

# Public Law Family Fees

## Response to Consultation

***Please contact***

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## **About BAAF**

The British Association for Adoption & Fostering (BAAF) is pleased to respond to this consultation. BAAF is the leading charity and membership organisation in fostering and adoption in the UK. We:

- promote the highest standards of child-centred policies and services
- speak out on behalf of looked-after children
- influence UK-wide policy and legislation
- provide much-needed information and advice
- promote greater public understanding of adoption and fostering
- support our members in their work

BAAF's main activities are the development, promotion and advocacy of best policy and practice; the provision of advice and information to our members and to the general public; training, consultancy and seminars; child placement services including *Be My Parent* online. We also publish a quarterly professional journal, *Adoption & Fostering*, books and guides for professionals, academics, parents and carers and research studies. The main users of our services are our members comprising local authorities across the UK, voluntary adoption agencies, independent fostering agencies and also individual social work, legal and medical professionals and carers.

This response is informed by the views of our members and particularly our Legal Group Advisory Committee whose members include local authority legal advisers and lawyers in private practice specialising in child care and adoption proceedings. We have not confined ourselves to the questions posed as we consider there are underlying issues of principle to be addressed, as well as some misleading assertions in the consultation paper.

### **1. Background & Strategy (pages 6-7)**

We note that it is a strategy "agreed by ministers" to "develop and reform the court fee system to ensure that it is fair and sustainable", and that the policy is that generally fees should be set at levels calculated to cover the full cost of the system if paid in full in every case.

We must begin by expressing our disagreement with the basic premise, certainly as far as public law family proceedings are concerned. As the paper concedes (page 9) social services departments (sic) – i.e. children's departments – are subject to a statutory duty to issue care proceedings when such a course is necessary to safeguard a child. In this respect, arguably care proceedings have more in common with criminal proceedings than they do with other civil and family proceedings.

In the consultation on civil court fees, CP5/07, it was acknowledged that, although the objectives for family business were based on achieving 100% cost recovery for most non-children private law family fees, different policy considerations might apply to public law care cases, adoption, domestic violence and private law children cases. We are not aware that there has been any proper public debate on whether the policy considerations

appropriate to these cases do indicate that the fees charged should aim to cover the court costs.

Full cost pricing, it is claimed, (page 6) is the best way of targeting the tax-payer's contribution to meeting the cost of the civil and family courts. If the proposals in the paper are effected, the tax-payer's contribution will be the same as at present, although it may fall disproportionately on some local council tax payers, as a result of the somewhat opaque methods of calculating the spending assessments. It cannot be argued that there is any urgency in implementing the proposed changes in the fees and we would therefore urge the government to allow time for proper debate on these important matters.

### **Pages 8 – 9**

We note the arguments set out at the bottom of page 8 and the top of page 9, but find them unconvincing. These arguments might carry some weight if the decisions to institute care proceedings were on a par with – say - a decision as to whether to expand the stock of the local library rather than to improve amenities in the local park. The paper acknowledges that local authorities are subject to a clear statutory duty to protect children and would be acting unlawfully to avoid court proceedings when these are appropriate. But the same paragraph also hints – based on no evidence of which we are aware – that there might be a perverse incentive to pursue court proceedings prematurely or unnecessarily. It is the view of many practitioners and researchers that in practice local authorities are often too slow to bring proceedings when they should be brought. There are many examples of cases eventually brought before the court where children have been permitted to endure chronic neglect and deprivation which earlier statutory intervention might have avoided. Unless the court service can produce any evidence that there is currently a perverse incentive for local authorities to issue proceedings prematurely or unnecessarily we strongly deprecate the proposed changes. Even if there were evidence of perverse incentives encouraging local authorities to issue proceedings, these would have to be balanced against potential perverse incentives and unintended consequences of implementing the proposals in the paper. These could include a risk that a higher number of children will be accommodated by local authorities under section 20 of the Children Act 1989 where parental 'consent' to such an arrangement is equivocal, and that pressure may be brought to bear on relatives or friends of the child to issue applications for residence or special guardianship orders when the child in reality, or arguably, needs the protection of a care order. In both such examples the child would be denied the right to be legally represented and to have his or her interests protected by the appointment of a CAFCASS officer, and in the section 20 cases, the parents would also be less likely to be able to access legal advice.

### **The proposals and options (pages 11 – 13)**

As we have argued above, we do not in any way accept the premise on which these proposals are based. But, even if we did, we are unconvinced by any of

the options proposed. In Option 2 it is acknowledged that “case preparation is not the only determinant of case links and costs.” We entirely agree. We also agree that the detailed assessments would be an absurdly wasteful use of everyone’s time.

However the same problems arguably apply to Option 3. Whether or not a case can be dealt with without a Final Hearing or Issues Resolution Hearing will only be marginally affected – it at all – by the quality of the initial case preparation. Far more significant will be a range of other factors including the actual issues in the case, the parents’ ability and willingness to give clear instructions to their legal representatives, the involvement of other parties, the complexity of the evidence, the quality of the judge’s case management, the efficiency of the court and other matters over which no one has any control, such as illness or accident. We do not believe it is sensible at a time when the proposed new public law outline has yet to be implemented to attempt to link staged payments of fees to the stages in the outline. While it is of course hoped that the new procedures will help to reduce delays we believe it to be irrational at this time to base the fees payable on a notional idea of how cases might progress.

There is the further difficulty also about attempting to implement these changes at the same time as the bringing into force of the public law outline. As stated above it is uncertain what the effect of the PLO will actually be and there is a danger that any assessment of its impact will merely be confused by a major change in the fee structure at the same time.

While we vehemently oppose the entire premise of the proposals therefore we believe that the least illogical course would be to propose a one-off fee on the issue of proceedings. It is not clear from the paper whether the fee is to be charged per case or per child, but if it is the latter then we would argue that the fees should be set lower in cases where several children are involved. We understand however from a letter from HMCS dated 22 February 2008 that all the proposals in the consultation paper are per application and not per child.

### **Adoption Proceedings**

The current position is not quite accurately set out on page 14. It is not necessarily the case that local authorities apply and pay for Placement Order applications in public law care proceedings. Placement Order applications may also be freestanding; either when there is already a care order in place, or when the local authority brings a Placement Order application alleging that the S.31 Children Act grounds are made out, or that the child has no parent(s) with parental responsibility.

We understand from correspondence with the Department that despite the statement that “we propose to retain the structure of a single application fee covering both the Placement Order and any other subsequent adoption orders” this is not the intention. The fee for the adoption application (payable of course by the adoptive applicants – though frequently funded by the local authority in agency cases) will be payable separately (as now) and the

Placement Order application fee will be increased from £140 to £400. However, in the light of the letter of 22 February referred to above, we would welcome further clarification of the precise proposals. Whereas Children Act proceedings under the Family Proceedings Rules 1991 may be commenced in respect of more than one child within the same application, in adoption cases (both placement order applications and adoption applications) separate applications must be made in respect of each child, and a separate fee is therefore currently payable *per child*. This means that the cost to local authorities will be £400 *per child* for placement order applications. (There is no information in the consultation paper to indicate how the transfer of cost from HMCS to local authorities at £5m has been calculated.) We would point out that in these cases too local authorities have a statutory obligation; they must apply for a Placement Order when they are looking after a child (or bringing care proceedings in respect of a child) whom they consider should be placed for adoption. It is hard to see any real justification in principle for setting the Placement Order application fee any higher than it is at present. We also note that it is claimed that non-agency adoption applications are less likely to be contested. There seems to be some confusion here. While placement order applications may frequently be contested, adoption applications by adoptive applicants following the grant of a Placement Order are likely to be uncontested. But non-agency adoption applications are varied. They include intercountry adoption applications, sometimes quite complicated, applications by foster carers opposed by local authorities, as well as step-parent or relative applications. We suspect that there are currently no reliable figures to show what proportion of these cases are long drawn out and use additional court resources, but some undoubtedly are very complex. Since fees are charged for adoption applications per child, arguably an unfair burden is placed on those bringing simultaneous applications in respect of several children; in practice, a case involving three siblings, say, is unlikely to use three times as much court resources as an application in respect of one child.

### **Comments on the “Evidence Base”**

- (a) Rationale for government intervention (page 26): we note the statement that it is government policy to charge full-cost fees for those “using services.” We would take issue with the term “using services” in the context of pursuing care proceedings. When local authorities issue proceedings one would not normally consider that they were “making use of services” but merely following their statutory obligation. The same thinking is represented in Question 4 of the consultation questions which refers to trying to ensure that paying authorities only ‘pay for what they get’. On this approach it could be argued that the ‘paying authorities’ should be able to claim a rebate when the court’s own conduct of the proceedings fails to meet an acceptable standard!
- (b) We also note the claim (page 27 & page 30) that not increasing fees “would require HMCS to reduce spending by some £40m” If this is indeed the case, it is only as a result of a decision apparently already taken by the government, prior to the consultation, to reduce the HMCS budget by £35m (not, it seems, £40m, see page 6 of the consultation

paper). We would suggest that the logical course is for the budget adjustment that has been made in advance of responses to the consultation to be reversed.