published the data on which it has based the revised scheme. Even if it can average certificate costs, it does not have adequate data on case characteristics, nor can it link all the certificates of a case together, so it cannot know how the costs for one party to a case impact on the costs of other parties, or whether this is a product of the way the case has been handled by that party.

Panel membership

10. It is noted that an 15% uplift will not be included in the fixed fee for panel membership. The Council urges the LSC to reconsider this decision. The decision not to recognise that expertise in the fixed fee has major implications for the continuation of the panel, which remains an important indicator for other professionals, especially when they are referring parents or relatives, that the solicitor has the necessary

knowledge and skills. Should child care work cease to be a specialist area of practice the consequences for vulnerable families, the court and local authorities are likely to be negative with cases taking longer, more disputes and less satisfactory resolution. The LSC notes that it has absorbed the uplift into the standard rate it has set. Effectively this means that those without experience who do this work will get the same benefit as those with it. The observation that there are insufficient panel members to cover the work and that the number is declining is not a good reason to ignore panel membership. The most likely explanation is that solicitors are giving up this area of work because of insufficient remuneration.

Disproportionate impact on BME firms

11. The Council refers to its response to the initial proposals (October 2006), as attached to this document. The issues raised by the Council then, in respect of the disproportionate impact of the proposals on BME firms and communities and with regard to diversity within the profession, remain highly relevant and of serious concern.

12. The current consultation document has been limited to only some aspects of the original consultation – this fetters the exercise and, the Council submits, risks making it inherently flawed. In addition, by limiting the ambit of consultation, the LSC fails to acknowledge that there may be areas of concern that are particular to BME or other "minority" group practitioners which are not susceptible to the "broad brush" approach that seems to have been taken.

13. BME firms tend to serve community(ies) based in a particular locality rather than providing a niche service in a particular area of family law and practice. As such, they are likely to be asked to conduct a large number of private law matters, both ancillary and children cases, the fees for which are so low as to render such cases unsustainable.

14. The reality for most BME firms is that they are located in areas where they are unlikely to be able to secure a sufficient quantity of privately funded work to "subsidise" the loss making LSC funded work. Even were they to be able so to do, such a cross subsidy from the private funded sector to the public funded sector must, in any event, be wrong in principle.

15. In addition, BME firms which, like many others, are often small or medium size practices, will not have the capacity to undertake enough of the more complex type of public law cases for the "swings and roundabouts" argument to apply. It is unrealistic for such firms to be expected to "expand" with all the increase of costs such staff and office expansion entails. Given that "cherry picking" is, in any event, not allowed, firms that serve communities with a demand for private law cases will simply not be able to survive.

16. The proposal for regional fees will disproportionately impact on BME firms. BME firms in the north are likely to be located in urban areas (ie Leeds or Manchester) where there are higher BME populations than in rural areas. Cases involving BME clients tend to have a more complex profile involving international elements, use of interpreters etc. It follows that BME firms in the north, receiving the lower fees, will be disproportionately disadvantaged both in relation to other firms in their region and BME firms in the south east.

17. Advocacy takes longer and is more complex where interpreters are needed and conceptual issues require careful explanation. In private law cases, where the advocacy fee is included in the fixed payment, this will again disproportionately affect BME firms who will have to spend a greater proportion of time than usual when at court with non English speaking clients.

18. The LSC indicates that 2.5 hours is sufficient time for an undefended divorce and expects the "legal input" to end after issue of the petition,

with the parties dealing with the special procedure themselves and relying on court bailiffs to deal with service problems. This is clearly unrealistic in any case, but more so in respect of any client who does not speak English or who has impaired literacy skills. The fees available will not cover the basic work involved, let alone dealing with issues such as service of papers abroad, obtaining foreign marriage certificates or proving the existence of a "custom and practice" foreign marriage. BME practitioners, likely to have a greater quantity of such cases, will again, suffer disproportionate disadvantage in terms of remuneration.

19. Across all types of work any case involving interpreters takes longer and requires more time. Where cases do not reach the "escape hatches" or where those escapes are not available, BME practitioners or practitioners dealing with BME cases, will effectively have to work longer and harder than counterparts dealing with similar, but English speaking, cases to earn the same fees.

20. Nothing in the current consultation document improves the position of BME practitioners and clients. They remain, as they did under the first round of proposals, the most disadvantaged subset of that already disadvantaged group, the legal aid lawyer.

Q 5 Do you agree with the proposal to pay only half the level 3 fee where the client is not involved throughout the case?

21. When clients do not give instructions during a case, it is very difficult to decide when or whether to discharge their certificates since often they reappear for the final hearing. It is a great advantage to due process for parents to be represented and the court often asks solicitors to keep open their certificates if they can so that the parents can be represented if they wish to play a part. Many parents in care proceedings have problems with mental health, and drug and alcohol addiction which lead to erratic instructions. The proposal to pay only

half the fee is likely to have an impact on this issue. Moreover, the costs of running cases are not evenly distributed throughout the procedural timetable, and are very specific to the roll a particular client has in a particular case. A BME parent may be in another country and not know about proceedings until a very late stage. Or they may have insecure or illegal immigration status and may, therefore, be fearful of coming forward and participating in proceedings until a much later stage. Representation of such a parent will be complex and onerous and be unfairly remunerated.

Q 6 Do you agree with the approach of having a single stage at level 3

22. This will make little difference. A genuine graduated fee which had reference to the type and complexity of a case or the number of hearings would be an advantage. Both the earlier proposal and this proposal are for fixed fees.

Q 7 Do you agree with the revised proposals for acting for more than one child in the same case?

23. Fixing fees on a case basis rather than on each certificate is a more rational way to fix a fee. It is not possible to say whether a 50% increase for more than one child is appropriate, although the Care profiling study is likely to be able to produce some useful data on this in due course. Complex cases with many children are likely to reach the escape clause. Presumably, where a second child is born during the proceedings the uplift will apply – the LSC paper makes no mention of this.

24. There are cases where two or more children follow the same pathway through the proceedings so that acting for two children is much the same as acting for one. In such cases there will be over-remuneration in that the additional fee will not be reflected in additional work. However, it is also common that the number of children very much adds to the complexity. In cases with 3 or more children there may be under-remuneration. Concerns about the adequacy of the fee may

make it more difficult for children's guardians or courts to identify a solicitor willing to act. At the time the solicitor is instructed it is unlikely that the complexity will be clear, so the solicitor will not be able to predict whether the escape clause will operate.

25. The LSC state that their data shows that 85% of cases concern 2 or fewer children. Taking the DCA's Familyman data for the courts in the Care profiling sample in 2004, the percentage of cases involving 3 or more children ranged from 15% to 34%. This is likely to reflect demographics, local authority practices and court practices relating to transfers. Cases involving BME families frequently involve larger sibling groups. It does suggest that solicitors acting for children may be faced with more multi-child cases in some areas.

Q 8 Do you agree with revised proposals for acting for more than one parent on the same case?

26. Representing both parents together arises generally when they are cohabiting and where there is no conflict of interest. It is not clear why there is an addition of 50% for acting for more than one child and 25% when acting for two parents when, for example, statements will need to be prepared for each of them. It is important that parents are separately represented when there is a conflict between them; domestic violence is a common feature in care proceedings which may be denied or minimised by parents. In BME families, cultural pressures experienced by many women mean that sometimes very serious conflicts of interest between the parents will not be readily ascertained at an early stage and the full extent of the conflict may only be capable of discovery by the process of separate representation.

Q 9 Do you agree with the definition of advocacy? If not what amendments would you suggest?

27. The separate payment for advocacy is an improvement in the scheme and should serve to increase the likelihood that directions hearings are conducted by solicitors. The fact that the preparation element is

included in the fixed fee will mean that solicitors will still be reluctant to do advocacy in contested cases which require significant preparation. Advocacy generally requires substantial extra preparation above and beyond that which is incurred simply in running the case (e.g. preparation of compulsory Practice Direction documents, skeleton arguments, notes for cross examination, and very often written submissions). Court ordered advocates meetings are also a compulsory requirement of the Public law protocol and they need to be properly remunerated. They may take place at court on the same day as a hearing, or they may occur in advance of it. We note that the Draft Regulatory Impact Assessment which accompanies the consultation document fails to provide any analysis of the impact on the remuneration levels for counsel.

Q 10 Do you agree with the proposed approach to payment where a client changes solicitors?

28. This will make it extremely difficult for someone wishing to change solicitors to find a solicitor to take on his or her case. The transfer of a case brings with it extra work in reading into the case and in administration. A solicitor in this situation would have to do 4 times the work of the standard fee in this case to escape. It there is still much work to be done then it would not be economical at all to take the case. Client choice is very important but is likely to be reduced by paying a half fee. If there is a change of solicitor for good reason, it may not be appropriate for that solicitor to receive the same as the solicitor who may have to do a lot of work that should have been done before.

Private Law

Q 11 Do you agree with this approach to calculating whether a case is exceptional?

29. Our views on fixed fees above apply also to private law cases. We are concerned that the fixed fees do not take account of cases where, for example, findings of facts hearings are necessary. It is accepted that

there is a need for greater care in contact cases which involve or might involve domestic violence and which should not be propelled to agreement. This was the subject of an inquiry conducted by the FJC in 2006. Its report, 'Everybody's Business' recommended that the President of the Family Division should issue a new Practice Direction on this subject. Drafting of that Practice Direction is currently underway. Furthermore, we have reason to believe that if the proposal that all the work currently paid to counsel in F2 and F3 private law work is now to be remunerated out of the fund paid to solicitors, at the rates set out in the consultation document, that counsel will cease to do the work

30. Disputed domestic violence issues frequently arise in contact proceedings and need to be resolved. The impact of the disputed allegations of violence on the children is likely to be more complex than in injunction proceedings. The proposals need to reflect this. Also in interim hearings the use of counsel is not limited as counsel is likely to be instructed as a case becomes more difficult or the solicitor is unable to attend. There may be a number of such interim hearings to, for example, review contact. All of that involves advocacy and it is often at these early hearings that crucial decisions have to be taken that affect the future direction of a case (eg interim residence hearings) which may determine the final outcome of where a child is to live. Factors such as frequently full court lists and witness availability may mean a long wait at court or the re-fixing of a hearing several times.

Q 15 Do you agree with the scope of children cases at Level 2

31. We are concerned (para 3.34) that the fee does not include provision for a solicitor to attend with his or her client on conciliation appointments. Applications to the court are made when it is not possible to reach agreement by negotiations; there is usually some significant difficulty although in a number of cases agreement can be reached with the help of the court and a Cafcass officer. Solicitors play a very significant role in the negotiations at court and it is often

important for clients to have independent legal advice before reaching agreement. If solicitors no longer attend conciliation appointments it is likely that the proportion of agreements reached at these appointments will drop.

32. When matters cannot be resolved through conciliation, the court gives directions for the case management of the proceedings, including consideration of the filing of evidence, expert and otherwise, the joinder of children, and the parameters and timing of the preparation of a CAFCASS report. These are all important matters clients cannot be expected to deal with in person. We fear that the lack of legal representation in the early stages of court proceedings will lead to a lack of early resolution and to delay in cases where resolution is not reached. One of the major problems in private law proceedings in some courts is the delay in getting appointments – this often raises problems for the non resident parent who wishes to see their child or, for example, have over night stays. The very limited service that is offered by these provisions at an early stage is likely to make this delay more acute to the prejudice of the welfare of children. Even when conciliation leads to agreement, there is often considerable skill required in the drafting of an order – a poorly drafted order can often lead to greater conflict and increased likelihood of further litigation.

Q 16 Do you agree with the concept of a higher fee where settlement is achieved at Level 2 in children cases

33. This suggestion entails the troubling hypothesis that solicitors do not take instructions but guide litigation in their own financial interest. This proposition is not accepted. Solicitors work towards agreement where they can, indeed a large number of cases are settled between solicitors in correspondence without the need for a court hearing. There is already substantial pressure on parties to settle issues at a first conciliation hearing; a financial interest should not properly be added to that. Indeed concern was expressed during the FJC enquiry (above) that too much pressure led to unsafe arrangements being included in

consent orders. It is important that pressure is not put on parents to agree, particularly where there is a fear of violence. It is reasonable for the judge to indicate what order would be made were the case litigated the court should be willing to hear the case where there are genuine issues to be decided. There should be no prejudice to solicitors if the parties cannot agree.

Q 19 Would there be any justification for splitting the level 3 children fee?

34. The private law fees seem extremely complicated already – with an advice and a first appointment stage under the controlled work provision; then a 3rd level under the fixed fee and then a further level for the final hearing. In many cases this will not represent where the burden of work falls. It is often the case that contested interim hearings on disputed facts bear the most work rather than cases developing on an incremental basis towards a final hearing. There may this be very little relationship between the work and the fee at the third stage which may make solicitors more reluctant to take private law children cases. The payment for advocacy is of concern because of the significance of interim contested hearings.

35. The fixed fee regime is unsuitable for cases brought under the 1985 Child Abduction and Custody Act which often start with a series of hearings in which specialist counsel are generally instructed. Similarly cases of child abduction emanating from non-Hague convention countries, where the inherent jurisdiction of the High Court within the vehicle of Wardship is employed, must remain for specialist lawyers alongside Hague Convention cases for LSC funding purposes. On average the High Court in England and Wales deals with approximately 150 incoming Hague Convention Child Abduction cases per annum, there are about 80 signatory countries to the 1980 Hague Convention on the Civil Aspects of child abduction. The UK has a wide ethnic diversity with a population of immigrants who come from countries that have not signed the Hague Convention. Not to offer

people from certain ethnic backgrounds the same legal support as others, simply because their ethnicicity is not related to a group of 80 countries would be unfair and discriminatory. In these cases there should be parity with the funding for Hague matters, where not only is the child made a Ward of the High Court at the outset of an application but also secondary and further relief against Government agencies, the Foreign and Commonwealth Office and declaratory relief are all made within that same Wardship jurisdiction.

Q22 Do you agree with the proposed approach to payment where a client changes solicitor?

36. We have dealt with this issue in relation to care proceedings and the same argument applies.