



Association of **Lawyers for Children**

Promoting justice for children and young people

**Response of the Association of Lawyers for Children
to the Consultation on Reforming the Legal Aid
Family Barrister Fee Scheme**

Name: Association of Lawyers for Children

Details: The ALC is a national association of lawyers working primarily in the area of public child care law. It has over 1200 members, mainly lawyers who act for children, parents, other adult parties, or local authorities, as well as other legal practitioners and academics. It also has associate members such as Children's Guardians, social workers and other professionals such as medical staff. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of England and Wales, including London, Birmingham, Manchester and Leeds, as well as in shire counties and small rural areas. Several leading members are specialists who have over 20 years experience in child law, including local government legal services, and several hold judicial office.

The Association exists to promote access to justice for children and young people within the legal system in England and Wales. Within that framework, it lobbies in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice and lobbies against the diminution of such mechanisms; is a provider of high quality legal training focusing on the needs of lawyers concerned with cases relating to the welfare, health and development of children; is a forum for the exchange of information and views in relation to the development of the law in relation to children and young people; and is a reference point for members of the profession, Governmental organisations and pressure groups interested in the practice of child law and the development and practice in relation to cases involving children.

The Association also provides regular training for lawyers, social workers and medical experts with the aim of promoting good practice and a multidisciplinary approach to access to justice for children.

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RESPONSE

Introductory Comments

1. The analysis that underpins this Response, and the meat of the ALC's position on this consultation, is set out within the paper produced by the ALC entitled "Advocacy Fees – Preliminary Thoughts of the ALC", dated 3rd August 2008, and prepared for the Family Representative Body meeting that took place on 4th August 2008. For ease of reference, it is appended hereto.

2. In summary, that paper:
 - (a) sets out some fundamental principles which ought to apply to any future advocacy scheme (paras 4-7);
 - (b) warns that any advocacy scheme that does not fully and properly account for the enhanced levels of hearing preparation demanded by the Public Law Outline will inevitably doom that important reform to failure from the outset (paras 8-19);
 - (c) examines the issue of comparing solicitor and barrister advocacy rates, rejecting the methodology used by the FGFS consultation paper to found its general assertion of significant difference between the rates, and suggesting a comparability of the rates in more complex cases (paras 20-28);
 - (d) addresses the issue of increased spend on counsel, suggesting that the State is in effect now paying more for a greater and enhanced service (paras 29-31);
 - (e) in the event of there having to be reductions in the amounts to be paid to counsel, makes some suggestions about where such reductions should more fairly and sensibly be made (paras 32-41);
 - (f) addresses the question of affordability (para 42);
 - (g) deals with the longer term picture, expressing serious reservation (especially from the perspective of the Bar) about any scheme based on a single fee for advocacy, and making a suggestion of its own (para 43-50).

3. Whilst this is not the time to deal in greater depth with the longer term picture, it should be stressed that the unified advocacy scheme outlined at Annex B to the Preliminary Thoughts paper arises only in the event of a decision taken to construct something entirely new. The ALC does not suggest that the Family

Graduated Fee Scheme cannot work, nor indeed that, with appropriate revision, guidance and monitoring, it could not work very effectively. Rather the intention was to show that, if required, a viable alternative scheme could be created which was far more consistent with:

- (a) the principle of equality of pay for equality of service (when properly defined – see the Preliminary Thoughts paper at para 4), and
 - (b) the provisions of section 25 Access to Justice Act 1999,
- than any scheme based on a single fee per hearing or per matter.

4. Whatever scheme does pertain in the long term, whether the FGFS or something new, it is fundamental that it should apply to both barristers and solicitors providing advocacy services.

Further Comments on the Consultation Paper

5. The following further comments are made on the detail of the consultation paper.
6. Para 3.30. A minor inaccuracy in the consultation paper's description of the FGFS. The total fee is not increased by 33% in respect of *all* work carried out while the proceedings are in the High Court. The High Court uplift does not apply to the special preparation fee, save where special preparation is certified by reason of the bundle exceeding 700 pages (in which event it is also deemed to be a court bundle payment)..
7. Para 4.8. Table 1 is interesting for a number of reasons:
 - (1) It is interesting to note that, whereas the *total* year-on-year rises in FGF spend are for the last three years stated to be 8.5%, 3.7% and 4.4%, *in public law cases* (the largest FGF category) the rise is less and has tailed off (the annual rises in public law over the same period are 6.1%, 3.5% and 1.9%).
 - (2) Especially in terms of predicting likely future costs, it would be helpful to know the breakdown of private work as between the categories of family injunctions, private law children and ancillary relief:
 - (a) Now that domestic violence has in effect been criminalised, it would be surprising if category 1 work did not decline markedly over the next few years, with injunctions dealt with far more in the criminal courts.

- (b) The whole thrust of recent State policy in the private law children field, heralded by the January 2005 *Next Steps* White Paper, has been to divert cases away the court arena and, where possible, to deal more quickly and more cheaply with those that reach it. It would be surprising too if that policy did not have an impact on the amount spent on private law children work in the coming years.
- (c) It would be very useful to know how much of the spend on ancillary relief work (and indeed injunction and private law children work too) is secured by way of a charge on matrimonial property, therefore recoverable in due course and accordingly not a long-term cost to the public purse.
8. The points above are raised because advocacy costs cannot be considered in a vacuum. They are inevitably influenced by the changes affecting the work in which the advocacy service is provided. The implementation of the Human Rights Act 1998 turned every one-file case into a two-file case, and doubtless contributed to the more marked rises in FGF spend in less recent times. Conversely, it is fanciful to believe that the changes noted above at para 7(2)(a) and (b), when taken together with the impact of the PLO and the widely-reported slow-down in the issue of care cases, will not have some effect on the future spend on the FGFS.
9. It should be stressed that barristers working under the FGFS, like their solicitor colleagues undertaking advocacy, do not feel that they are earning more per hour than they were five years ago. The demands of the work as a whole and of individual cases have grown markedly over that period, and it is felt strongly by both barristers and solicitors that the rates of remuneration have not kept pace with that increased burden.

Reductions in Barrister Payments under the FGF Scheme

10. Within its Preliminary Thoughts paper, the ALC urged the MOJ/LSC to be extremely cautious about any reductions in barrister fees under the FGF Scheme, and that point is repeated here.
11. If, however, there are to be reductions, then far more careful thought needs to be

given to where those reductions should be made.

12. If the touchstone is value for money and the aim is to perform an exercise preparatory to a harmonisation of advocacy rates between barristers and solicitors, then:
 - (a) it becomes essential to identify which parts of the Scheme are working and best securing value for money and which that are not;
 - (b) it has to make sense, and to be in the public interest, to identify where there are gaps in the rates between solicitors and barristers and to look to narrow any such gaps where they exist/exist most;
 - (c) it is necessary to gauge how the work requiring the advocacy service is likely to develop.
13. None of the three options suggested by the consultation paper will achieve an end consistent with those objectives. They represent something of a blunderbuss approach to a problem that requires addressing with greater insight and precision.
14. The three suggested options will either keep the existing flatness of the FGF Scheme as it is, or, in the case of Options B and C, make it flatter still. That is not an outcome consistent with the public interest which seeks to ensure proper value for money for the advocacy service actually provided.
15. More focused alternatives are suggested at paras 32-41 of the ALC's Preliminary Thoughts paper.
16. Furthermore, the FLBA has, subsequent to the production of that paper, announced that it will be undertaking a survey of its members geared to providing statistical evidence about the workings of the FGF Scheme.
17. It would doubtless make sense for the MOJ/LSC to consider the results of that research before deciding what, if any, changes are required to the FGFS. That would also be an opportunity to consider how the guidance to and monitoring of the FGFS can be improved. It is perhaps unsurprising that it is where the guidance helps least, in the realm of special preparation where there is no guidance on what

normal preparation should be, that the overspend has been greatest.

18. By that stage too, the first bank of PLO cases will have been completed and appropriate regard can be had as to how well or otherwise the FGFS reflects the reality of practice under it.
19. The ALC remains of the view, set out within the Preliminary Thoughts paper, that, if the LSC and MOJ remain determined to reduce the amount spent on counsel, it would doubtless be a better use of time all round and produce a more sensible and equitable result if they were to indicate the level of savings desired, and then for the means by which those savings can be secured to be agreed between the Bar representative bodies and the LSC/its statistician.
20. Insofar as the ALC seeks to comment on the questions raised by the consultation paper, it has done so in the round above and within the appended Preliminary Thoughts paper.
21. The short but telling point is that, given the short and long-term aims of the consultation paper, a better, more informed and more appropriate solution can be found than any of those suggested by it.

8th September 2008



Association of **Lawyers for Children**

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**Appendix to the Response of the
Association of Lawyers for Children
to the Consultation on Reforming the Legal Aid
Family Barrister Fee Scheme**

“Advocacy Fees - Preliminary Thoughts of the ALC”

Dated 3rd August 2008

ADVOCACY FEES - PRELIMINARY THOUGHTS OF THE ALC

Introduction

1. The purpose of this short paper is to share at an early stage with the LSC, the MOJ and fellow stakeholders the preliminary thoughts of the Association of Lawyers for Children, as the largest stakeholder children lawyer organisation with both solicitor and barrister members.

2. The purpose of this paper is not to plead the case for greater resourcing of the family justice system – the ALC’s views on that issue are well-known – but to make some (hopefully) constructive comments on publicly funded advocacy fees (particularly regarding care work) that may assist the meeting taking place on 4th August, the current Family Barrister Fee Scheme consultation and the formulation of the broader advocacy consultation to be launched in September 2008.

3. In summary, this paper:
 - (a) sets out some fundamental principles which ought to apply to any future advocacy scheme;
 - (b) warns that any advocacy scheme that does not fully and properly account for the enhanced levels of hearing preparation demanded by the Public Law Outline will inevitably doom that important reform to failure from the outset;
 - (c) examines the issue of comparing solicitor and barrister advocacy rates, testing the general proposition of significant difference that lies at the heart of the current FGF consultation paper;
 - (d) addresses the issue of increased spend on counsel, examining whether in effect the State is now paying more for the same service or is in fact now paying more for a greater service;
 - (e) in the event of there having to be reductions in the amounts to be paid to counsel, makes some suggestions about where such reductions should more fairly and sensibly be made;
 - (f) addresses the question of affordability;
 - (g) deals with the longer time picture, expressing serious reservation (especially from the perspective of the Bar) about any scheme based on a single fee for advocacy, and making a suggestion of its own.

Fundamentals

4. The ALC endorses the principle of equality of pay for equality of service, on the understanding that the concept of equality of service is properly understood. Differentials in pay should not be reflective of professional labels, but of what actually makes the difference to the level of service required in practice – the kind of work involved, the complexity of that work and the experience/expertise of those required to provide the level of service appropriate to the case.
5. As a particularisation of that principle, any advocacy scheme should be broadly consistent with the allocation/distribution of work between tiers of court. In the case of care work, this is currently governed by the Draft President’s Guidance on Allocation, which in broad terms provides for the High Court to deal with the most complex cases, the FPC with the more “straightforward” form of public law cases (para 27) and the county court with the work in between.
6. Furthermore, in care work, it is vital that any advocacy scheme should be consistent with and work to support the Public Law Outline and its associated reforms. The ALC respectfully endorses the observations of the President of the Family Division, who, at the time of the PLO’s publication, commented that “its success will largely be dependent on the co-operation and expertise of the dedicated specialist lawyers who will operate it”. It endorses too the observation of Lord Justice Hughes in his recent address to the ALC that “good advocates and litigators save money, they don’t cost money” and the implicit corollary that inexperienced, inexpert advocates are a burden not a benefit to the system. Thus, it would be wholly counter-productive for any advocacy scheme:
 - (a) to risk losing the advocacy experience and expertise that currently exists;
 - (b) not to reflect one of the most explicit purposes of the PLO – namely to reduce the amount and length of court hearings through better and greater levels of case preparation.
7. Finally, the ALC expresses the view that the primary purpose of any advocacy scheme must be to remunerate advocacy, not to make up any perceived shortfalls in the level of non-advocacy remuneration.

The Public Law Outline and Case Preparation

8. The MOJ is in effect a joint sponsor of the PLO. It is therefore taken as read that it endorses the formula that lies at its heart – that, through better and greater levels of case preparation, so the amount and length of court hearings will reduce.
9. It is assumed that the MOJ equally recognises the converse - that inadequate case preparation stymies the judicial ability to case manage and resolve issues effectively, and inevitably leads to further and repeated hearings and thereby longer and costlier proceedings.
10. The concept of early and focused issue identification lies at the heart of both the PLO and Experts Practice Directions.
11. That concept by necessity recognises that proper hearing preparation (both for case management and contested hearings) lies in far more than reading the papers, taking instructions and preparing factual statements.
12. It is vital that the advocate, whether solicitor or barrister, needs to step away from the detail of the case, identify the issues that it actually raises, and consider how those issues can and should be resolved. That process inevitably involves:
 - (1) time for reflection;
 - (2) time for legal research (and legal research is not something pertinent only to the final/contested hearing - case management cannot be undertaken effectively without an understanding of the large and growing body of law that informs issues as varied as disclosure and special measures);
 - (3) time for other forms of research (for example of diversity issues);
 - (4) time for enquiry (note for example the various new steps and enquiries that now need to be undertaken under the Experts Practice Direction);
 - (5) time for consultation (with other advocates/any unrepresented litigants as well as clients) (note the emphasis on co-operation throughout the PLO Practice Direction);
 - (6) time for the preparation of the paperwork required by the PLO Practice Direction and viewed as being fundamental to the court's ability to identify and resolve the live issues in the case (again it is important to recognise that

13. By way of explanation for removing preparation rates from the advocacy scheme for solicitors, the LSC has said that the non-advocacy fee includes an element referable to hearing preparation, such having supposedly been worked out by reference by the cost of case preparation in previous years. The research that it commissioned now appears not to be able to bear this out (see below). But, even if the non-advocacy fee did in full cover the case preparation of previous years, it should be obvious to the reader of the paragraphs above why this is an inadequate basis upon which to proceed for the next two years.
14. What is important is not what has been expended on hearing preparation in the past but what ought to be expended on hearing preparation in the future, under a new a regime which emphasises it and sees it as the route to shorter and cheaper proceedings.
15. Whatever the merits or demerits of the settlement reached by the MOJ, LSC and the Law Society, it is perfectly plain that it did not take sufficient account of the requirements of the PLO and its associated reforms, and equally plain that it should not simply be allowed to undermine them.
16. The PLO cannot succeed on the basis of no or even pre-existing levels of preparation, and, absent a change in approach, two outcomes are inevitable:
 - (1) deprived of the very glue that holds it together, the PLO will fail;
 - (2) the amount of hearings will simply increase, meaning that any saving (through non-payment of preparation) will be dwarfed by increased expenditure on advocacy.
17. Consequently, as a matter of urgency, the MOJ and LSC need to rethink the decision not to fund preparation as part of the solicitor's advocacy fee. It is a false, entirely counter-productive saving.
18. The reintroduction of preparation charges could then usefully be accompanied by a sliding scaling of advocacy charges such that, in the interim/case management

stages of the case, the first X amount of advocacy hours done on the case would be payable at a higher rate than normal, the next Y amount of advocacy hours would be payable at the normal rate, and any subsequent Z amount of advocacy hours would be payable at a rate below the normal. Such an approach would:

- (a) properly support the PLO's emphasis on and expectation of greater work in the early stages of a case;
- (b) provide a disincentive against further hearings;
- (c) provide an incentive for fewer hearings in the interim stages of a case.

19. Of course, dealing simply with an excess of hearings by remunerating the later ones at a lesser rate simply deals with the symptoms and not the root cause. The Care Proceedings Review provided the diagnosis, the reforms that it spawned the cure. It is now a matter of ensuring that the cure is and can be properly administered.

Comparing Existing Barrister and Solicitor Rates

20. The current FGF consultation paper proceeds on the premise that "currently there is a significant difference between the rates for advocacy paid to solicitors and those paid to barristers under FGFS" (para 4.2).

21. Insofar as this assertion is intended to be of general application (as reflective of more complex as well as less complex work), it is not accepted. It is born of a methodology (see para 4.3 and footnote 3) that is self-evidently flawed - because it does not properly compare like with like and does not take sufficient account of the inherent structural differences between a scheme based on hourly remuneration and one which is in large part not as graduated as it purports to be.

22. The methodology uses at its starting-point an analysis of solicitor advocacy in care cases. There is no upfront indication as to whether that is advocacy in the FPC, county court or High Court, for parents, for guardians or for others, but it is assumed that the analysis creates on that side of the equation a figure for the average solicitor advocate case. If so, that average figure will reflect the current reality that solicitors undertake the vast majority of care advocacy in the FPC, but will act far less so (certainly in trials and for parents) in the county court and even

less so in the High Court (with such work undertaken instead by counsel). That solicitor advocacy figure is then compared with a barrister advocacy profile, created by assumptions derived from barristers' existing conduct of (on average) more complex work. In other words, the LSC's methodology is comparing on one side the price of conducting on average less complex work with on the other more complex work. Further, the FGF Scheme includes elements designed, properly, to remunerate counsel for the reading and preparation which is an essential requirement for proper advocacy. It is unclear whether the analysed solicitor advocacy figure includes an element for preparation, and if so, how that has been calculated (it is understood from information shared by the LSC at the recent Civil Contracts Consultative Group meeting held on 30th July 2008 that an attempt to analyse a sample of public law children's cases to establish what time was spent by solicitors in preparing for advocacy was not successful).

23. An alternative, it is suggested, more reliable and accurate method of comparing the rates across the board would be to take the hours actually undertaken by counsel, to price them as though they were undertaken by a solicitor advocate and then to compare the resultant solicitor advocate figure with the FGF fee.
24. There are two worked examples appended to this paper (see Annex A), using that methodology, comparing and contrasting the position at final hearings in more and less complex cases.
25. The first conclusion that is readily apparent from those examples – and which is in any event evident from the most basic working knowledge of the FGF Scheme – is that, as a scheme, it is far too flat, insufficiently sensitive to complexity and experience. While the scheme provides for a 33% uplift on High Court work, the differentials in respect of FPC and county court work are far too small. For example, the barrister brief fee (before add ons) is the same for a half day final hearing in the FPC as it is for a 9 day final hearing in the county court, while many of the add ons will be able to be claimed in the former scenario as well. This produces the inequitable result of the State remunerating less complex work at a greater pro rata rate than more complex work. In the working examples, the less complex limited issue FPC case, which would be likely done by a more junior

barrister, is remunerated at the rate of c £105 per hour, whereas the more complex county court case, undertaken (at it should be) by a more senior barrister, is done at the rate of c £85 per hour (or c £80 per hour for the hearings alone). If one bears in mind the likely private client charge out rates for more junior and more senior barristers (c £100 per hour for the former and c £150 per hour for the latter), the corresponding rates of pay are even harder to justify.

26. The second conclusion is an inevitable consequence of the first – that the differentials in solicitor and barrister remuneration will vary according to the work involved. As the examples illustrate, in terms of care work covered by the FGF Scheme, the less complex the case, the greater the differential in pay between solicitor and barrister advocacy. At the less complex end of the spectrum, there is likely to be a significant differential favourable to the Bar, but, with the more complex case, the rates are comparable and may even favour the solicitor.
27. Thus the assumption of an imbalance between barrister and solicitor rates across the board is a false one, or at the very least one that has not been made out by sound methodology and on reliable data to date.
28. It should be stressed that the comments above are based on a comparison that uses the pre October 2007 solicitor advocacy rates (with allowance for preparation). Once preparation is taken out of the equation, the differential between solicitor and barrister remuneration is inevitably accentuated. If one object of the harmonisation exercise is to encourage solicitors to do work hitherto undertaken by barristers, then the removal of remuneration for hearing preparation seems destined to achieve precisely the opposite result. The disastrous consequences of this approach for the PLO have already been outlined.

Increase in Spend on Counsel

29. The prompt for the current FGF consultation exercise seems to be the increase in spend on barrister fees through the Scheme in the last five years from £74 million to nearly £100 million (see the covering letter of Lord Hunt).
30. What those figures, however, mask is the changes in and affecting the work

undertaken by barristers, most particularly in childcare litigation, where (as noted above) barristers tend to undertake on average the more complex work. Of particular note are the following (and the list is not exhaustive):

- (a) the ever increasing volume of paper involved in care proceedings – in part, the consequence of the requirements for greater disclosure to ensure Article 6 ECHR compliance, in part the consequence of technological advances enabling newer forms of documentary evidence – indeed, the point is made good by Lord Hunt in his covering letter when referring to court bundle payments running at twice that intended, though that is not (as he seems to suggest) an example of a payment being out of control – a court bundle payment is not a discretionary payment, it is a fixed sum reflective of the size of the court bundle (CBP1 is payable when the bundle is over 175 pages and CBP2 is payable when the bundle is over 350 pages) – what in fact that increase shows is that the original assessment of likely court bundle payments was inaccurate, in that it simply did not take sufficient account of how the work was likely to develop in practice;
- (b) the ever increasing volume of relevant case-law and Practice Directions and allied greater judicial expectation of case paperwork – five years ago, closing written submissions at the end of a five day trial were a rarity, now they are the norm, while the Bundles Practice Directions provides for preliminary paperwork from all parties for all High Court and most county court hearings;
- (c) advances in science, particularly pertinent to cases of non-accidental head injury – for example five years ago there was no research indicating the incidence of birth-induced subdural haematoma – now no advocate can properly cross-examine a neuroradiologist without knowing of the Whitby research (ongoing), more recently the Looney research and most recently the Rook research;
- (d) greater understanding of child abuse – consider for example the impact in public as well as private law proceedings of the ACA’s inclusion of domestic violence within the statutory definition of harm;
- (e) the need now to take proper account of diversity issues.

31. Absent explanation, the figures can mislead. The State is not paying more now for the same service. Individual barristers are not now earning 33% per hour more

than they were in 2003. The State (in its various guises) has over the past five years significantly increased the burden on the advocate, especially in more complex cases, and cannot do so without in some way expecting to have to pay for having done so.

Reductions in Barrister Payments under the FGF Scheme

32. The comments above ought to make the MOJ/LSC extremely cautious about any reductions in barrister fees under the FGF Scheme.
33. If, however, there are to be reductions, then more careful thought needs to be given to where those reductions should be made. If the aim is to move towards harmonising the advocacy rates between barristers and solicitors, then it has to make sense, and to be in the public interest, to narrow the gap where the gap exists/exists most – namely, in the less complex form of care cases (see below in relation to two counsel cases).
34. None of the three options suggested by the consultation paper will achieve that end. They will either keep the existing flatness of the FGF Scheme as it is, or make it flatter still.
35. Given the LSC figures showing the majority of care cases concluding in one day, a far more warranted change would be to provide in every care case where the final hearing is listed for and concludes in one day that counsel's fee for that day should be reduced by 33%. In Example B, this would mean a payment of £593.96 (£69.88 per hour) a saving of almost £300 for each such hearing. The LSC could usefully cost such an amendment and provide an addendum to the existing consultation paper suggesting that as an alternative option (depending on the level of potential saving, whether alone or in conjunction with other changes).
36. Another viable alternative would be to seek to make savings within two counsel events-based cases – possibly by introducing two junior event rates to reflect more

serious/time-consuming and less serious/time-consuming two counsel cases¹ and/or by providing in every two counsel contract that, where the case overruns its time estimate, the maximum allowable under any contract extension would be 75% of the event fee for each day in excess.

37. If part of the aim of the consultation paper is to deal with the expansion of special prep in any event – and, if it is running at eight times what was originally intended, it is hard to resist the conclusion that it is overused by some counsel – then the following is suggested as a means of controlling that item of expenditure;
- (a) the abolition of special prep for complexity;
 - (b) the replacement of special prep in care split hearings with a bolt on payment payable at stage two equivalent to 2½ hours at the existing rate (£100.50);
 - (c) the replacement of special prep in cases where the bundle exceeds 700 pages with a bolt on payment, payable once and only as part of the F5 fee, equivalent to 5 hours at the existing rate (£201).
38. It certainly cannot be right for special prep (whose growth again doubtless reflects the perceived flatness of the FGFS) to be considered in the same way as court bundle payments. As noted above, the latter is an objective marker of complexity and its removal from the Scheme would simply mean that the gap between the pro rata payments to counsel for less complex and for more complex work would grow further still.
39. What the above shows is that, if changes need to be made to the FGF Scheme, then such will be most sensibly made by negotiation and more focused reduction. Indeed, there are others – for example, the removal of the difficulty taking instruction SIP and the lack of pay differential in child abduction cases between ex parte and inter partes hearings – which could produce savings to the public purse without making the Scheme more unfair

¹ At the moment, for a 10 day High Court case remunerated under the FGF Scheme, junior counsel will receive (allowing for add ons) in the region of £9,000 (in effect for 3 weeks' work, including prep). However, junior counsel, if led on an 11 day case, will under the events-based scheme earn £14,520 – about £5,000 more for one extra day in court but considerably less in the way of work and

40. The simple but telling point is that, if the Scheme is to be squeezed, then it should be squeezed in places which can be identified applying logic and common sense, and in ways consistent with the fundamental objectives of any advocacy scheme outlined above.

41. Indeed, if the LSC and MOJ remain determined (notwithstanding the comments above) to reduce the amount spent on counsel, it would doubtless be a better use of professional time and produce a more equitable result if they were to indicate the level of savings desired, and then for the means by which those savings can be secured to be agreed between the Bar representative bodies and the LSC/its statistician.

Affordability

42. Can the LSC afford to fund preparation for solicitor advocates and not to make swingeing cuts in the FGF Scheme? The answer is that it plainly can, it plainly should and it would cost more not to do so:

- (a) The MOJ's last annual report indicated a saving of £152 million on legal aid last year, covering both civil and criminal legal aid (source Familylawweek website for 27 May 2008).
- (b) The previous cost to the budget of residential assessments has gone.
- (c) The cost to the budget of expert assessments is likely to be reduced by the impact of the new Experts Practice Direction.
- (d) There is widespread evidence of the number of care cases having reduced, especially in London, influenced not only by the PLO but doubtless by the huge rise in the cost of bringing care proceedings.
- (e) The PLO would suggest that not properly funding case preparation and complexity in care cases would (as suggested above) be false, entirely counter-productive savings. Good advocates save money, they do not cost money.

The Way Forward

43. As a strong supporter of the PLO (see its response on the draft PLO), the ALC would like to see it given the best chance of success. The reality is that that is not

responsibility. Having two junior events rates (the existing £1,320 and a lower one of £1,000) would

happening. Morale amongst those charged with making it work in practice has never been lower, whilst changes to publicly funded remuneration have hampered rather than assisted.

44. The PLO seeks fundamentally to reorganise the way in which care cases are undertaken, which is why applying assumptions based on previous practice to new forms of remuneration is so dangerous.

45. Especially now that the upward rise in Legal Aid expenditure has been checked, with factors in place likely to check it further (see above), common sense would suggest letting the PLO bed in in practice, properly supported, and then taking stock of its impact before embarking on further radical restructuring of systems of remuneration.

46. The interim position has already been addressed above. In terms of the way forward in the longer term, the ALC is far from convinced of the merits of a single advocacy fee (OMOF), which runs the very real risk of the State overpaying for less complex work, underpaying for more complex work or even finding no one of sufficient ability to undertake the latter.

47. OMOF is in any event only workable if the practitioner/firm is likely to undertake a mixture of straightforward, average and more complex cases. It would not adequately reward the more experienced solicitor advocate and is wholly ill-suited to the Bar, a referral profession subject to market forces. As the public interest would dictate, the caseload of the experienced barrister tends to be complex cases and the caseload of the less experienced barrister more straightforward ones. Thus. OMOF for the Bar would mean the less experienced getting paid significantly more per hour/day than the experienced, which would in turn mean the more experienced having to deskill and chase the easier work to survive, which would in turn mean the most difficult of cases being at times dealt with by those who are not experienced enough to do them properly. Thus, especially for the Bar, OMOF would be contrary to the public interest, which has to be in ensuring that the work

doubtless produce significant savings.

is done by those qualified to do it, that thereby miscarriages of justice are avoided insofar as they can be, that straightforward cases are not remunerated at the same level as complex ones, and that experience and expertise are not penalised.

48. As a means to a more viable alternative, the ALC is prepared to work constructively and co-operatively to put together a fair unified advocacy scheme for solicitors and barristers that ensures the best interests of the individual and the public at large by rewarding experience, expertise and complexity in a way that is transparent and controllable.

49. For its own part, the ALC has already constructed in outline form (see Annex B) an integrated scheme for advocacy that is far simpler, more predictable, less consuming of professional time, less open to abuse and accordingly easier and cheaper to manage and administer than the existing FGF Scheme for Counsel.

50. Finally, it should be stressed that this paper is a preliminary one, produced to assist discussion and debate, and the ALC looks forward to hearing the views of others before finalising its position. Apology is also made for the lateness of its production, caused by reasons beyond its author's control.

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Piers Pressdee²

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ANNEX A - FEE COMPARISON

The object of the exercise was to undertake a comparison of barrister and solicitor rates by, it is suggested, a more accurate means of comparing the two, and in particular to examine the extent of any differential in rates:

- (a) in the more complex kind of care case;
- (b) in the less complex kind of care case.

Example A

This involved examining a case recently undertaken by the author (a barrister of 17 years call), payable under the FGF Scheme, and then applying solicitor advocacy rates (incl and excl prep) to the hours actually involved in the conduct of the case. Other than in respect of the extent of any discretionary complexity uplift to be applied to the solicitor's overall fee, this comparison involves no assumptions being made.

Case details – Oxford County Court - care case – representing father accused of causing non-accidental injuries (humeral and rib fractures on separate occasions) to his son - 900 page trial bundle – threshold hearing listed for 5 days, completed in 4 days – 7 experts involved (including treating clinicians), 3 required for cross-examination - SIPs authorised/claimed: parties, parent, experts & conduct – additional payment of 5 extra hours (bundle over 700 pages).

Work Done	Bar	Sol
11/5/08 Prepared questions for experts meeting (F1) Time eng: 2 hrs	£192	£129.80
12/5/08 Attended PHR for threshold hearing (F5P: as counsel also instructed on threshold hearing the brief fee is payable at the PHR) Prep 4 hrs, at court from 9.30am listed 10am, finished in court 11.30am – neg/con 1hr 30m, waiting 15 mins, hearing 15 mins	£1,037	£382.94
10/6/08 Advocates Meeting, directed by court (F3) Prep 1 hr 30m, meeting 30m	£326	£129.80
16/6/08 Conference (F4) Prep 1 hr, con 1 hr	£167	£129.80

POST OCT 2007 SOLICITOR RATES

(EXCL THE 26 HRS PREP RELEVANT TO PHR/THRESHOLD HEARING)

(F) SOLICITOR FEE TOTAL (BEFORE MARK-UP)	£1,543.77
(G) SOLICITOR FEE TOTAL (INCL 15% CHILDREN PANEL MARK-UP ON ALL EXCEPT WAITING TIME)	£1,765.60
(H) SOLICITOR FEE TOTAL (WITH 15% CH PANEL MARK-UP PLUS 15% DISCRETIONARY EXTRA FOR COMPLEXITY)	£1,987.43
(I) SOLICITOR FEE TOTAL (WITH 15% CH PANEL MARK-UP PLUS 35% DISCRETIONARY EXTRA FOR COMPLEXITY)	£2,283.21

COMPARATORS PRE OCT 2007

COMPARISON OF (A) & (D) – RATES EFFECTIVELY IDENTICAL

(BAR RATE 0.33% HIGHER)

COMPARISON OF (A) & (E) – SOLICITOR RATE 14.76% HIGHER

COMPARATORS POST OCT 2007

COMPARISON OF (A) & (H) – BAR RATE 111.08% HIGHER

COMPARISON OF (A) & (I) – BAR RATE 83.73% HIGHER

BAR RATE PER HOUR

ON THIS CASE GLOBALLY	£84.61 PER HOUR
FOR PHR/THRESHOLD HEARINGS	£80.54 PER HOUR

Example B

This is a hypothetical example (but one highly likely to occur in practice) of a less complex care case. Again, it involves a comparison of the fee payable under the FGF Scheme with existing solicitor advocacy rates (incl and excl prep) to the hours actually involved in the conduct of the case.

Assumed case details – FPC care case – 1 day final hearing - 400 page trial bundle - SIPs only for parties and parent – actual time engaged of prep 4 hrs, advocacy 2 hrs 30 mins, neg/con 1 hr, waiting 1 hr (total of 8 hrs 30 mins).

FEE TOTALS

(A) BARRISTER FEE TOTAL £886.50

PRE OCT 2007 SOLICITOR RATES

(B) SOLICITOR FEE TOTAL (BEFORE MARK-UP) £535.70

(C) SOLICITOR FEE TOTAL (INCL 15% CHILDREN PANEL
MARK-UP ON ALL EXCEPT WAITING TIME) £611.19

(D) SOLICITOR FEE TOTAL (WITH 15% CH PANEL MARK-UP
PLUS 15% DISCRETIONARY EXTRA FOR COMPLEXITY) £686.68

POST OCT 2007 SOLICITOR RATES (EXCL THE 4 HRS PREP)

(E) SOLICITOR FEE TOTAL (BEFORE MARK-UP) £276.10

(F) SOLICITOR FEE TOTAL (INCL 15% CHILDREN PANEL
MARK-UP ON ALL EXCEPT WAITING TIME) £312.65

(G) SOLICITOR FEE TOTAL (WITH 15% CH PANEL MARK-UP
PLUS 15% DISCRETIONARY EXTRA FOR COMPLEXITY) £349.20

COMPARATORS PRE OCT 2007

COMPARISON OF (A) & (C) – BAR RATE 45.04% HIGHER

COMPARISON OF (A) & (D) – BAR RATE 29.10% HIGHER

COMPARATORS POST OCT 2007

COMPARISON OF (A) & (F) – BAR RATE 183.54% HIGHER

COMPARISON OF (A) & (G) – BAR RATE 153.87% HIGHER

BAR RATE PER HOUR

ON THIS CASE £104.29 PER HOUR

ANNEX B – OUTLINE INTEGRATED ADVOCACY SCHEME

This scheme is based on the formula used by many barristers' chambers for local authority care work.

The scheme would sub-divide family work as follows, which sub-divisions will set the remuneration in any given family case taking place in the FPC, County Court and High Court:

- (a) by five categories of work:
 - children (public law) (with slightly different rates for parent and child representation);
 - children (private law other than international child abduction);
 - international child abduction (with different rates for ex parte and inter partes hearings);
 - family finance and property (including both matrimonial and cohabitee cases);
 - injunctions;
- (b) by three levels of court – FPC, County Court and High Court;
- (c) by four levels of seniority:
 - newly qualified (0-5 years post qualification);
 - experienced (6-16 years post qualification);
 - highly experienced (at least 17 years post qualification);
 - silk;
- (d) in the case of work at/for court, by the listing/length of the hearing, with:
 - a brief and refresher approach for all cases listed and/or going over a day, with the brief fee set at different levels depending on the length of the case; but
 - financial disincentives/penalties for cases significantly overrunning their time estimates (eg reduced refreshers for hearings exceeding their time estimates by over two days).

As will be apparent, the fee for court-work would be determined by the species of case, the level of court, the listing or length of the hearing and the level of experience of the advocate undertaking the work. No SIPs, page uplifts or extra hours are

necessary to graduate the fee, because the fee is already sufficiently graduated. The dates of qualification for all family advocates could be held on a centralised computer. All the other information that the administrator of the scheme would require would be able to be found on the face of the court order: By having a simpler scheme with less capacity for forms to go astray, mistakes to be made and discretions to be exercised, administrative savings should inevitably follow and costs will be more easily controlled.

This scheme could in due course be underpinned by an accreditation scheme that would ensure a more complete match-up between the expertise of the advocate and the expertise required by any given case.