

THE **LAW SOCIETY**
OF NORTHERN IRELAND



Department of Justice consultation

STANDARD LEGAL AID FEES FOR SOLICITORS IN ARTICLE 8 AND ARTICLE 50 CHILDREN (NI) ORDER PROCEEDINGS IN THE FAMILY PROCEEDINGS COURT

Response of the Law Society of Northern Ireland

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ABOUT THE LAW SOCIETY

The Law Society of Northern Ireland (“The Society”) is the professional body for solicitors, regulating and representing all solicitors in Northern Ireland.

The Society represents over 2,800 solicitors working in approximately 470 firms throughout Northern Ireland in the public sector, in business and in the community and voluntary sector. Members of the Society thus represent members of the public, small, medium and large enterprises, government bodies and charities making the Society uniquely placed to offer constructive comment on policy and law reform proposals across a broad range of topics.

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INTRODUCTION

1. The Society welcomes the opportunity to comment on the proposals put forward by the Department of Justice (“the Department”) to introduce a standard fee regime for Article 8 and Article 50 Children Order proceedings in the Family Proceedings Court (FPC).
2. At the outset, the Society would highlight that many family law practitioners have frustrations about the current system. The “time and line” approach is administratively burdensome and cumbersome for both the Legal Services Agency (LSA) and practitioners alike. This is a contributing factor in the long delays for solicitors to be paid for their work in legally aided family law cases¹. Further, the complexities and the subjectivity involved in the LSA’s assessment of “time and line” claims by practitioners, leads to dispute, further delay and, in the view of many, arbitrary cuts being made to legitimate claims for payment. While the Department’s consultation refers to the proposals reducing administrative complexity, it makes no commitment to improving the time taken to make legal aid payments.
3. Further, the Society recognises the imperative to ensure that good budgetary control is exercised over all areas of public expenditure. With this in mind, the Society welcomes the chance to reform the current system, for the benefit of government, practitioners and clients alike.
4. However, for many reasons which are made clear throughout the remainder of this document, the Society finds the proposals contained in the Department’s public consultation document to be unacceptable. It is the Society’s firm belief that the proposals are detrimental to the justice system and will lead to some of our most vulnerable citizens being denied access to justice. Due to the scope of the proposals being limited to this subset of Children Order proceedings, this will have an acutely negative impact on children.

¹ Source: Legal Services Agency monthly dashboard

5. The Society urges the Department to fundamentally rethink the proposals put forward. The Department should engage constructively with all interested stakeholders including the solicitor profession to co-design an appropriate standard fee scheme. A revised proposal should deliver on the principle that Access to Justice is the equal right of all, not a select few who can afford it. It should further recognise that professional legal expertise is an essential and valued part of the justice system and legal professionals should be fairly compensated for their work, now and in future.

COMMENTARY ON METHODOLOGY

6. This section considers the methodology which has been applied by the Department in preparing the current proposals and highlights a number of issues which the Society has identified.

Qualitative evidence

7. To begin with, a fundamental defect in the preparation of the current proposals is the lack of qualitative evidence that has been considered. This is referred to by the Department at 13.2 of the consultation document which states:

“Despite considerable efforts, the DoJ has not been able to secure the level of engagement desired. Cognisant of the gap in qualitative data available, the DoJ has developed an additional stakeholder questionnaire, to supplement and run in parallel with the consultation, to obtain qualitative data from solicitors involved in Article 8 and Article 50 proceedings.”

8. The Department’s initial proposal for engagement was to form focus groups with a range of stakeholders. This proposal did not progress due to the Covid-19 pandemic and concerns around issues such as social distancing. Semi-structured interviews were also proposed. However this came at a time when the pandemic continued to have a sharply negative impact on the solicitor profession. In November 2020, 42% of solicitor firms reported that they had furloughed 1 – 10 members of staff, 22% reported having made redundancies and 95% of firms reported seeing a decrease in turnover of up to 50%². It was never going to be possible to secure the level of engagement required from the profession at a time when many solicitors were struggling to simply stay in business. It is regrettable that a robust qualitative evidence base has not been developed in advance of the public consultation exercise.

² Source: Law Society of Northern Ireland commissioned survey, reported in the Spring 2021 Edition of *The Writ*

9. However, the Society is of the view that this is not an irreparable situation. The relaxation in many of the pandemic-related restrictions that were prevalent throughout much of 2020 means the possibility exists for the Department to engage in the way it initially intended. The Society has in recent weeks repeatedly made the offer to the Department to facilitate substantive and meaningful engagement directly with family law practitioners through focus groups and/or semi-structured interviews. The Department has in recent days replied to indicate it would like to avail of this opportunity to gather detailed qualitative evidence from practitioners. The Society welcomes this change in approach.

Dataset

10. The Society is grateful to the Department for providing, during the consultation period, the datasets used by it and the Northern Ireland Statistics and Research Agency (NISRA) to develop the proposed fee regime. Following examination, the Society would like to highlight several issues with the datasets that bear consideration.
11. In the first instance, as the consultation document itself recognises, the data used has been captured from two very different systems, namely Phoenix and the Legal Aid Management System (LAMS). No distinction was made between the two systems in the information provided to the Society. It has been accepted in the past that, due to the manual nature of Phoenix, cases could be wrongly coded. Indeed, the need to improve reliability was one of the factors behind the introduction of LAMS. This raises questions on the robustness of the dataset which has been examined and used by NISRA to derive the proposed standard fees.
12. The dataset used also contains, in respect of Article 8 cases, many cases where a composite fee has been paid. This is a standard fee regime already included within the current system whereby the simplest cases can attract a composite fee. For example where a case is settled at the first court date or transferred to the Family Care Centre at the first hearing. The Society has identified 1,140 cases in the dataset that appear to be composite fees. This

large group with an atypically low payment, skews the average payment figure lower.

13. The Society would further wish to highlight that using a dataset which runs only until March 2020 fails to recognise the significant changes which the legal system has faced due to the Covid-19 pandemic. Many efficiencies have been realised by the move to remote and hybrid proceedings. This is most obvious in respect of travel time and mileage while the Department will derive further savings from the move to case reviews carried out remotely. However, there are potential challenges posed by new ways of working mandated by the pandemic. Consultation and advocacy via remote means can often be a lengthier process for instance which would have the effect of increasing costs in the current payment system or increasing losses for solicitors in a fixed fee regime that has not accounted for this. Introducing an inflexible standard fee regime without any appreciation or consideration of how these cases will operate in future is an unnecessary risk.

Methodology

14. Notwithstanding the concerns referenced above in relation to the purely quantitative approach taken by the Department in arriving at the current proposals, the Society has examined the Department's methodology with a view to offering constructive critique of same.
15. Of primary concern is the overly simplistic model that the Department and NISRA have arrived at. 7,122 Article 8 case and 1,999 Article 50 cases are contained in the dataset. The cost of cases ranges from £4 to £11,310³ in Article 8 cases and £8 to £10,715 for Article 50 cases. Attempting to condense the breadth and variety of the over 9,000 cases under review into a fee schedule which offers one standard fee and an "escape threshold" in each case type is not credible if solicitors are to be treated fairly. It does not come close to reflecting the realities of representing clients in these complicated, often

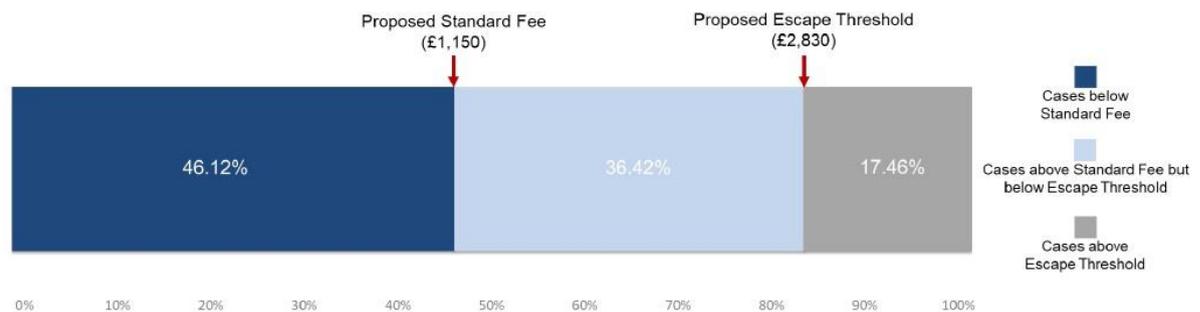
³ Not accounting for the -£40.48 entry which the Department has included in its analysis which the Society considers anomalous and as such should not have been included in the calculations

acrimonious cases. Further, it does not reflect any objective analysis of the data. The diagrams below show the distribution of both types of case and the proposed escape thresholds.

Article 8 cases



Article 50 cases



16. As can be seen, a significant proportion of the cases analysed fall between the proposed standard fee and beneath the escape threshold. The Society and practitioners cannot accept a proposal where 41% of solicitors in Article 8 cases and 36% of those in Article 50 cases are not fairly remunerated for the work they undertake. This will have an impact on the quality of service able to be offered with a consequent impact on access to justice for citizens.

17. The Society recognises and shares the desire for reform of the system. However, the public consultation document espouses one overly simplified model. This is unreasonable and raises questions over the validity of the consultation that stakeholders have not proactively been asked about other

models which may be more appropriate. This is all the more questionable in light of the fact that only three years ago the Department was proposing an entirely different approach. Those 2018 proposals and suggested alternative approaches that could be explored are suggested later in this document.

Cost neutrality

18. The Department’s consultation states that the proposal is not intended to make any monetary savings to the Legal Aid Fund, instead intending it to be cost neutral. The following table outlines the comparison between what was paid out in Article 8 and Article 50 cases in the period 2017/18 – 2019/20 through time and line expenses and what would have been paid out had the proposed standard fees been in place for those same three years. Travel and mileage costs have been excluded in line with the Department’s proposed approach to keep these costs separate from the standard fees.

	Article 8	Article 50
Total amount paid under current model (£)	6,770,170	3,492,900
Total amount that would have been paid under proposed standard fee model (£)	6,379,064	3,472,057
Variance (£)	(391,106)	(20,843)

19. If the standard fees proposed had been in place for the cases included in the datasets, £20,843 less would have been paid to solicitors in Article 50 proceedings, and £391,106 less would have been paid to solicitors in Article 8 proceedings than what was paid under the current model.

20. The data provided by the Department does not allow for the identification of trends by year, and the limited insight into three years’ worth of cases does not attest to the variability of the cases seen in the FPC.

21. Further, the Department has proposed that where cases involve multiple children or where a solicitor is representing more than one client in family proceedings only one standard fee would be paid. The fact of multiple persons being involved in a case naturally increases the work involved for a solicitor and they should be fairly compensated for this increased workload. Many practitioners consider that the current system in relation to multiple children / clients is applied inconsistently. Any standard fee regime should make provision for a consistent and clear uplift to be applied in cases involving multiple children or clients.
22. It is noteworthy that despite the Department's standard fee proposals in 2018 generally containing higher fee rates than those in this consultation which is purported to be cost neutral, the 2018 proposals were expressly designed to deliver savings. The Society would welcome the Department's views on this apparent contradiction. It should be noted that even the higher fees proposed in 2018 were viewed by the profession as a significant reduction in their fees per case. A further comparison with the Department's 2018 proposals is dealt with in the next section.

Comparison to 2018 proposals

23. As referenced above, "Remuneration for Civil Legal Services Family Proceedings" consultation, released in February 2018 by the Department, also proposed the introduction of standard fees for Civil Legal Services Family Proceedings. Despite the relatively short time period between both consultations, there are significant differences between the approach to the proposed standard fees.
24. The Department's proposals in 2018 put forward rates that were generally higher than those contained in the current proposals. The proposed standard fees in each proposal have been included for reference in the table below:

	2018	2021
Article 8 (£)	620 – 710 ⁴	620
Article 50 (£)	1,740	1,150

25. That the Department has stated in the current consultation that the introduction of standard fees is not intended to make monetary savings is contrasted with the fact that, in 2018, their proposal was framed as a cost reduction exercise.
26. It is also noteworthy that the 2018 proposals did consider a greater degree of flexibility in their approach to standard fees, implicitly recognising the variety of cases. This is reflected in, for instance, the inclusion of ‘top up’ fees within the 2018 consultation. In addition to the proposed standard fee, in 2018 the Department also considered accounting for various complexities within cases by including provision for a ‘First Day of Hearing’ fee, a ‘First Directions Hearing’ fee, a ‘Refresher Day Fee’, a ‘Late Sitting Fee’, a ‘Judgement Fee’ and a ‘Directions and Written Work’ fee. Although the proposed rates of payment for each of these fees was never settled, the suggestion of top up fees went some way to acknowledge the variability of cases in the FPC.
27. Further flexibility was reflected in the 2018 proposals whereby different fees were available for different types of case. Article 8 Residence Orders or Contact Orders would attract a standard fee of £710 while Prohibited Steps Order and Specific Issue Orders each had a proposed fee of £620.
28. That neither top up fees nor consideration of different types of cases are included within the current proposal, in addition to the fact that the proposed fees are lower in the current consultation, is a step back in the level of flexibility required to impose a new standard fee model with fairness.
29. Within the 2018 consultation, the Department stated that outliers were removed from their analysis, including “very low payments” and “very high payments”. In

⁴ The 2018 model proposed a breakdown of Article 8 costs; a Residence Order and Contact Order each had a proposed standard fee of £710; a Prohibited Steps Order and Specific Issue Order each had a proposed standard fee of £620.

the current consultation, the methodology section outlines how only the “costliest” cases were removed for analysis in respect of the escape threshold. However, no consideration has been given to the removal of outliers at the lower end of the dataset. It is the Society’s contention that this inevitably skews any identification of a median fee, and in effect brings it closer to the lower end of the spectrum of fees.

30. The Society notes that at the outset of discussions leading to the final 2018 proposals a Table of Fees very similar to the current proposals was produced by statisticians on behalf of the Department. However, after extensive engagement with the Society and the profession the Department’s representatives increased these fees in recognition that the raw data did not fairly reflect the work done by family solicitors. This recognition by the Department was based on analysis of the different types of case within Article 8 and Article 50 applications, the many complicating factors and on actual shadowing of practitioners going about their daily business. It is this insight and qualitative evidence that is lacking within the current proposals. As a direct result the fees are significantly lower than those proposed in 2018. That the Department accepted the value and validity of such evidence in 2018 reinforces the Society’s view that the Department should not proceed with the current proposals without further constructive and detailed engagement with practitioners.

OTHER CONSIDERATIONS

31. This section considers some further issues which have arisen through the Society's consideration of the Department's proposals.

Family legal aid fees attrition

32. The Society notes with concern that the legal aid fees paid under the current system date back to 4 November 1996. The fact that these rates have not changed for 25 years is of great concern and represents a significant de facto cut to the legal aid budget for family law cases. To demonstrate this, consider that inflation as measured by the Retail Price Index, is approximately 100% from November 1996 to August 2021⁵. The 25 year freeze in fees therefore represents a stealth cut of over 50% in real terms to the fees paid to solicitors in these cases. In the last four years alone, the Professional Services Wages data for Northern Ireland indicates there is at least a 10% increase in median wages of the Legal and Accounting profession.

33. To base the proposed reforms of this area of legal aid without any consideration of the actual level of outdated rates further reinforces the unfairness of the current proposals. Family law practitioners are being left behind and this will have knock on impacts not just for the profession but for the citizens who require legal aid to access justice.

Gender and other equality considerations

34. Throughout the course of the Society's analysis, the potential negative impact of the introduction of standard fees was considered in relation to gender. Of the 241 current accredited Children Order Panel members, 192 or approximately 80% are female. Where the introduction of standard fees has weaknesses or the potential to have negative effects as identified in the analysis above, this could have a disproportionate impact on female solicitors.

⁵ Source – Office of National Statistics
<https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/chaw/mm23>

35. The nature of the cases targeted means these proposals will also have a direct effect on children. The Department's Equality Screening document states:

"The Department recognises that access to effective representation is a key priority of this Section 75 category and has sought to mitigate the risk of the potential withdrawal of service by the legal profession in response to the proposals by consistently seeking engagement with this stakeholder group throughout policy development."

36. As covered throughout this document, the Society is concerned that the engagement with the solicitor profession to gather qualitative evidence has been inadequate. This has led to a lack of understanding at the Department of the profession's likely response to these proposals. As discussed in the "Impacts" section of this document, the Society believes the current proposals is likely to lead to many practitioners withdrawing service from this area of law. This in turn, raises serious concerns about the likely equality impacts of the policy, for females and for children in particular.

37. Further, the Department recognises in its Rural Impact Assessment that there are potential disproportionate impacts of the policy for rural practitioners. This is the principal rationale behind the proposal to keep travel expenses separate to the standard fee regime. The Society would add to these considerations that the likely withdrawal of service that would follow implementation of the current proposals could disproportionately affect rural communities where access to a local solicitor may be made much more difficult or even impossible.

Administrative burden

38. The Department's consultation document in various places raises that the proposed standard fee regime will reduce the administrative burden on solicitors. This neglects the fact that solicitors cannot know in advance with any accuracy the likely cost of a case. For instance, a case might evolve over time to involve other parties, for example, grandparents or numerous other issues. The nature of the Department's proposal, requiring those cases exceeding the escape threshold to be dealt with on a time and line basis means that in almost every case the solicitor will have to continue to maintain these records. These

proposals assist the Department and the Legal Services Agency in reducing their administration but do nothing to assist solicitors in doing the same.

Potential for swifter resolution

39. The Department puts forward that a potential benefit of the proposed standard fees is that they may incentivise swifter resolution of proceedings. This is a misunderstanding of both the nature of the cases under consideration and current practice. It is very often not possible to resolve cases without recourse to the court, particularly where the case is difficult or acrimonious. The fee the solicitor is being paid has no bearing on this. Further, in most cases, alternative dispute resolution is already attempted where possible in order to reach quicker conclusions and the best outcomes for clients.

Changing nature of families

40. The introduction of standard fees introduces an inflexibility which is also of concern. Research carried out in 2016 by the Northern Ireland Council for Voluntary Action⁶ demonstrated that policy has not kept pace with the social change and make-up of modern families in Northern Ireland, with almost twice as many children (10,504) born to unmarried parents in 2014 compared to 1994 (5,337). Policy needs to retain a degree of flexibility to keep pace with societal change, especially within the context of the sensitive nature of Family Court Proceedings. On this point, the Society notes with concern that no concrete and proactive review of the standard fee regime is included in the proposals. This point is considered in greater detail in the “Alternatives” section of the document.

⁶ <https://www.nicva.org/article/inside-northern-irelands-family-courts>

IMPACT OF PROPOSALS

41. The Society has engaged directly with family law solicitors throughout its consideration of the Department's standard fee proposals. The response has been uniformly negative.
42. Family law is not as financially rewarding a career choice as other areas of law, particularly legally-aided family cases where remuneration rates have been eroded by inflation for 25 years. The majority of family law practitioners work in this area of law as a vocation and due to a dedication to supporting families and children through difficult times. However, solicitor firms are businesses that need to be profitable to survive and solicitors as highly skilled professionals have the very reasonable expectation to be remunerated commensurate with their skills and expertise.
43. The section of this document considering the methodology has shown, using the Department's figures that approximately 40% of cases would be underpaid under the current proposals. The fundamental issue is that for solicitors to continue to provide legal aid in these cases they need to be able to make a reasonable profit to reinvest in their business and to offer competitive salaries. The proposed fees do not allow that and the clear message from many practitioners is that they are likely to withdraw from providing their services in Article 8 and Article 50 cases.
44. As covered above, the impacts here are more likely to be felt by female practitioners. The effects may take some time to become apparent but gaps in service are more likely to appear first in rural areas where there are fewer firms which also tend to be smaller and therefore have less capacity to absorb the damaging impact of these proposals.
45. Smaller city firms are likewise more likely to withdraw from the market sooner. The larger firms may in the first instance be able to take the risk of accepting cases likely to be loss-making. The risk though is that the work will be passed to more junior, less experienced staff potentially reducing the quality of service

to legally-aided clients to a more basic level. This will also lead to a two tier family justice system where those with means can afford experienced lawyers and those without will suffer by comparison. In time though, particularly as any standard rates when established are very unlikely to change or keep pace with inflation as history has shown, even the larger firms will not be able to sustain this loss-making business.

46. Linked to this, the Society believes the basic availability of solicitors choosing to practise in legally aided family law will be impacted. Fewer newly qualified solicitors are choosing to work in the traditionally legally-aided legal sectors, understandably choosing instead to pursue more stable career options. The current proposals are highly likely to accelerate this trend.
47. The Department should consider the recently published report into the sustainability of civil legal aid by the Law Society of England and Wales⁷. This clearly demonstrates the market contraction which follows unsustainable legal aid reform with a 45% reduction in civil legal aid providers over the last decade. A reduction of this scale, in a jurisdiction as small as Northern Ireland would be catastrophic.
48. Over time therefore the Department's proposals will lead to a serious deficit in Access to Justice outcomes for some of the most vulnerable in society.

⁷ <https://www.lawsociety.org.uk/topics/research/civil-sustainability-review>

ALTERNATIVES FOR CONSIDERATION

49. The Society has made clear where it sees deficiencies in the proposals put forward by the Department. In the interests of pursuing a fairer outcome and engaging constructively with the Department, the Society has considered what alternative models might be appropriate. These are put forward as a basis for further engagement and, where any figures are referenced, it is for illustrative purposes only.
50. The Society is of the view that any fee regime should contain an explicit commitment to periodic review which would consider the impact of the regime on Access to Justice outcomes, the impact on the legal profession and whether the rates require revision. This should include consideration of issues such as inflation, average wage growth and cost of living increases. Reviews of this nature should be carried out by an independent third party, not by the Department in order to mitigate conflicts of interest, both actual or perceived.

Tiering

51. A core flaw in the proposed model is the attempt to condense a wide variety of cases into essentially one fee (while allowing a small group of cases to “escape”). The Department could consider a fee schedule that considered different tiers of fee, linked to appropriate, clear and objective benchmarks. For instance, in Article 8 cases, one might establish an appropriate lower-tier fee with medium- and upper-tier fees being set at appropriate increments above that. This would partially address the issue of the large number of cases under the Department’s proposals which would incur much greater costs than the standard fee but still fall below the escape threshold.

Adoption of 2018 elements

52. As already covered, while the specific rates put forward by the Department in 2018 were still under discussion, there are elements from the structure of the 2018 proposals which may usefully be considered here. Consideration of differing rates for different types of cases would come closer to ensuring remuneration is commensurate with the work involved. Going further, top up

fees in specific, pre-defined circumstances also recognise that the real world experience of these cases cannot be summed up into a single, unalterable figure.

Flat fee with add ons

53. A similar approach might also be explored which considered the payment of a “basic fee” after having accounted for various metrics such as the average number of hours, letters, calls etc involved in a case. An additional fee could then be available on application, to supplement additional input as required if the case became more complex.

CONCLUSION

54. This document makes clear that the Law Society of Northern Ireland and the solicitors it represents oppose the Department's proposals in relation to standard fees in the Family Proceedings Court.

55. In the view of the Society, the proposals have the potential to do significant damage to the solicitor profession and will have a detrimental impact on the justice system by limiting Access to Justice to only those with the means to afford representation.

56. The Society urges the Department to consider the issues raised here and to fundamentally rethink their proposals. As a starting point the Department should urgently seek to address the deficit in their understanding of the real world experience of solicitors who work on these cases. The Society stands ready to assist and facilitate the Department in this and to work constructively with the Department to develop a fair system which protects our most vulnerable citizens and recognises the value of solicitors in the justice system.