Public Law Family Fees consultation – Response of the Family Justice Council

Full cost recovery: basis of the policy

1. The Family Justice Council is concerned by the premise on which the consultation is based and, therefore, does not seek to confine itself to answering the questions posed in the paper. It wishes to record its concern that the consultation fails to address the key issue as to why the fees in public law children cases should be set to cover the full costs. The Council is aware of the consultation issued on Civil Court Fees, CP 5/07 in which the policy of full costs recovery was discussed but it notes the statement on page 38 of that document under the heading:

> **"Medium Term Objectives**
> "To agree and deliver financial objectives for family business for the 2007 spending review period and beyond. The SR04 66% target was based on achieving 100% cost recovery (net of Remex) for most non children private law family fees. **Different policy considerations may apply to public law care cases, adoption, domestic violence and private law children cases. For example, it is arguable that domestic violence injunctions should not be a fee-charging service at all (because of their urgency and the vulnerability of the applicant)".**

2. This passage leads the reader to expect that the principle of full cost recovery would not necessarily apply to public law proceedings but the current consultation is predicated on just that principle. "..to increase most fees for public law family cases – fees that are paid by public bodies, not individuals – to full cost price levels during 2008-9". The Council suggests that consultation on whether "different policy considerations" should apply has not taken place and should have done so prior to the issue of this document.

3. Public law cases are brought to court to protect the most vulnerable people in our society – children who cannot protect themselves. These are

children, often from the poorest sections of the community, who have been harmed or who are at risk of harm in abusive and often dangerous situations. They need protection which must come from the Children's Services Departments of local authorities. The Council suggests that this should be considered on a similar basis to the criminal courts, which do not operate a principle of full cost recovery, since they exist to protect society. The principle can be understood within the context of civil proceedings which seek to resolve disputes between parties but public law family proceedings are taken for the protection of children not voluntarily, or in protection of the litigant's own interests, but pursuant to statutory obligations contained in the Children Act 1989.

Timing

4. The closing date for the consultation is the 11th March 2008, but the operation of the new fees is intended to begin from April. This raises concerns about the consideration of the responses to this consultation and whether there will be time to reflect on them and make any alterations considered necessary. The Council understands that the timing of the Comprehensive Spending Review necessitates decisions about allocation of money being made but it has concerns that there is a perception that decisions have already been made. There has been a reduction in the HMCS budget in anticipation of increasing the fees to full cost recovery levels.

The disincentive to issue care proceedings in appropriate cases

5. The Council accepts that local authorities will not, intentionally, change policy on care proceedings as a result of court fee increases and that the Directors of Children's Services and senior social workers will endeavour to continue to provide the leadership needed to discharge their statutory duties in difficult circumstances. However, the Council believes that there is a real risk that the fee increases would have a number of ***unintended*** consequences. These include:

- increasing the costs of initiating care proceedings may influence more junior social workers in their recommendations on the timing of proceedings;

- social work teams may feel under more pressure to recommend s.20 accommodation for children when it is not appropriate as it is a far cheaper option. Correspondingly, some parents may be pressured by the local authority to agree to their child being accommodated, without the local authority having proved the thresholds necessary to warrant compulsory state intervention (s.31, s.44 CA)[1],and;
- rather than incur the costs of care proceedings, local authorities may seek to put more pressure on family members to care for children without a care order, or adequate support, being put in place, and when their suitability to do so may be borderline, and/or their willingness to do so lukewarm, with the result that children may be left vulnerable[2].

6. It is difficult to escape the conclusion that local authorities will face greater disincentives to initiating court proceedings in appropriate cases as a result of these additional costs. Local authorities already face challenging budgetary problems. Sums allocated additionally to local authorities will not be "ring fenced". The Council understands the reluctance to impose restrictions on authorities about how they must spend allocated funds but is concerned about the practical implications of this. Many local authorities are already under funded and may choose to spend sums of this magnitude in other ways. Sums allocated for this purpose will, of necessity, have to be based on previous years' figures but it is known that numbers of proceedings can fluctuate from year to year, which may result in a shortfall of funds. Reports already received by the Council suggest that in some areas allocated funds will be insufficient to cover the predicted number of applications.

[1] This practice has been documented - see J. Hunt and A. McLeod, The Last Resort: Child Protection, the Courts and the Children Act (1999) at p.35-42.)

[2] Recent research already confirms that many family and friends carers, who are often significantly more impoverished, more likely to be living in overcrowded accommodation, in worse health and are older than unrelated foster carers, receive neither financial nor practical support. For example, such carers are significantly more likely to be left alone to manage contact arrangements despite the considerable strain it can place on such placements to the potential detriment of the child. (Farmer E and Moyers S (2008 forthcoming) *Kinship Care: Fostering Effective Family and Friends Placements*, Jessica Kingsley).

7. Indeed, it is difficult to avoid the suspicion that the proposals are actually designed, at least in part, to reduce the number of applications for care orders when the paper refers to the increased fees as an “incentive to use services economically and efficiently” (p9).

8. There is much anecdotal evidence to suggest that some local authorities are already slower to commence proceedings than the courts would wish to see. This is not because of the current level of court fees, but because of the likely total cost of the proceedings involving residential and community-based assessments (which local authorities have recently become solely responsible for following their removal from the scope of legal aid), psychiatric and psychological assessments, independent social work reports etc. Another relevant factor is that local authorities face difficulties in recruiting and retaining good quality social workers and lawyers to deal with the demands of child protection work. If the cost of proceedings is likely to be increased by a £4,000 application fee it seems likely that this will place further obstacles in the way. The consultation paper suggests, at p9, that “Full-cost court fees will mean, however, that the cost to authorities of court proceedings and alternative social services intervening are set on a comparable basis”. However, the Council would contend that legal proceedings will always involve various additional costs over and above consensual interventions.

9. There is anecdotal evidence to suggest that some care centres experience a fall off in applications during the last two or three months of the financial year followed by a surge in applications in April and May. It is believed that this is a direct result of the budgetary difficulties faced by local authorities. The Council would suggest that research into the true costs of protecting children is required, of which court fees is a minor part.

The perverse incentive hypothesis

10. The paper suggests that currently there may exist a “perverse incentive” which influences local authorities to pursue care proceedings “prematurely and unnecessarily” when consensual interventions may be more appropriate. The Council rejects the assertion that local authorities are prone

to issue proceedings “prematurely” or “unnecessarily”. The Council would be interested to see if HMCS can cite any evidence in support of this assertion.

11. It is the combined experience of Council members that local authorities simply do not view care proceedings as an alternative to other social work intervention. With the advent of the new Public Law Outline, save in cases of genuine emergency, such as serious non-accidental injury, the local authority will have to demonstrate that they have exhausted all realistic forms of family support before issuing proceedings.

12. At a recent JSB training event, over 50 judges, mainly from the Circuit Bench, and mainly very experienced in trying public law cases on a day to day basis were asked two questions:

- Do any of you have any experience of care cases being brought prematurely or unnecessarily? **Not a single judge had such experience**.
- Do you have experience of cases regularly coming before you which have been inappropriately delayed by poor decision making by local authorities? **Every single judge had such experience**. Some commented upon cases where delays had run into years.

13. Of course, the judiciary rarely have direct knowledge of the care cases which should have been, but which were never, instituted. However, the tragedies revealed in public inquires such as that relating to the death of Victoria Climbie provide an acute illustration of what can occur when local authorities fail to intervene robustly when a child is suffering harm.

14. That unscientific poll merely reflects widespread interdisciplinary professional concerns that local authorities tend to take too long to initiate care proceedings rather than tending to initiate them prematurely. The delays in doing so already result in children drifting in s20 accommodation or being at risk of continuing significant harm within their family of origin, particularly in those cases which are perceived to have a lower level of urgency. The

Council is particularly concerned about the impact upon chronic neglect cases.

15. The Council is also concerned as to the detrimental impact upon parents whose access to legal assistance is limited until proceedings are actively contemplated or being brought[3]. Early legal advice for parents was a key recommendation of the Review of Child Care Proceedings and is central to the pre-proceedings stage of the Public law Outline. If local authorities make more use of section 20 arrangements rather than initiate court proceedings, parents will be denied the opportunity of adequate legal advice and thus their understanding of their rights, and the working partnership with the local authority, could be undermined. Moreover, the chances of cases being resolved at an early stage will be vastly reduced.

Data Quality Issues

16. The Council has concerns about the quality of the information relied upon to make the calculations for funding local authorities to meet the new pressures of the proposed fee increases. The figures collected for the numbers of applications made each year are substantially larger than the 11,000 quoted in the Care Proceedings System Review (2006) and are open to dispute. Despite the restrictive nature of the Allocation Order 1991, the *Judicial Statistics 2006* indicate that 4,078 care *applications* and 310 supervision applications – total 4,388 were made *in* the County Court. This would suggest that local authorities are making approximately 1/3 of all s.31 applications to the county court – this figure has no credibility with local authority lawyers and judges handling care cases.

17. If the number of county court applications recorded in *Judicial Statistics* is wrong, this is most likely because county court staff enter applications into Familyman incorrectly, indicating cases have started in the county court when they have transferred from a magistrates' court. A check in one court during

[3] Level 2 and 3 of the new public funding arrangements

the *Care Profiling Study* found that only 30% of the cases recorded on Familyman as 'county court starts' had started in the county court. It was also noted that there were very wide variations between courts in the proportion of cases recorded as county court starts from 5% to 25%, see table 1.

Table 1: Familyman Data supplied to care profiling project

year	sheet	CC starts	cc starts children	total cases	total children	% CC Starts cases
2004	Bristol and Taunton	7	12	123	202	5.6
	Leicester#	5	14	44	96	5.2
	Reading	22	46	87	163	25.2
	Sheffield	37	63	213	351	17.3
	Leeds*	30	44	254	433	11.8
	Barnet	5	6	34	69	14.7
	Coventry	6	11	61	128	9.8
TOTAL		112	196	816	1442	13.7

* 3 out of 10 cases checked were CC starts

3 out of 3 cases checked were CC starts

18. The Council understands that data quality checks are not undertaken when using Familyman data for the *Judicial Statistics.* The comments on the tables only note data quality issues with FPC data but not with county court data. Since data are collected separately from the magistrates' court database (Tracker), it seems likely that cases which have been transferred but are recorded as county court starts will have been counted twice. This would indicate a further problem with the *Judicial Statistics* and an inflated figure for care applications overall. The inaccuracy of the Judicial Statistics in relation to the number of care applications has already been brought to the attention of the MoJ in the *Care Profiling Study* report.

19. The *Judicial Statistics* indicate that in 2006 there were 13,421 applications for care orders and 938 applications for supervision orders -

14,359 in total. These cases are classed together as care proceedings – applications under Children Act 1989, s.31. The Cafcass Annual Report 2006-7 (p.5) indicates that there were 6,791 requests for the appointment of a children's guardian in care proceedings in the year 2006-7. A request reflects a case – all the child parties will normally have the same guardian. If there are 1.75 children per application (figure based on *Care Profiling Study*) this would suggest 11,885 children subject to a care application. On this basis there would seem to be 2,574 excess care/supervision applications included in the *Judicial Statistics.*

20. DCSF only records the number of care orders not the number of applications, and only publishes the number of children subject to a care order on the census date. As part of the *Care Profiling Study* DCSF statisticians were asked to establish the number of new final care orders made each year from 2004 -2006. The figures were: 2004 - 6200; 2005 - 5500; and 2006 - 5000. In the Care Profiling sample 56.6% of applications resulted in a care order. Applying this proportion to the number of orders in the DCSF database indicates figures of 11,000 and 8,800 applications for the same years. These figures do not include supervision orders. It should be noted that neither the MoJ nor the DCSF collects data about the number of applications by each authority. If HMCS has based its calculations on any other data, the Council would be grateful for clarification as to how the calculations for compensating local authorities have been done.

The Public Law Outline

21. On page 9 of the consultation document, reference is made to the introduction of the Public Law Outline (PLO):

> "The move to full cost fees in April 2008 is timed to coincide with the implementation of reforms designed to make the procedure for care cases speedier and more cost effective. This provides an opportunity to ensure that the fee-charging structure is aligned with and supports the new procedure."

This suggests that HMCS will be unable to predict the effect of the new fee-charging structure on the PLO. When the previous Protocol for the Judicial Management of Care Proceedings was implemented there was a drop in the number of care applications; early indications from the pilot areas suggest that the same appears to be true of the Public Law Outline. The proposed fee increases being implemented simultaneously will be a further disincentive to local authorities to issue care proceedings, leaving children potentially vulnerable and parents unable to access adequate legal advice or challenge the allegations of the local authority in court. The Council suggests that it would be more prudent to wait until the new procedures have had time to bed down before changing the charging structure. The Public Law Outline is independent from the proposed fee changes. Linking their introduction to it is likely to confuse more than it clarifies.

Questions:

(If the Council considers it appropriate to comment on the Fee Structure Options)

1. **Given that fees need to be set to cover the full cost, do you agree that a single application fee is not the best approach?**

Answer:

A single fee depending on the level set could provide an incentive for the courts to be more efficient in the handling of cases. There are current processes which add to the costs unnecessarily. For example, the need for repeated renewal of ICOs is based on the expectation that a case will be completed in 12 weeks. It would be far more realistic to accept that an ICO will last from the point when it is first made to the final hearing, and date it accordingly, cutting out processes which do not work well to protect rights. *This would require a change in primary legislation.*

Q2. Do you agree that a variable fee based on the assessed quality of case preparation is likely to be impractical?

Yes. The same approach is not taken in each court. Even though the new system identifies specific documents to be provided, judges will differ in the extent to which they are satisfied by the content and style of such documents.

Q3. Do you agree that there should be a "pay-as-you-go" structure for care proceedings fees?

No.

Q4. Do you agree that the proposed structure strikes the right balance between simplicity and ensuring that paying authorities only pay for what they get?

If you do not agree, please explain why and indicate what alternative structure you would propose?

The Council doubts that HMCS has adequate information, at present, on which to make sound, evidence-based decisions on this. It should be noted that the published *Judicial Statistics* appear to misrepresent substantially the number of applications made to the County Courts and, as a consequence, to double count the number of applications made. A further consequence of this is likely to be inaccuracy in the calculation of the average costs of proceedings.

Page 16 of the consultation paper states:

> 'Local authorities will broadly pay for what they get, and there will be an indirect incentive to ensure good early case preparation.'

Again, the Council doubts that HMCS has sufficiently robust management information on which it can currently base such a judgment. There are substantial differences in the approach of different courts and different judges which do not appear to relate to the way in which local authorities prepare cases. It is likely, at least initially, that some courts will set an IRH whilst

others would handle an identical case without an IRH, dealing with issues at an additional appointment or at a FH. These differential fees will not be spread across all local authorities but fall disproportionately on those local authorities whose cases are dealt with by the less efficient courts.

It has already been observed that different local authorities experience the same delays in their local care centre regardless of the different levels of expertise in their social work and legal teams. It is also known that within large care centres some judges are better at managing cases than others. This amounts to something of a lottery. Before introducing such a system HMCS should be able to demonstrate to local authorities that it can deliver the equivalent level of service in all court areas and at all levels of court.

Q5: Do you agree with the proposal on additional fees? If not, why not?
No, for all the reasons given above.

Q6: Do you agree with the proposal to retain a single application fee, rather than an incremental fees structure, in adoption cases? If not, please explain why and indicate what alternative structure you would propose.

Where a placement order is dealt with during care proceedings, the additional costs relate to the complex processes set by Parliament and HMCS. Given that the policy is to ensure that children who require adoption are adopted as soon as is practicable, the fees structure should support this by requiring no additional fee for cases where placement and care are dealt with together. This could be compensated by setting a slightly higher figure for those cases where placement is dealt with separately. If this were done it would be essential to ensure that adequate time was available to deal with cases at a single hearing. No additional fee should be paid because the judge finds it necessary to adjourn because of lack of time to complete the hearing.

Equality Impact Assessment

The consultation paper states:

> ‘Government policies must be assessed specifically to ensure that they do not discriminate against anyone on the grounds of: race; disability; gender; sexual orientation; age; religion or belief; and caring responsibilities.
>
> These proposals do not affect fees charged to individuals. There is therefore no adverse equality impact. ‘

The Council has to take issue with this assessment because it takes an overly narrow approach to discrimination. It is likely that cases involving parents who do not speak English, or have a learning disability such that they require the services of an interpreter or representation by the Official Solicitor, will be longer and more complex than other cases without such factors, and that local authorities will incur higher fees in processing these cases through the courts. The majority view on the Council is that this risks creating incentives for local authorities to seek to manage these cases without proceedings to the potential detriment of parents, who may be pressured to agree arrangements, or to their children who will remain in less secure placements, rather than adoption, because compulsory measures have not been taken. In relation to non-English speaking parents, the issue is likely to be more common for some local authorities than others. In the Council’s view, these proposals are indirectly discriminatory in terms of race, age and disability.