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19 March 2012

Family and Civil Legal Aid Framework Consultation
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New Fees Framework for Family Legal Aid Providers

Thank you for the opportunity to comment on the proposed *New fees framework for family legal aid providers* (proposal). The New Zealand Law Society's (Law Society) Family Law Section has prepared this submission on behalf of the Law Society. The Section has existed as a group with voluntary membership since 1997 and represents the interests of 975 family lawyers.

1. Executive summary

1.1 The Law Society has consulted widely with family lawyers about the proposed fixed fees framework (proposal). The overwhelming majority of family legal aid providers expressed despair and strongly believe the proposal in its current form is financially unsustainable. It achieves the opposite of the objectives and aims set out in the Bazley report. The number of car boot lawyers, so roundly criticised in the Bazley report, will inevitably increase as a result of the proposal.

1.2 The fees proposed have been calculated using flawed data and do not represent the average cost of a family legal aid case. The fees do not take into account the actual time, skill and expertise required to deliver legal advice and representation to the required standard. The fees are so low that lawyers will struggle to cover basic overheads and the cost of running a practice.

1.3 The Law Society has warned the Ministry over several years about the declining rates of family lawyers prepared to deliver legal aid services, and the Bazley report noted the difficulty in finding family legal aid lawyers. The proposal will see an irreversible exodus of family lawyers from the legal aid system. This will be the case especially for senior practitioners – the fixed fee proposal discourages the involvement of senior lawyers in all but the most complex of cases.

1.4 The low level of the proposed fixed fees means family legal aid providers will be at serious risk of breaching their professional and ethical obligations. For this reason, many practitioners will simply not risk undertaking legal aid assignments.

1.5 The proposal will severely impact on access to justice for those whom the legal aid regime is intended to assist. Vulnerable parties will be denied justice and protection and will be subjected to the very power disparities the Family Court has fought so hard to redress. It will establish a two-tier system of justice and promote inequality of arms between privately-funded and legally-aided parties.

1.6 The Law Society acknowledges the fiscal pressure facing the government and the need to reduce legal aid expenditure. However, the proposed cuts (which are in excess of 10%) represent a false economy: there is likely to be cost-shifting, resulting in blowouts in the Family Court and other areas of government. There is a risk that self-represented litigants will flood the Family Court, clogging the system and increasing both delay and cost to the Family Court and Court users. Inability to access properly funded legal representation for one party to Family Court proceedings impacts on the costs of the other party and the state.

1.8 Advice and assistance from family lawyers is fundamental to early resolution of disputes. Providing adequate time for lawyers to undertake the work involved in the family proceedings steps will enable providers to ensure that, wherever possible, early resolution is reached and agreements are durable. This will decrease the likelihood of repeat applications to the court and to the Ministry for legal aid grants and will also protect children who are the subject of proceedings. This is an investment that is likely to deflect future costs not only to the Family Court and the legal aid system, but also other areas of the government including education, health and the criminal justice system.

1.7 The Law Society's submission on the current review of the Family Court has identified options for fiscal savings in the Family Court that, if implemented, would have significant flow-on savings for the legal aid system.

Recommendations

(a) The introduction of fixed fees for family legal aid should be deferred until submissions from the major review of the Family Court are considered. This would enable potential significant savings that have been identified to be considered. These savings will have flow-on effects for the legal aid system. Deferral would avoid the current piecemeal, 'silo' response to cost blowouts in the Family Court and legal aid, and enable all stakeholders to take a holistic approach to the problem.

(b) The Ministry should consider a pilot or staged roll-out of the proposed fixed fee framework. This would enable the Ministry to identify whether or not the activities can be undertaken in the timeframes allocated and make necessary adjustments if required.

(c) To restore the integrity of the data, the Ministry should base the average cost of a grant on $2,200 to $2,500. This figure captures the actual cost to the Ministry of all cases regardless of when they were opened or closed. The proceedings steps should be recalculated based on this more realistic average cost of a grant.

(d) There must be an easy process established to identify additional factors and characteristics of a case, and to move between the three case management levels at any stage in the grant, including identified criteria for legally complex or high cost cases.

(e) Clarification is required of what "disbursements" have been absorbed into the fixed fee and the cost allocated to those "disbursements" together with the revised list of disbursements. Agents' fees should continue to be claimed as a disbursement.

(f) Providers should be eligible for a 15% "uplift" to rates in cases where characteristics of a case warrant more than the allocated $140 for "additional factors". Additional criteria should be added to the "additional factors" step in each category and should be able to be claimed "once per activity" rather than "once per case".

(g) The Ministry should consider other potential savings, such as a more stringent application of the merits test, greater use of the Commissioner's discretion to withdraw or amend a grant, and greater use of technology.

2. Introduction

2.1 Legal aid enables vulnerable members of society to have access to legal assistance that is fundamental for the understanding and assertion of individual rights, obligations and freedoms under the law. This is particularly so in the area of family law, where not only the interests and protection of the individuals themselves are in issue, but often, and more importantly, the interests and protection of children.

2.2 The purpose of the Legal Services Act 2011 (Act) is to promote access to justice by establishing a system that provides legal services to people of insufficient means and delivers those services in the most efficient and effective manner.[1] The function of the Secretary for Justice under the Act is to establish, maintain and purchase high-quality legal services.[2]

2.3 The Ministry has been instructed to both improve the quality of legal aid providers and significantly reduce the cost of the legal aid system. It is axiomatic that price must be commensurate with the quality. The proposal, as currently drafted, undermines the purpose of the Act and the function of the Secretary for Justice and will severely impact on access to justice.

2.4 The proposal encourages a reduced family legal aid service which will be to the detriment of children and families in New Zealand. The times allocated for family legal aid will result in a two-tier legal system with legal aid clients receiving a pared-back service. The proposal promotes the inequality of arms between privately-funded and legally-aided parties. If the purpose of the proposal is to discourage Family Court proceedings, then vulnerable parties will be subjected to the very power disparities the Family Court was established to redress.

2.5 The Law Society is concerned that the proposed changes will result in an exodus of family lawyers – particularly senior practitioners – from providing legal aid services. Most family lawyers undertake legal aid work as a professional duty and a social service. The following comment is indicative of much of the feedback received from family law legal aid providers throughout New Zealand:

> *"I have always enjoyed legal aid work and in particular mental health work. Even though it has never been the most cost effective work, I always considered it to be part of my social responsibility. I will probably give up legal aid work if fixed fees are introduced."*

3. A holistic approach

3.1 The Ministry has advised that fixed fees in family legal aid will be introduced in July this year. The Law Society is concerned about the timing of the introduction of fixed fees in light of major reforms currently under consideration, i.e. the current review of the Family Court and the Legal Assistance (Sustainability) Amendment Bill.

3.2 The Family Court review aims to ensure the court effectively meets the needs of users and that services are cost-effective and affordable. The Law Society's submission on the Family Court review has identified a number of changes that will achieve both significant fiscal savings and improve the practice of all professionals working in and within the Family Court.[3] These changes can be made with targeted rather than substantive legislative change and will have flow-on benefits for the legal aid system. The benefits to the legal aid system

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1 See s 3 of the Legal Services Act 2011.
2 See s 68(1)(a) of the Legal Services Act 2011.
3 Available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0008/49913/Family_Court_Review_-_050212.pdf

will come through a more efficient court process leading to a reduction in costs per grant with the lawyer able to achieve an earlier, more durable resolution for the parties and use less court time.

3.3 On 27 February, the Minister of Justice asked the Justice and Electoral select committee to defer consideration of the Legal Assistance (Sustainability) Amendment Bill until the completion of the Family Court review. Minister Collins said that:

> *"… delaying the Bill allows us to align decisions around protecting the most vulnerable by keeping both legal aid and the Family Court for those who most need it".*[4]

3.4 For the same reasons, the Law Society recommends that the Ministry defers the introduction of fixed fees in family legal aid until the proposals to achieve fiscal savings in the Family Court can be considered. The outcome of the Family Court review may go some way to addressing the concern of the rising cost of family legal aid. Equally, changes made to the way family legal aid is funded are likely to impact on the cost and efficiency of the Family Court. The two are fundamentally interrelated. This is particularly so given one of the results of the underfunding of legal aid providers is likely to be that the work that needs to be done will simply shift to another party in the system, for example Lawyer for the Child or Counsel to Assist. Deferral of the proposal would reduce the piecemeal and silo response to cost blowouts in both areas and enable all stakeholders in the system to take a holistic approach to the problem.

4. Fiscal pressures and sustainability

4.1 The Law Society supports the need for prudent use of government expenditure in all situations, not only in times of recession. It understands the fiscal pressures facing the government and the need to reduce legal aid expenditure by 10%. However, the sustainability of a legal aid system should not only focus on fiscal sustainability, but also on the delivery of an effective and efficient system to those it was established to assist.

4.2 The Law Society questions whether the emphasis on the reduction of lawyers' costs is warranted. The biggest increase in legal aid occurred as a result in changes to the eligibility criteria in 2006 which saw an increase from 750,000 to 1.3 million eligible New Zealanders. The economic impact of this has far exceeded the Ministry's predictions and five years later the country is facing a major blowout in legal aid expenditure driven by government policy.

4.3 There has also been an increase in the cost per legal aid grant in the family area as the direct result of changed policy and legal settings. Over the past five years the obligations on lawyers in the Family Court have increased significantly, including a requirement in some areas for submissions to be in writing. Legislative changes have impacted on Family Court proceedings (the Care of Children Act 2004 was introduced in July 2005) and new processes have been introduced, such as the Early Intervention Process (EIP). The changes have increased the obligations of family lawyers to undertake more tasks in a proceeding. The changes have affected private clients as well as those that are legally-aided.

4.4 In the Law Society's view, the perceived "savings" with the introduction of fixed fees in family law are likely to result in cost-shifting and possibly blowouts in other areas, such as increased judge-time; court-appointed counsel costs (to assist the court in dealing with the increased number of self-represented litigants); and the transfer of costs out of the family justice sector to Police, Child, Youth and Family (CYFs) or other government agencies.

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[4] Minister of Justice media release, "Legal aid bill deferred", 27 February 2012.

5. The nature of family law and family law clients

5.1 Family law is unique from other jurisdictions as it deals with predicting a future event and finding sustainable solutions to resolve an issue, rather than dealing with a past event as in the criminal and civil jurisdictions. While many cases may start off relatively straightforward, they often evolve into complex cases as new issues emerge.

5.2 The complexity of family law was accepted in the Bazley report, which recognised that different types of law present a range of complexity which affects the amount of resource required to process an application.[5] The report stated that the merits test, which applies to family applications, requires consideration of a wider set of factors than is the case for criminal applications and the high number of complex applications in the legal aid system were due to the high proportion of family cases that were legally aided.[6]

5.3 The complexity of family law cases was also acknowledged by the former Legal Services Agency: the Agency considered that dealing with an application for family legal aid was 30% more resource intensive than a criminal application.[7] The proposal fails to reflect the complexity of family law, and the time allocated for the majority of steps (particularly preparation time) is simply unrealistic and inadequate. The time allocated displays a fundamental lack of understanding of the very nature of family law.

5.4 Parties involved in family law proceedings find it distressing as they are dealing with their most personal and intimate affairs. They are often at their most vulnerable, are emotional and frequently irrational. In particular, they are under extreme stress when care arrangements for children are challenged, they are faced with the loss of their relationship and their assets and are under pressure in terms of income and sometimes their own personal safety. Others may be under threat of compulsory treatment or having their children removed by CYFs.

5.5 Clients do not always present the information lawyers require in a linear fashion and it takes time for the lawyer to develop a relationship of trust with the client in order to obtain the necessary details to provide adequate advice. Lawyers must ensure that clients are in a rational frame of mind to consider options and make decisions. This may result in the need for more than one attendance. Instructions change over time as the client's personal situation changes, they move through the grief process; or depending on the response of the other party. In other words, the situation does not remain static even when proceedings are not opposed.

5.6 Vulnerable people, including children, often find themselves the subject of family disputes and/or Family Court proceedings through no fault of their own. For example, many Family Court proceedings regarding children involve applications by extended family (including grandparents, aunts and uncles, and extended whanau) who have had to become involved due to the children's parents being unable to provide adequate care. The applications they are making, or need to make, are necessary for the protection of children. Where parents are separated and in conflict, it is often not realistic to expect rational consultation and co-operation particularly at the early stages of separation.

5.7 The Bazley report noted that some of the legal aid system's clients can only be described as "difficult".[8] Most legal aid clients are vulnerable members of society, may have mental health issues (both diagnosed and undiagnosed), drug and/or alcohol abuse or dependency, or low levels of intelligence and/or literacy. In addition, many legally-aided clients do not

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5 See paragraph 101 of the Bazley report.
6 See paragraph 104 of the Bazley report.
7 See paragraph 101 of the Bazley report.
8 See paragraph 287 of the Bazley report.

speak English or have English as a second language. Some have been physically and emotionally abused, sometimes over a significant period of time.

5.8 These clients frequently take much more time to deal with than the average private client. Clients with mental health or dependency issues will often make constant calls and or email persistently. With private clients it is easier for lawyers to make them aware that every time they contact the lawyer it will cost them money. Legally-aided clients often fail to grasp the longer term consequences (i.e. that they will have to repay all or some of the legal aid grant at a later date), and can be persistent or vexatious. Consequently, taking on a legal aid client can be a significant drain on lawyers' time.

5.9 In the Law Society's view, the often complex needs of clients in the family jurisdiction has to be reflected in the time provided for in the fixed fees proposal.

6. The Family Court jurisdiction

6.1 The Family Court has 23 statutes under its jurisdiction of which legal aid is available for all proceedings except dissolution and the status of marriage. Proceedings include *state vs individual* (for example mental health proceedings and Children Young Persons and Their Families Act 1989 (CYPTF Act proceedings)) and *individual vs individual*. The state has a direct interest in ensuring at the outset that prior to proceedings and when an initial application is made to the Family Court adequate resources are available to promote the early resolution of disputes and to ensure, as much as possible, that resolutions are durable. Such an investment is likely to deflect future costs to not only the Family Court and the legal aid system, but also other areas of the government including education, health and the criminal justice system.

6.2 Unlike other jurisdictions, family proceedings often require new grants of legal aid to comply with regular court-ordered reviews (for example CYPTF Act, Protection of Personal Property Rights 1988 and mental health proceedings). This was recognised in the Bazley report because, for example, court-ordered care of children arrangements change over time and as a child gets older, the arrangements require change to meet that child's needs.[9] A further example is in domestic violence proceedings when a respondent may apply to vary an order or have it discharged as they no longer pose a risk to the other party.

6.3 There is also a potential for future conflict in family cases as usually parties will continue to have some involvement with each other in their role as parents. How the original application is dealt with is critical to the likelihood (or not) of repeat applications. Research shows that where parties are empowered to make their own decisions (through mediation or negotiation) they are more likely to accept the outcome of those decisions and to self-resolve in the future. For those parties who are unable to reach agreement, research also shows that provided they consider the process to be fair, they are more likely to accept a decision.

6.4 The progression of a case often depends on the other party and factors outside of the control of one party. The case can start as one thing and then move to another (for example Care of Children Act (COCA) proceedings can become CYPTF proceedings or domestic violence proceedings). Whilst lawyers are able to limit their retainer and only act for a client in certain aspects of a case this may be difficult to do under the current contract for services with the Ministry.

6.5 The situation for family legal aid providers is significantly different to criminal legal aid providers:

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[9] See paragraph 293 of the Bazley report.

- the delivery of family legal aid relies on the willingness of individual providers to undertake family legal aid, which is seriously in question;
- the client's need to access legal advice in the criminal jurisdiction is usually as a result of Police action and charges being laid resulting in a Court appearance. This ensures some (limited) built-in safeguards through the administration of the proceedings by a District Court Judge, at the very least;
- in criminal proceedings, the Crown is the other party and will ensure the presentation of the proper evidence and the application of correct procedure. In family law, the Court relies on the evidence provided by each party or by using other sources including Lawyer for the Child and specialists reports. Inability to access properly funded legal representation for one party to Family Court proceedings impacts on the costs of the other party and the state; and
- in family law cases, the need to access justice primarily occurs before Court proceedings are issued (sometimes they are never issued) or even anticipated. The advice and assistance received from family lawyers at the first instance is fundamental to the early resolution of disputes.

6.6 Adequate resourcing in terms of time allowed in the family proceedings steps will ensure that, wherever possible, resolutions and agreements are durable and therefore unlikely to involve repeat applications to the court (and for legal aid grants). The settling of disputes will also protect children who are the subject of these proceedings.

7. The role of lawyers

7.1 At the heart of "access to justice" is access to legal advice and assistance to enable parents and caregivers to resolve disputes for the benefit of children. This does not necessarily mean access to the Family Court but referral to appropriate counselling, mediation, education programmes such as Parenting Through Separation and other programmes that will assist parents and caregivers to resolve issues which affect their children. Clients are also referred to other agencies where the issues are not of a legal nature. Lawyers undertake this important role of "triaging" cases to ensure that clients are aware of these services prior to filing an application in the Family Court (generally as a last resort).

7.2 Respondents who require legal aid need to be adequately funded to respond to applications, particularly those that involve the protection of children. Not every response to an application is driven by the need to "fight" the other party.

7.3 The role of lawyers in assisting parties to resolve matters themselves should not be underestimated. Lawyers can and do promote early resolution of cases. This is illustrated by the fact that only 15.9% of parenting applications require a decision to be made by a Judge.[10]

7.4 Lawyers also ascertain whether there is an urgent legal issue and provide assistance to clients to access the Family Court to ensure an adequate holding pattern is in place while other issues are resolved. This is vital in ensuring the safety of children and applicants, and potentially reduces overall costs to the Family Court. A good example is when an order preventing the removal of a child from New Zealand is urgently obtained which will reduce the likelihood of a costly Hague Convention application at a later time.

7.5 If matters do proceed to Court, high quality representation will have a positive benefit to the costs of the other party, the overall cost of the case and the outcome of the case. Clients who feel they have not achieved procedural fairness often appeal or apply to have their case

[10] Ministry of Justice letter of 17 May 2011 (in response to NZLS FLS, question 29): 2009/10 COCA cases 5% final hearings and 10.9% interim hearings.

reviewed within a short period of time. This increases the cost for legal aid and also for the Family Court.

8. Shortage of family legal aid providers

8.1 The Law Society has warned the Ministry over several years about the declining rates of family lawyers who are prepared to deliver legal aid services. The Bazley report commented on the availability of legal aid providers and particularly noted the difficulty in finding family legal aid lawyers.[11]

8.2 Ministry figures show that the number of legal aid providers offering their services to legal aid clients has fallen by nearly half since June 2009. Only 1,927 applications for approval for legal aid provider status under the Act were received from all lawyers at the end of the transitional period of 31 December 2011 – approximately 60% (1,161) of these are family legal aid providers.

8.3 These figures also do not represent the declining caseload each of these providers is willing to carry. Anecdotally, we understand that many family lawyers, while still being prepared to be a listed provider, have had to reduce the number of legal aid cases due to the financial burden of legal aid cases to their practice. The results of the Law Society's survey – outlined below – indicates this will be further exacerbated if fixed fees as currently proposed are introduced.

8.4 The Law Society responds to numerous calls on a daily basis from members of the public who cannot find a family legal aid provider to assist them. This is despite that person ringing those who are listed as providers on the Ministry's website. We attempt to assist the public to find lawyers who are prepared to do their case on legal aid but it is becoming more difficult. If there is a significant reduction in the number of legal aid providers, it is likely that this will increase the public's inability to find a family legal aid provider.

8.5 In preparing this submission, the Law Society asked family lawyers who were legal aid providers to complete a survey. A total of 764 responses were received (this is 66% of the family legal aid providers who had applied for provider status before 31 December 2011). The results are shown in the table below:

Table 1: Family lawyers surveyed, February 2012

How many years' experience have you had as a lawyer since your admission	0-2 years - 4.7% 3-5 years - 9.2% 6-10 years - 17.1% 11-15 years - 15.6% 16-20 years - 12.9% 20+ years - 40.5%
Are you applying to be or continue to be a legal aid provider	Yes - 71.3% No - 28.7%
Percentage of work that was legal aid	None - 17.6% 1-25% - 34.3% 26-50% - 13.9% 51-75% - 17.5% 76-100% - 16.7%

[11] See paragraph 229 of the Bazley report.

Percentage of family legal aid work you are currently undertaking	None - 4.7% 1-25% - 36.7% 26-50% - 20.2% 51-75% - 17.7% 76-100% - 20.7%
The level of legal aid work that you will provide under the fixed fee proposal	None - 16.3% Significantly less than at present - 33.6% Less than present - 22.2% Same as at present - 16.1% More than at present - 2.4% Significantly more than at present - 1.5% Unsure - 7.9%
What best describes your practice	Barrister - 26.8% Sole practitioner - 21.8% Law firm 2-5 partners/directors - 39.8% Law firm 6-10 partners/directors - 8.4% Law firm 11+ partners/directors - 3.2%

8.6 These statistics are concerning.

8.7 They show that 16.3% of family lawyers will not undertake any legal aid assignments if the fixed fees proposal in its current form is introduced, and 55.8% will do less or significantly less family legal aid. This means a total of 72.1% of family lawyers will significantly scale back or cease legal aid work.

8.8 The Ministry appears to be comforted by the number of family legal aid providers who reapplied for approval prior to 31 December 2011. However this is in direct contrast to the survey results shown in Table 1 above, and to feedback the Law Society has received from family legal aid providers. Feedback indicates that:

- many lawyers have reapplied in order to continue to act for existing clients and to assist their colleagues in agency (or to instruct barristers) matters if required;
- had providers known about the fixed fee proposal before the application for renewal occurred, many providers would not have applied to continue as legal aid providers; and
- just because lawyers have been approved as legal aid providers, does not mean they will actively provide family legal aid or actively provide to the same level (as mentioned above, 16.3% of family lawyers will not do any legal aid work if the fixed fees proposal, in its current form is introduced and 55.8% will do less or significantly less family legal aid).

8.9 The family area needs more providers than other areas of law. This is because there is a greater potential for a conflict of interest. It is not unusual for a case to involve a number of lawyers: counsel for each party, Lawyer for the Child and Counsel to Assist. In some cases extended whanau and government departments are also represented. If the same family members are involved in a number of family proceedings then very quickly lawyers in an area can become conflicted. A reduction in legal aid providers causes conflict of interest issues particularly in provincial areas where there are already low numbers of legal aid providers.

8.10 The government's aim of reducing the number of applications for legal aid and the associated cost is likely to result in unmet legal needs and, in particular, vulnerable children and adults remaining in unsafe situations. Disputes will still need to be resolved, they will not resolve themselves.

8.11 It is difficult to see how the Ministry can comply with the purpose of the Legal Services Act 2011 to "… promote access to justice by establishing a system that—(a) provides legal services to people of insufficient means" (s 3(a)). If lawyers are no longer able to provide their services to "people of insufficient means", those people will be unable to access justice.

9. Senior and intermediate legal aid providers

9.1 The Bazley report expressed the importance of senior, experienced practitioners and stated that the legal aid system would benefit from a senior bar.[12] The Law Society believes that senior lawyers are vital to the provision of high quality legal services. They have greater experience of family law issues and likely outcomes, as well as wider legal and procedural knowledge which is able to be applied to a range of legal, factual and procedural complexities that may arise. Even in cases which appear relatively straightforward, complexities such as sexual abuse or Hague Convention issues require and benefit from the greater experience of a senior practitioner.

9.2 The Law Society is concerned that many of those scaling back or exiting family legal aid will be senior practitioners: 69% of those who responded to the survey have 11 or more years' post-admission experience (and 40.5% have 20-plus years). The proposal will result in senior, experienced lawyers not undertaking legal aid work and the work being taken up by less skilled and less experienced lawyers.

9.3 Under the proposal senior and intermediate level providers will be remunerated at the junior rate of $105 per hour. For legally complex cases a rate of $134 is available to senior lawyers. For intermediate lawyers, this is a 12.5% decrease in the current rate, and for senior lawyers it is a 22% decrease. In the past decade, the only increase in a legal aid provider's hourly rate was an increase of 10% in July 2008 (reduced to 8.5% in July 2009). In the meantime providers' actual costs have continued to increase. Current legal aid rates have not kept pace with private hourly rates, other professional fees or the Consumer Price Index.

9.4 Senior lawyers will not accept the $105 rate and it follows that they will withdraw their services from all but the most legally complex cases. Intermediate legal aid providers are unlikely to be able or willing to undertake legal aid work at the rate of $105 per hour.

9.5 The Bazley report suggested that senior lawyers might be contracted on an individual basis at a rate that suitably reflects their experience and expertise. It envisaged the rate would be closer to that of the Crown Solicitor rates rather than the current Level 3 rates.[13] The current fixed fee proposal discourages the involvement of senior lawyers in all but the most complex of cases and the concerns expressed in the Bazley report, the loss of senior lawyers, will be exacerbated by the current proposal.

10. Junior lawyers

10.1 The proposed framework raises longer term issues for the profession in terms of the support and mentoring that senior practitioners provide to less experienced family legal aid providers. Frequently, legal aid work is done by more junior lawyers in the firm but is overseen (as is all legal work) by a partner (senior lawyer) within the firm. This supervision is often without cost to the Ministry. However, the fees proposed are such that even as a learning exercise, it is not possible for most firms to continue to allow junior lawyers to do the work. We have heard from a significant number of lawyers that their firms have stopped taking on graduates and have been making junior lawyers redundant. It appears that for many firms withdrawing from legal aid, or reducing legal aid, means that they do not need

[12] See paragraph 432 of the Bazley Report.
[13] See paragraph 432 of the Bazley Report.

junior lawyers and they can reduce the work of the firm without it being significantly detrimental to the bottom line, by simply reducing juniors. Unfortunately, this is not a problem that will be readily apparent in the short term but may result in a shortage of lawyers in the medium to long term.

10.2 It is unlikely that junior lawyers will continue to be employed to undertake legal aid work as, even where there is less direct cost in terms of their salary, the fixed cost of running an office remains the same and the supervision requirements for the senior lawyer are significant and unremunerated. Junior lawyers will be in breach of the terms of their legal aid contract if they attempt to undertake work without supervision including appearing in Court without a lead provider present (where they do not have lead provider status). Unsupervised junior providers raise quality issues.

11. Self-represented litigants

11.1 As mentioned above, a large number of practitioners who applied for family legal aid provider status under the new Act have indicated that if fixed fees are introduced in their current form, they will withdraw from providing legal aid services and cancel their contract with the Ministry. If a lawyer cannot be found then the individual will have no option but to represent themselves.

11.2 The proposed decrease in the eligibility threshold[14] is also likely to result in more self-represented litigants. This increase in the number of self-represented litigants will inevitably impact on the efficiency and cost-effectiveness of the Family Court. The legal aid "savings" (if any) gained from the fixed fee proposal will be a false economy since they will be offset by increased costs in Family Court resourcing and other areas of government expenditure.

11.3 In July 2009, the Ministry published a discussion document on self-represented litigants.[15] A shortage of research data limited the conclusions able to be drawn in relation to the family jurisdiction.[16] The perception was that the number of self-represented litigants was increasing. The Bazley report also acknowledged the upward trend of self-represented litigants in the Family Court and that this was causing problems in that Court.[17] Dame Margaret went on to state that this illustrated "that changes to the legal aid system need to be considered within the justice system as a whole, particularly where they could result in more un-represented litigants".[18]

11.4 There has been no analysis or forecasting undertaken about the likely increase in self-represented litigants and the costs associated with them (both in the initial proceedings and as repeat applications/appellants).

12. Professional obligations of lawyers

12.1 All lawyers have an obligation to comply with the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules). The Rules emphasise the care needed by lawyers when delivering services. As the regulator of the profession, the Law Society is concerned that the proposed fixed fees are manifestly inadequate and do not allow sufficient time for legal aid providers to undertake the work to the level required by their professional

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14 Legal Assistance (Sustainability) Amendment Bill.

15 *Self-represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions*, M Smith, E Bonburn, SW Ong, Ministry of Justice, July 2009.

16 The lack of empirical research has been noted by the Law Commission "Delivering Justice for All" March 2004. There is research now under way on the topic at the University of Otago, supported by the NZ Law Foundation (reported in NZ Lawyer, 27 January 2012).

17 See paragraph 30 of the Bazley Report.

18 See paragraph 42 of the Bazley report.

obligations, including as officers of the Court. This will put them at serious risk of breaching these obligations and prevent them from complying with their client care obligations. It puts legal aid providers in an untenable position in relation to s 81 of the Legal Services Act 2011 which states that the fact that a lawyer provides legal aid services does not in any way affect that provider's obligations under any rules or codes of conduct of any professional body.

12.2 In particular, we are concerned that there will be insufficient time for lawyers to ensure clients fully understand what is happening in proceedings and the decisions being made. The Law Society is concerned that this will lead to increased dissatisfaction by clients in relation to the outcome of their case. As a consequence there is likely to be an increase in complaints against the lawyers concerned and less durable outcomes, including an increase in appeals or repeat applications. The following comment encapsulates the significant number of comments received from family legal aid providers:

> *"the rates and times allocated in the proposal are so low that a lawyer would be giving very little time to a case and in my view any shortcutting would be tantamount to negligence."*

12.3 Under s 75 of the Legal Services Act 2011 a person must not provide legal services unless he or she is approved by the Secretary for Justice. Under s 69 of the Act, the methods and delivery of legal services includes entering into agreements with individual lawyers. Clause 5.3 of the proposed provider contract requires lawyers to comply with the Ministry's legal aid provider practice standards. The contract and the practice standards impose obligations on legal aid providers that must be met but which the Ministry does not appear to be able to afford. A number of the practice standards impose obligations and although these are not mandatory they will be time-consuming. The timeframes provided for in the proposal should reflect these additional obligations.

12.4 The practice standards emphasise 'file hygiene' and the hard copy recording of what has occurred. It is likely that a lawyer who is pressed for time will meet requirements by simply sending written advice in order to avoid meeting and speaking to the client wherever possible. However, many legal aid clients have limited literacy and the likelihood of them properly understanding advice that is only provided in writing is minimal.

13. Cost of compliance

13.1 The many recent changes to the legal aid system have increased compliance costs for legal aid lawyers at a time when they are already under financial pressure. The fixed fee proposal will cause further significant cost and inconvenience making the provision of legal aid an unappealing option for most lawyers. The compliance costs to legal aid providers include:

- the less-than-smooth transition from the Legal Services Agency to the Ministry when the Agency was disestablished in July 2011;
- accommodating new forms and processes (particularly in IT billing and invoicing systems) as a result of the implementation of the Act and the associated regulations in July 2011;
- the need to re-apply to the Ministry for legal aid provider status (and the time associated with that process) by 31 December 2011;
- delays and administrative burden in getting grant applications approved (an on-going issue); and
- significant delays in getting payments processed and approved by the Ministry, and the extensive correspondence required to get invoices paid (another on-going issue).

13.2 Against this background, the Law Society is concerned about the haste with which the proposed fixed fee framework has been developed. There will be, yet again, additional changes and pressures for providers to incorporate the new fixed fees forms and processes into their current time management systems (by July 2012). There is also concern about the further delay in payments of invoices and processing of grants that might result from the Ministry implementing the proposed fixed fees framework.

14. Flawed data

14.1 The Law Society is concerned that the data relied on by the Ministry is flawed. The proposed fixed fee schedules are based on the Ministry's analysis of the average amounts paid for activities in family cases opened and closed during the 14 month period from October 2010 to December 2011 and some 300 hard copy file samples. The Law Society understands that the fees are derived from the average of approved payments per activity with the results moderated by the Ministry. In addition, 5% was removed from the top end as being considered high cost cases. However, it is highly unlikely that many actual high costs cases would have started and finished within a 14 month period. Using this formula, the Ministry calculated the average cost per case to be $876 over that period of time.

14.2 In the family area it is not sensible to use as an average example cases opened and closed within a 14 month period. Few family cases resolve within that period meaning straightforward cases are over represented in the data set and the more difficult (and usual) cases will not be captured. This applies to both the overall cost per case and the cost per step as a straightforward case is generally straightforward throughout its progression.

14.3 The concerns about the Ministry's use of this limited sample is supported by the Ministry's own data[19] which shows the average cost per case over that period to have been between $2,200 and $2,500 (not $876). This data captures the actual cost to the Ministry of all cases over that period, regardless of when they were opened. This is a more realistic reflection of the average cost of a family legal aid case.

15. Impact on firms and business models

15.1 The fixed fees and rates proposed in the consultation document are insufficient for lawyers to maintain the necessary infrastructure and systems, and to deliver the high quality legal services required by the Ministry.

15.2 Most lawyers undertake legal aid work out of a sense of professional obligation to ensure access to quality legal representation for the most disadvantaged members of society. They do not expect the legal aid remuneration rate to match their private rates. Lawyers undertaking private work charge between two to four times the hourly legal aid remuneration rate. The profession's willingness to continue to provide family legal aid services very much depends on the payment of an hourly rate which, while not meeting their usual private market rate will nevertheless cover most of their running costs (not leaving them out of pocket) and enable them to meet their professional and ethical obligations.

15.3 Lawyers have for many years subsidised the legal aid system. They commonly discount their hours on a legal aid file rather than waste time by applying to the Ministry for an increase to the grant or applying for a reconsideration of a decision. The bureaucracy and administrative burden associated with dealing with the Ministry is time consuming and frustrating. The associated telephone calls and returned correspondence for the most minor omissions only increase the providers' subsidisation of a supposedly public funded system. There are often delays in getting an initial response from the Ministry regarding an increase

[19] See Family jurisdiction- Average costs supplied to attendees at the Ministry's workshop on 25 January 2012.

in grant and further delay in practitioners receiving payment for the legal services they provide. While it appears one of the justifications for the fixed fee is to reduce this acknowledged administrative burden, the Law Society is concerned that the administrative burden will not decrease and in addition will be more burdensome if a provider needs to move between a fixed fee to a fixed fee plus or a complex case and consequently the same issues will arise.

15.4 It is unreasonable for the Ministry to expect practitioners to continue to use their businesses to subsidise the provision of legal aid. The proposal is simply not financially viable for lawyers to run a practice and provide high quality legal services in the manner promoted in the Bazley report. It achieves the opposite of the objectives and aims set out in the Bazley report. Car boot lawyers, so roundly criticised in the report, will inevitably occur.

15.5 Current family legal aid rates are noted in Table 2 below.

Table 2: Family legal aid rates (GST exclusive)

	Level of Experience		
	Level One (0-4 years)	Level Two (4-9 years)	Level Three (9+ years)
FC1	92	116	124
FC2 (Family/District Court)	106	120	134
FC3	120	134	149
FC4	130	144	159
Travel time	48	58	68

15.6 The proposed hourly rate for fixed fee and fixed fee plus cases of $105[20] (or $53 per half hour depending on the appropriate case level rate) cannot purchase *high-quality legal services* as the Secretary for Justice is required to do under s 68(1)(a) of the Act. If quality legal services could be purchased for that amount it must surely follow that the government would be able to purchase all its legal services at this rate including from the Crown and from other legal providers contracted by government.

15.7 The proposed rate does not come close to even the costs awarded under party costs in the District Court and High Court Rules. These are usually accepted to be no more than two thirds of the actual legal costs. The fees proposed are less than half of the lowest cost estimated by District Court Judges, and significantly less than the average cost of actually undertaking the work. It is not reasonable that the costs awarded against an unsuccessful party should be significantly greater than the fee which the lawyer for the legally aided (and successful party) can claim.

15.8 The proposal bears no relationship to or understanding of the reasonable costs of running a business. It does not take into account the fixed overheads of a business including rent, electricity, private indemnity insurance, office support, the cost of a practising certificate, or the on-going training and continuing legal education of lawyers to maintain their professional standards. Practitioners are unanimous in their concern about the ability to provide high-quality legal services within the timeframes provided for the proposal. The feedback provided included a specific breakdown from some lawyers of the costs of running a practice and two examples are included below.

- *Example 1 – Barrister's chambers (not a main city)*

[20] Page 7 of the fixed fee consultation document.

The average annual overheads for running a barrister's practice (a chamber made up of four barristers, shared conference room and secretary/receptionist), is $108,099.42 per barrister per annum. This includes office costs, insurance, car, travel and accommodation costs, wages and PAYE, interest and bank charges (taken from audited, annual financial statements). This does not include any drawings or income payable to the barrister. When broken down to the 1,040 standard chargeable hours per annum (to take account of annual leave, sick leave and statutory holidays), this equates to $103.94 per hour. This equates to a gross profit of $2.06 per hour less tax, which is less than the minimum wage.

- *Example 2 – Medium sized law firm (main centre)*
  A medium sized law firm currently doing some legal aid work has calculated that when they divide all of their running costs by the number of authors, if the authors do their budgeted hours of five hours billable a day (generous by most law firm standards) a charge of $235 (GST exclusive) is required to break even. If the billable hours were to be increased to 6 hours a day then they require $196 per hour to break even. This is a firm that has the service delivery requirements preferred by the Ministry, premises including meetings rooms and administration staff.

  On current legal aid rates, the firm is making a significant loss on legal aid cases but it had been prepared to do a small amount of this work to assist those in need. However, the proposed fixed fees are so low that even the most junior of authors doing legal aid work would result in an unsustainable drain on the firm and it would not be possible for the firm to continue.

15.9 Feedback from family legal aid providers who are partners in firms was that if fixed fees are introduced in their current form, there will be professional and support staff redundancies as a result of firms either withdrawing from providing legal aid services or, in an effort to reduce overheads, if they continue to provide legal aid services at the rates proposed.

16. Global granting pilot

16.1 A global granting pilot in the family jurisdiction was trialled in 2006. The pilot was undertaken to determine whether family legal aid cases could be managed within a fixed fee system. Those who took part were generally positive about the pilot, because it reduced the amount of administration time involved in dealing with the Legal Services Agency. However, the feedback also indicated it did not work well in respect of the allocations of time, which were in some cases insufficient to complete the tasks to meet professional obligations. There was no ability to deal with special factors and particular situations that arise in family law. In fact, some of the files were ultimately removed from the trial for this reason.

16.2 Examples of "special factors" included where a client was a prisoner and the provider required transport and travel time to the prison; and where a translator was required. In the majority of cases an amendment would have needed to be sought under the global granting process.

16.3 Feedback also indicated that in some cases the payment provided under the pilot was reasonable but in some cases it was not. Examples provided included:

- the majority of files were "unders" resulting in the firm suffering a financial loss;
- the $130 for judicial conferences was not sufficient to obtain instructions, identify the issues, draft and circulate the joint memorandum required by the court and to attend the conference;
- there was no ability to extend the four hours provided for pre-proceedings – this effectively meant that proceedings would need to be issued to ensure on-going funding

as opposed to clients entering into a genuine attempt to resolve matters without the need for involving the Court; and

- proceedings under the CYPTF Act, the fee for uncontested CYF reviews was not reasonable and for contested CYF reviews needed to be considered on a case-by-case basis.

16.4 The lawyers the Law Society spoke to who were involved in the global granting pilot reported that relationship property cases were unworkable and inappropriate for a fixed fee framework.

THE PROPOSED FIXED FEE FRAMEWORK

17. Types of cases – fixed fee, fixed fee plus or legally complex

17.1 The proposal establishes three case management levels:

- fixed fee cases - where fixed fees apply to all case activities apart from hearing times;
- fixed fee plus cases – based on the fixed fee plus additional hours where the fixed fee is not sufficient because specific factors increase the work required; and
- legally complex cases – where fixed fees would apply for some or much of the case, but some activities (which may extend to all case activities) require the replacement of fees with hours at the higher hourly rate.

17.2 There is no objection in principle to the three case management levels provided there is an easy way of moving from a fixed fee case to a fixed fee plus case at any stage in the grant.

18. Fixed fee plus cases

18.1 If special circumstances exist at the time the application for aid is made, a practitioner should be able to seek a fixed fee plus rate, specifying the existence of the circumstances to justify the change. This would be by way of a simple "tick box" process. The result will be that there will be additional but fixed amounts of aid available.

18.2 It is anticipated that information relevant to the client would reasonably be known at the time the practitioner is instructed and the legal aid application is being made. This would trigger the ability to seek additional hours to cover the extra time the practitioner will need to spend advising the client and preparing court documents. The ability to make this application in a simple "tick the box" manner will save time, both for practitioners and the Ministry, and thus lead to administrative savings at both ends.

18.3 The following circumstances should be added to the "additional factors" step in each category. The Law Society is concerned that these "additional factors" can be claimed only once *per case* (it is hoped this is simply a drafting error). Additional factors should be able to be claimed once *per activity*. The following circumstances should be added to the three factors already listed in the proposal at each proceedings step where:

- there is a complicated background to the proceedings including numerous previous applications having been made, the existence of previous Court orders and possibly the existence of proceedings in other courts;
- the child who is the subject of the proceedings has a disability or special needs which requires greater care to be taken or additional information to be obtained;

- there are other agencies already involved, for example Police and the Ministry of Social Development (MSD), requiring additional liaison and information-gathering for the lawyer; and
- there is a history of MSD or other third party involvement with the family.

18.4 If this information is not known when the application for aid is made, but it becomes known to the practitioner during the course of his or her instructions, it must be possible to retrospectively seek an extension on the basis that the criteria for the fixed fee plus case has been made out.

18.5 Some circumstances warrant more than the allocation of $140 for "additional factors". These are where there are significant on-going issues which will impact on the time required to properly advise and represent the client. The Law Society recommends that where the following characteristics are present, the lawyer should be eligible for a 15% uplift on all fixed fee activities relating to those clients (for example 15% added to the invoice) where:

- the client has English as a second language;
- the client has some other disability (hearing, blindness, illiteracy);
- the client is having difficulty properly instructing the lawyer as a result of mental health or personality issues including depression or anxiety which requires additional time to be spent with the client;
- there are cultural issues for the client;
- the client is difficult to contact and provides poor instructions because of poverty, lack of telephone/other means of communication, transience;
- there is a complex family situation such as a large number of children requiring different care arrangements; and
- there are allegations of family violence (including psychological violence).

18.6 The above criteria are similar to the criteria currently used by the Ministry to approve the appointment of senior Lawyer for the Child and to authorise payments at the higher level.

19. Legally complex/high cost cases

19.1 Some factors are almost always present in complex/high-cost cases. The existence of these factors is not always known at the point where the application for aid is made but become apparent where a defence is filed or the proceedings progress. For this reason, practitioners who initially anticipate that the case will fall within a fixed fee arrangement must be able to swiftly seek to have the case confirmed as a high cost case after the grant of aid has been made.

19.2 What must be emphasised is that in the family law jurisdiction, it is not always possible to identify a case as high cost at the outset. Circumstances can, and do, change during the course of a legal matter. As a result, there are not so well defined stages of progression as there are in other areas of legal proceedings.

19.3 The criteria for identifying a high cost case may include:

- multiple parties (particularly step-parents; grandparents; other family members; non-kin caregivers);
- multiple applications – either at the outset of the proceedings or filed over the course of the proceedings;
- self-represented litigants;
- more than one change of counsel on the other side;
- a large number of children or different living situations/needs;

- non-compliance with orders or directions including breaches;
- alienation cases;
- cases involving private expert witnesses (for example critiques of s 133 reports or s 15 economic disparity reports);
- repeat applications/vexatious litigants;
- parties who are cognitively impaired as a result of mental health issues, personality disorders or for other reasons such as injury or alcohol/drug issues;
- where there has been a complete breakdown in the relationship between the parties and no possibility of any issues being resolved directly by the parties;
- cases where a professional supervision agency is involved;
- cases where there are allegations of sexual or physical abuse involving the Police/MSD and possibly criminal proceedings;
- cases where there has been or is current CYFs involvement;
- cases where external factors impact on the smooth progression of the case including delays with the courts/court professionals or individual requirements of regional Courts; and
- cases where the circumstances of the family change during the course of the proceedings, which alter the manner in which the proceedings need to be addressed or managed and/or the types of proceedings necessary. For example, one party may assault the other, or a new child may be born into the family.

19.4 In cases which are identified as potentially high-cost cases, high-cost case plans need to be approved quickly and the lawyer needs to know exactly what framework they will be doing the work under. Guidelines, templates and samples are required to guide both the Ministry and the provider through the logistics of this process.

19.5 In addition, the Law Society believes that particular types of cases should automatically be regarded as complex as they require the skill and expertise of senior family legal aid providers. These are:

- Relationship property proceedings;
- Adoption – particularly an application to dispense with consent; and when an adoption order proceeds to a defended hearing; and
- Hague Convention cases.

19.6 There may be other types of cases or steps in particular proceedings that might be identified as being automatically regarded as complex cases. The proposed review of the fixed fee framework, which the Ministry has advised will follow implementation, needs to specifically consider what cases should be automatically accepted as legally complex cases.

19.7 The Law Society supports the retention of the higher hourly rate of $134 which is the current senior rate for lawyers with nine or years' experience in complex high cost cases.

19.8 If the outcomes of the Family Court review result in significant savings to the Family Court by more disputes being resolved without the need to file Family Court proceedings, the cases that do proceed to a hearing will be of a more complex nature than they are at present.

20. Time allocated in the family proceedings steps

20.1 In the majority of steps, the time provided is simply unrealistic and inadequate. Analysis of the individual steps in each family proceeding shows that in most cases, a significantly greater reduction than 10% has been made.

20.2 The time allocated displays a fundamental lack of understanding of basic legal principles and the very nature of family law. In particular, preparation time is grossly understated.

Investment in the pre-proceeding process is particularly important as it results in less court time and more durable solutions. The framework does not take into account the actual time, skill and expertise required to perform the tasks to a high quality standard. Each of the proceeding steps is discussed in detail in **Appendix 1**.

21. Disbursements

21.1 The Ministry is proposing amendments to what may be claimed as a disbursement. "Non-lawyer costs and agents' fees" may not be claimed as a disbursement and the proposal states that other previously allowable disbursements have been "built into the fixed fees". There would be a revised list of disbursements for which prior approval is not required. Otherwise the existing disbursement policy would apply.

21.2 It is unclear from the proposal which "disbursements" have been absorbed into the fixed fee and which have not. Consequently, it is impossible for the Law Society to comment on this aspect of the proposal without confirmation of:

- what disbursements have been built into the fixed fees;
- the amount of money that the Ministry has allowed for those disbursements; and
- the revised list of disbursements, including the maximum amounts allowed (if any) for which prior approval is not required.

21.3 The above points require clarification.

21.4 This is a particularly worrying aspect of the proposal as disbursements are real costs incurred by lawyers on behalf of their clients, specific to that client. While legal aid remuneration rates have remained static, the costs of disbursements have continued to rise as a result of inflation, greater prevalence of cell phones (most legal aid clients do not have land lines), and greater Court procedural requirements. For example, the need to file bundles of documents for hearings and provide copies of the documents required for service on parties. Court documents can be voluminous in family cases. The Family Court in some areas provide copies of documents and even Judge's minutes and letters as PDF attachments to emails. Practitioners therefore cover the cost of printing those documents.

21.5 In respect of agents' fees, the Law Society's view is that these should continue to be claimed as a disbursement. Alternatively, if there are agents instructed for call overs, there should be some room for an "uplift" in fees to enable the agent for the need to come up to speed with the file (see the comments on agents' fees below). Agency fees are usually due to an attempt by a lawyer to save money for both the Ministry and the Family Court. This is because a lawyer is attempting to limit travel cost or trying to ensure that a matter does not have to be adjourned.

22. Could fixed fees work?

22.1 The Law Society believes that fixed fees in the family jurisdiction might work in some circumstances – but only if:

- the time allocated and the fixed fee attached to that time is adequate for a provider to complete the tasks required to a standard that enables them to meet their professional and ethical obligations;
- there is a simple transition from the "fixed fee cases" to the "fixed fee plus" and "legally complex" categories if required (a simple "tick-box" process has been suggested above);

- the process for moving between these categories needs to be available at the beginning of the case and also as matters develop – this reflects the unique nature of family law; and
- careful consideration is given to the suitability of the cases being included in the fixed fee framework (for example, relationship property should not be included).

22.2 The Law Society recommends that if a fixed fee framework is introduced in the family jurisdiction, it should be piloted in some areas or introduced in a staged roll-out. This would enable family legal aid providers and the Ministry to properly identify whether or not the activities could be undertaken for the fee proposed.

22.3 If a pilot is not an option, the Law Society further recommends a review of the framework within six months to identify whether adjustments are required and that representatives from the Law Society are included in the working group reviewing the framework . It is also likely that by the end of that period, the government would have considered the potential significant savings that might be made to the cost of the Family Court, following the Family Court review and the impact of those savings on the legal aid system.

23. Other potential savings

23.1 The legal basis currently exists for the Commissioner to refuse to grant legal aid if the Commissioner considers the grant is not justified. By exercising this discretion and applying the merits test more stringently savings can be made, rather than providing inadequate time and funding for cases that do have merit. This is echoed by the Bazley report that stated "case management should start with the stringent application of the merits test for family cases".[21]

23.2 The Law Society suggests the following areas that might be considered to achieve efficiencies and savings to the legal aid system:

- reconsider excluding some types of proceedings from the legal aid funding schedule (for example, unopposed adoption cases might not eligible in future);
- review Ministry processes and procedures to create greater efficiencies in the administration of legal aid;
- limit funding for aspects of cases where budget blowouts can occur, for example, limiting interim contact to a maximum amount of time;
- greater use of the Commissioner's discretion to consider if there are sufficient merits in the substantive case before legal aid is granted;
- greater use of the Commissioner's discretion to withdraw or amend a grant; and
- greater use of technology and facilities such as telephone conferencing – for example, it could be standard procedure for counsel and the client to attend court by teleconference for all judicial conferences, which would save time (in terms of waiting time) and travel disbursements.

23.3 These suggested changes will give the Ministry the ability to achieve fiscal savings without compromising the provision of high quality legal aid services. It may go some way to reducing the number of family legal aid providers who have indicated they will no longer provide legal aid services or even attract lawyers back to undertaking legal aid work.

[21] See paragraph 297 of the Bazley report.

24. Conclusion

24.1 It will be evident from the foregoing that the Law Society has very significant concerns about the fixed fee proposal. We would welcome the opportunity to discuss our concerns with the Ministry.

Yours sincerely

Jonathan Temm
President

Appendix 1 – Consideration of the individual proceedings steps for family law legal aid

General Comments
The analysis of the individual steps in each family proceeding shows that in most cases, a significantly greater reduction than 10% has been made.

There are a number of activities that appear in multiple categories. In order to avoid repetition, some general comments are made here that apply to each category.

Additional Factors
The proposal records that additional factors can only be claimed "once per case". The Law Society hopes this is a simple drafting error, and that it should read "once per activity". This will need to be amended.

In some categories of work, such as Adoption, there is no provision for additional factors. There should be provision for additional factors in each category.

Early Intervention Process
There is no reference to the Early Intervention Process (EIP) in the proposed fixed fees. It is recommended that there be an extra step of $140 (minimum) to cover the EIP memorandum and attendance at the EIP judicial conference.

Defended Hearing
Proposing to remunerate counsel at an hourly rate of $106 ($53 per half hour) for court hearings is inappropriate. Appearing in a defended hearing is one of the most demanding areas of legal work, requiring high levels of competence. However, proportionally, appearing in defended hearings is a small percentage of the work done, as the family law area is geared towards settlement out of court. Such work should be remunerated in a way that recognises the level of expertise and competence required. The proposed hourly rate of $134 for complex cases should apply for all defended hearings. Even if the work is done by a junior practitioner they will need to be closely supervised by senior counsel. Therefore the higher rate is justified.

Post-defended hearing
There is no provision under the Adoption, Domestic Violence, Paternity, and Personal & Property Protection Rights categories for post defended hearing activities. This appears to be an oversight, as if there is a defended hearing under any category there will be additional work involved following receipt of the judge's decision.

The proposed allocation of $90 and $140 for Review of Judgment, where it is provided, is insufficient. Judgments can often be lengthy, and the tasks of reading the judgment, and advising the client, cannot be completed within this allocation. It is not simply a matter of telling the client the outcome. Explaining the decision, ensuring the client understands the outcome and on-going responsibilities, and advising on rights of appeal is also required. A fixed fee of $318 (3 hours) would be sufficient.

Additional Activity for Urgent Applications
There should be an additional category for urgent applications, regardless of the legislation under which the application is made. An urgent application for a temporary protection order, or order preventing removal of a child from New Zealand, for example, <u>always</u> requires significantly more work, usually after hours. The initial meeting with the client will be lengthy, and the speed with which documents have to be prepared to file them with the Family Court by the 3pm cut off justify an additional amount. There are onerous requirements on counsel to ensure that the evidence presented in support of urgent applications is sufficient and there is a certification requirement where the lawyer has to certify the statutory requirement is met (that the document discloses all relevant information whether advantageous

or not). This results in lengthy attendances, and possibly discussions with third parties to clarify or confirm evidence.

Urgency should not come under the "additional factors" activity but should be a separate activity within the initial application. It is unrealistic to expect counsel to deal with urgent proceedings within the proposed initial application fixed fees. An additional fee that equates to 2 hours should be provided for urgent applications.

Disbursements
Page 9 of the proposal states that "non-lawyer costs and agent's fees would not be claimed as a disbursement (or otherwise) as these have been built into the fixed fees. There would be a revised list of disbursements for which prior approval is not required. Otherwise, the existing disbursement policy would apply." In respect of agents's fees, please see the comments below. In respect of other disbursements, it is unclear what disbursements have been absorbed into the fixed fee and which have not. For example, 50 per cent of the payment for a DNA test in a paternity proceeding is $562.50. The Ministry's fee for paternity is $570.00 – this only leaves $7.50 to complete all of the work required. Included below under the Paternity steps, the Law Society has suggested that the costs of a DNA test are included in the steps. However, clarification is still required as to what disbursements and the amount of those disbursements, have been built into the fixed fees.

Agent's fees
A particular concern is that the agent's fees may not be claimed as a disbursement because presumably the agent may simply pick up the case from scratch, with no background knowledge, and spend the same time for the task and receive the same fixed fee as the instructing solicitor. There is the concept of "necessary duplication" which is very real. An agent will need to come up to speed and that should not be subsidised by the instructing solicitor simply because, for example, the case is heard at a distance. The Ministry recognises that a client may have a local lawyer, notwithstanding that the case is at a distance, and it hardly serves access to justice for a poor and vulnerable party to be required to provide instructions by telephone to a lawyer they have never met. For that reason, if there are agents instructed for call overs, there should be some room for an "uplift" in fees for the necessary duplication.

PROPOSED FAMILY FEES SCHEDULES

Pre-Proceeding Settlement
Settlement short of proceedings should be encouraged.

It is to the Ministry's advantage that matters resolve short of litigation. This will produce significant savings if proceedings do not eventuate. Therefore more funding should be available in this category.

At the proposed new 'standard' legal aid rate of $105 per hour, the proposed fee for "negotiation of settlement" at $470 equates to 4.4 hours work. The current guideline is 6 hours at the provider's hourly rate. This is a reduction of 27%. Most lawyers indicated that they regularly spend more than 6 hours on this step so the Ministry is already achieving efficiency in within the 6 hours allocated. The proposed fee for this activity is insufficient, and the fee should be adjusted to reflect the existing guideline of 6 hours.

If there is a round table meeting then the actual meeting time should be added to the fee.

Parties should be able to access a fee for settlement negotiations during the course of proceedings on a one off basis. This may facilitate agreements being reached rather than matters progressing through extensive and costly litigation.

Adoption
<u>Application(s)/Order(s)</u>

Application(s)/Order(s)
In a very straight forward matter the proposed fee of $570 may be sufficient however in a more complex matter the fee will be completely insufficient.

Social work reports are always obtained in applications for an adoption order. The reports are not released to counsel and parties and counsel need to attend the Family Court to peruse them. An additional fee should be allocated for this as an activity step. Alternatively this could be listed as a separate task, and should justify a higher fee under the step it is included in.

Application to Dispense with Consent
The fee proposed is $140. This is manifestly inadequate for the work involved. Preparing an application to dispense with a birth parent's consent is not standard Family Court work and this should come under the "complex' case category.

Defended Hearing
Applications for an adoption order are not typically defended. When they are, it is more likely to be because the Ministry of Social Development does not support the adoption for some reason, rather than the birth parent(s) objecting. Adoptions with international aspects are more commonly defended because of immigration status consequences.

If an application for an adoption order proceeds to a defended hearing, the matter should come under the "complex" case category.

Post Defended Hearing
There is no provision under Adoption for post defended hearing activities. If there is a defended hearing then there will be additional work involved following receipt of the judge's decision.

Children & Young Persons (CYP)
Introduction
The care and protection provisions of the Children Young Persons and Their Families Act 1989 (CYPTF Act) include some of the more draconian powers of the state. The CYPTF Act provides for the state to remove children from their parents, by force if necessary. CYPTF Act proceedings (and proceedings under the Mental Health (Compulsory Assessment and Treatment Act 1992) are fundamentally different from all other family law matters as they involve the state versus its own citizens.

Parents have the right to be heard in all proceedings affecting their children. Since it is the state that is bringing the proceedings, the state has an obligation to ensure that adequate legal aid is available for parents who cannot afford private legal representation.

The proposed fees for CYP proceedings cannot possibly be considered adequate for "high quality" legal services. Neither do they promote access to justice. They will not attract counsel of sufficient experience and ability to properly undertake the work.

Process of Proceedings
Proceedings under the CYPTF Act are not always commenced by the filing of an application for declaration and custody, as appears to be contemplated in the proposed fixed fees. The Ministry may become involved due to a referral being made to the Care and Protection Co-ordinator under ss 18 and 19 of the CYPTF Act. A Family Group Conference (FGC) would then be held. If the conference reaches agreement on the outcome, short of an application for a declaration, then that may be the end of the proceeding. Whilst the Ministry does not usually encourage parents to have legal representation at an FGC, it is essential that parents are able to access legal advice through this part of the process. Indeed, it is a fundamental legal right.

A fixed fee for "pre proceeding settlement" must be added to this category.

If no agreement is reached, or the agreement is that the child is in need of care and protection, then the ministry will file an application for a declaration. This may be accompanied by an application for a custody order in respect of the child. The result of the court proceedings will be either: a consent order for a declaration; a consent order for a declaration and a custody order; a consent order for a declaration and a defended custody order; or a defended declaration and custody order.

Application(s)/Order(s)

First/only proceedings

Parents whose children have been uplifted by CYF are in a very distressed state, and do not understand the legal basis upon which the state has acted. A lawyer's work in this area will typically require more time in attendances than in other areas of family law.

Under the existing steps, counsel receive 8 hours at their guideline rate ($880 at the minimum hourly rate through to $1,072 at the higher rate) for this work. The proposed new fee of $570 at the new proposed "hourly rate" is effectively 5.4 hours. This is a reduction of 32%. The allowance of time is manifestly inadequate for counsel to complete all of the tasks identified for this activity.

The tasks listed under this heading are incorrect and require amendment. It is the Ministry that prepares and files the application for a declaration and custody of the child, not the parents. The parents will file a notice of intention to appear, and must file an affidavit in reply to the affidavit(s) filed by the Ministry. Affidavits in reply often take longer to prepare than an affidavit in support of an application. This is because the client must not only answer the affidavit/application, but will invariably have their own relevant information to present in evidential form. Other witnesses may also be required. There is also often a very limited timeframe within which to complete these documents.

The work involved includes taking instructions; attending and advising the client; identifying legal and factual issues; applying for legal aid; receiving service of application for declaration and supporting affidavit; receiving the Lawyer for the Child report; preparing a notice of intention to appear/notice of defence and supporting affidavit; attending to registrar's lists; attending a judicial conference; reporting to the client; invoicing legal aid. If agreement on all matters is reached at the FGC, the work may be completed within the 10 hours. The minimum number of hours for this category should be at least 10 hours.

Application(s)/Order(s) – Second, Third and Subsequent proceedings

There are no efficiencies with multiple applications as the parents are typically the respondent. However, a parent may file an application for access to the child and the application will need to be accompanied by an affidavit and possibly other supporting documentation.

Pre-Hearing Matters

At the proposed new 'standard' legal aid rate of $106 per hour, the proposed fee for "pre-hearing matters" at $710 equates to 6.7 hours of work. This is manifestly inadequate for all of the listed tasks. There can often be significant time delays in receiving specialist reports. However, the matter will not necessarily be stagnant during that time period. There can, and very often is, on-going work such as arranging a parent's access to the child.

Each task from the 5th bullet point on should be dealt with as a separate activity.

Specialist reports are often 20 to 30 pages long. There are significant client attendances involved as the client cannot have a copy of such a report, and so must attend their lawyer's office to read and consider it. The lawyer must be fully familiar with the report in order to explain it to their client, consider and advise on its ramifications and determine whether evidence needs to be filed in response to it. In order to discharge their professional obligations to an adequate standard, the lawyer must read the specialist report at least twice, and often more.

Judicial Conferences
The fee proposed for attending judicial conferences is sufficient so long as it is understood that this can be claimed for each judicial conference. The Registry decides when a judicial conference is required. There can be a number of judicial conferences through the course of proceedings, particularly in CYPTF proceedings.

Mediation/Round Table Conferences
While the fee for preparation may be sufficient, it needs to be clear in the task column that counsel will be remunerated at the $53 per half hour for attendance of the actual time of the conference.

Defended Hearing
If the matter is to proceed to a defended hearing then the proceedings must be classified as complex. These proceedings often involve specialist reports, and there are generally a number of witnesses to cross-examine. The original affidavit of the social worker, in support of the declaration, may contain statements made by others, who may need to be called to give evidence if the matter proceeds to hearing. Realistically it is impossible to set a fixed fee for these proceedings because each case is so different.

Post-Defended hearing
Review Hearing
This is currently a step under the "Post Defended Hearing" category but this should be a separate step. If custody orders are made in the Ministry's favour under the CYPTF Act reviews are required every 6 months until the child is 7 and yearly after that.

The existing steps provide 3 hours for a review. In almost all cases this is inadequate. Five hours is a more realistic timeframe.

Domestic Violence (Applicant and Respondent)
Application(s)/Order(s)
First/only proceedings
The proposed fee of $570 for this initial step is insufficient.

Under the existing steps, counsel receive 6 hours at their guideline rate ($660 at the minimum hourly rate through to $804 at the higher rate) for this work. In reality this does not cover the time currently spent on these matters. The proposed fee of $570 at the new proposed "hourly rate" is effectively 5.4 hours. This is a 10% reduction. The proposed fee and the associated time allocated, is manifestly inadequate for counsel to complete all of the tasks identified for that activity. Many clients involved in domestic violence proceedings are in an extremely distressed and stressed state. Adequate initial advice at this stage is crucial to the course of the proceedings. When proceedings are to be filed, the attendances on the client are often 1 to 2 hours (to obtain initial instructions and then attendances to complete documentation), with up to 2 hours drafting, plus the time involved in preparing the applications for legal aid and dealing with all of the other matters listed under the task heading. The proposed fee fails to acknowledge the significant work that can be required in obtaining information from doctors, police, service providers, medical experts, to support the initial application. Failing to do this properly at the commencement of the proceedings can result in inadequate evidence being placed before the Court which can be challenged at hearing (and ultimately result in protection being lost for vulnerable clients who warrant and need it).

Whilst there may be efficiencies through the various other activity steps, this first level should be adequately remunerated. Given that the current allocation of 6 hours is already inadequate, this should not be reduced further.

Second and Third Proceedings
Whilst there may be efficiencies and savings with additional applications, it would assist counsel if there are tasks identified for these activities so that it is clear what is covered under this area.

There is no valid reason for a difference between the fee for filing subsequent proceedings ($290.00) and defending subsequent applications ($240.00). The work is the same whether issuing or defending.

Applicant Only

Undefended Second – Fourth and Subsequent Applications

The tasks under these headings are difficult to understand, for example "preparing one or two orders/protection related conditions in addition to the protection order". How does this differ from the second and third proceedings under the initial application step? There is no valid reason for a difference between the fee for defending subsequent applications ($240.00) and filing subsequent proceedings ($290.00). The work is the same whether issuing or defending and should be at the $290 rate.

Defended Protection Order

The proposed fixed fee of $470 is inadequate for the work involved in responding to a defence filed. This is effectively 4.4 hours at the proposed hourly rate of $106. This is a reduction of 37%. As discussed above in respect of CYPTF Act matters, preparing an affidavit in reply can often involve more attendances than preparing an initial affidavit. There may also be additional witnesses who also need to be briefed if the matter proceeds to hearing. The minimum amount of time required should be at least the same as what is currently available, which is 7 hours.

Respondent Only

The only fee proposed under this activity is for preparing an objection to attend a programme. The fee for an objection to a direction to attend a programme is generous.

There will also need to be an activity added for respondents who wish to defend the making of a (final) protection order, in addition to objecting to the direction that s/he attend a programme. In these circumstances a respondent will need to file a Notice of Defence, which must be accompanied by an affidavit pursuant to the Family Courts Rules 2002.

Formal Proof Hearing

The proposed allocations for these activities are sufficient.

Pre-Hearing Matters

The proposed fixed fee is sufficient.

Judicial Conferences

The fee proposed for attending judicial conferences is sufficient so long as it is understood that this can be claimed for each judicial conference, bearing in mind that there can be a number of judicial conferences through the course of proceedings. The Registry decides when a judicial conference is required.

Proposed Additional Activities

Interlocutory Hearings

There is no provision for Interlocutory hearings under Domestic Violence proceedings. However these may still be required.

The allocation of $140 as a fixed fee for this activity under General Family is insufficient for this work. Interlocutory applications are not common, and there is no standard template. They involve an application (or more than one application) to compel something to occur. They will need to be accompanied by either an affidavit or a memorandum/submission of counsel. There is often research involved in preparing such an application. It may be sufficient if there is an allocation of time for preparation, (as for defended hearings), related to the amount of hearing time.

Post Defended Hearing

There is no provision under Domestic Violence for post defended hearing activities. If there is a defended hearing then there will be additional work involved following receipt of the judge's decision.

General Family (Day-to-day care and Contact and Guardianship)

Application(s)/Order(s)

First/only proceedings

The proposed fee of $570 for this initial step is insufficient. Under the current steps, counsel receive 8 hours at their guideline rate ($880 at the minimum hourly rate through to $1,072 at the higher rate) for this work. The proposed fee of $570 at the new proposed "hourly rate" is effectively 5.4 hours. This equates to a 32% reduction. The allowance of time is manifestly inadequate for counsel to complete all of the tasks identified for that activity. Many clients involved in the Family Court are in a distressed and stressed state. When proceedings are to be filed, the attendances on the client are often 1 to 2 hours (to obtain initial instructions and then attendances to complete documentation), with up to 2 hours drafting, plus the time involved in preparing the applications for legal aid and dealing with all of the other matters listed under the task heading. Whilst there may be efficiencies through the various other activity steps, this first level should be adequately remunerated. It is highly likely that with a better level of funding at the commencement of proceedings, matters are more likely to settle without the need for costly litigation, as more care and attention can be given at the outset, with sufficient time for the client to understand the advice being given. The current allocation of 8 hours should not be reduced.

Second and Third Proceedings

Whilst there are efficiencies and savings with additional applications, it will assist counsel if there are tasks identified for these activities so that it is clear what is covered under this area.

Respondents Only

There does not appear to be any allocation for when counsel are acting for respondents. Either the initial application/first proceeding activity should be amended to include a reference to drafting defence and affidavits in response, or an additional activity is allocated. Preparing an affidavit in response can involve more attendances than an initial affidavit as the client has their own information which they wish to include, as well as responding to matters in the applicant's affidavit. There is often a very limited timeframe within which to complete this.

Formal Proof Hearing

The proposed allocations for these activities are sufficient.

Memorandum of Consent

The proposed fee for this work is sufficient for a more standard memorandum of consent. However, for agreements which are complex (up to 3 to 4 pages) this fee (and time) will be insufficient.

Pre-Hearing Matters

At the proposed new 'standard' legal aid rate of $106 per hour, the proposed fee for "pre-hearing matters" at $710 equates to 6.7 hours work. This equates to a 16% reduction. This is manifestly inadequate for all of the listed tasks. 8 hours is the suggested minimum for the tasks listed.

There can often be significant time delays in the report writer preparing a report, and therefore counsel receiving, specialist reports. During this time there can be on-going work such as issues over interim care and contact to deal with. These issues do not result in a fresh application to the Court, which it appears under the fixed fees proposal is the only way in which the work would be remunerated. A further hour at least should be allocated for this.

Each task from the 6th bullet point on should be dealt with as a separate activity. The comments made under "Pre-Hearing Matters" in the CYP category regarding specialist reports are equally applicable here. A minimum of two hours for the receipt and consideration of such reports would be an adequate amount of time.

Judicial Conferences
The fee proposed for attending judicial conferences is sufficient as long as this can be claimed for each judicial conference, bearing in mind that there can be a number of judicial conferences through the course of proceedings. The Registry decides when a judicial conference is required.

Interlocutory Hearings
The allocation of $140 as a fixed fee for this activity under General Family is insufficient for this work. Interlocutory applications are not common, and there is no standard template. They involve an application (or more than one application) to compel something to occur. They will need to be accompanied by either an affidavit or a memorandum/submissions of counsel. There is often research involved in preparing for this type of application. It may be sufficient if there is an allocation of time for preparation, (as for defended hearings), related to the amount of hearing time.

Mediation/Round Table Conferences
While the fee for preparation may be sufficient, it needs to be clear in the task column that counsel will be remunerated at the $53 per half hour for attendance of the actual time of the conference.

Post Defended Hearing
Review of Judgment
The first bullet point under the tasks will need to be removed as it is incorrect to include reference to attending the defended hearing here.

Review Hearing
If this is a review of an interim order that becomes a final order in a relatively straight forward way then this allocation would be sufficient. However, it is not possible to "attend a review hearing" within this allocation if the matter has become more complex or has effectively begun to be re-litigated. In this situation the matter may well need to go back to being a subsequent proceeding.

Mental Health
General comment
Under the task box for each activity there is no reference to the actual work required to be undertaken for mental health work. None of the tasks specified envisage anything beyond receiving initial instructions, identifying legal and factual issues and attending to legal aid requirements. The reality is much different. These clients are vulnerable people who are subject to a substantial incursion on their rights, particularly their right not to be arbitrarily detained and their right to refuse medical treatment.

It is necessary to liaise with health professionals, family members, to obtain and analyse the clients mental health files, prepare for and attend the hearings and to explain matters as fully as possible to clients, who are often not well positioned to understand the situation. The work required has not been particularised in the way it is for the other categories of family law work. Instead, there has simply been a replication of what appears in the existing guidelines without any thought to the extent of the work that is required.

No separate time is allowed for hearing. In relation to all steps, there ought to be full hearing time available for actual hours of hearing. There can be no justification for treating mental health matters differently to other categories of family work in this regard.

Experience suggests that already a substantial amount of time is written off where it exceeds the existing guideline fees. This may well distort the statistics relied on by the ministry.

Section 16 review
The hours allowed for are 2.28 hours compared to the existing 3 hours under current guideline hours. That equates to a reduction of 24% in time. The existing guideline hours are already inadequate and the proposed new time and associated fee will be even more so. A more realistic guideline would be to allow 3 hours preparation time plus actual hearing time.

Section 16 review repeat instructions within four months and eighteen months.
The existing guideline hours are 2 hours and 2.5 hours respectively. The proposed hours are 1.33 hours (39% reduction) and 1.81 hours (28% reduction). The existing hours are already inadequate and in practice there is no difference in time required for repeat instructions compared to an initial s 16 review. The same attendances are required on the client. Updated requests for information need to be made, there needs to be consultation with family and the current clinicians and there is hearing time required. There is no justification for a reduction in the time as the existing guidelines are already substantially inadequate. There is a real risk that a reduction in the fee for repeat instructions will be an impediment to warranted reviews. The time and fees allocated in the current steps for repeat instructions should remain to cover preparation only. The actual hearing time should be allowed in addition to the preparation time. Two hours should be allowed for preparation time plus actual hearing time.

Second s 16 review during one continuous period of assessment and treatment
The existing guideline hour of 1 hour is wholly inadequate. The proposed flat fee at 0.86 hours (reduction of 14% of time allowed) is even more so. This would not even allow for initial attendances of completing legal aid let alone attending to the s 16 review. The s 16 review is a vital check against the infringement of the individual's right not to be arbitrarily detained and to refuse treatment.

Undefended Compulsory Treatment Order application following a s 16 review
It is unclear whether this step includes any fee that would otherwise be charged under a Section 16 Review (the current Step 1). If so, then the proposed fee is wholly inadequate for the work required. At 4.09 hours it is an 18% reduction on the current guidelines of 5 hours. Five hours preparation time plus actual hearing time would be more realistic. On repeat instructions, whether within four months or 18 months, 4 hours should be allowed for preparation plus actual hearing time.

In relation to all steps regarding the hearing of an application for CTO, there needs to be allowance for s 18 examinations which are a separate process even if in practice they often run together with the hearing. It is not uncommon for a s 18 examination to be held on a date prior to the hearing and preparation and hearing time should be allowed for this. Where this occurs there should be an additional 1 hour allowed for preparation time plus actual hearing time.

In relation to all steps regarding the hearing of an application for a CTO, additional time should be allowed where the hearing is adjourned. It is common for hearings to be adjourned part heard or otherwise to see what progress is made and whether an order remains necessary or whether a Community order may be more appropriate compared to and Inpatient order. Where this occurs there should be an additional 1 hour for preparation time plus actual hearing time.

In relation to all steps regarding the hearing of an application for a CTO where the Court calls for a report under s 21 additional time should be allowed to recognise the additional time in dealing with this including assisting in determining the brief for the report and receiving, considering and acting on the report. There should be an additional 2 hours preparation time plus actual hearing time for addressing that particular matter.

Undefended Compulsory Treatment Order application where there has been no s 16 review
The existing guideline fee is 4 hours, which in some instances is sufficient for the most straight forward cases. For others it is inadequate. The fixed fee at 3.14 hours is a 22% reduction and will be inadequate in all but the most clear cut and straight forward cases and including where counsel is not inconvenienced by excessive waiting times when hearings are held. Four hours should be allowed for preparation time plus actual hearing time.

Defended Compulsory Treatment Order application following a s 16 review
The current guideline allows 7 hours. The proposed fee is based on 5.42 hours. That is a 23% reduction in time. In some instances the existing guideline fee is sufficient but usually it is not. The reduced hours available will be wholly inadequate other than in cases where a very limited point is

being argued. If the fee is intended to include any fee that can be charged for a s 16 review then it is wholly inadequate. Seven hours should be allowed for preparation plus actual hearing time. On repeat instructions, whether within 4 months or 18 months, 6 hours should be allowed for preparation time plus actual hearing time.

Defended Compulsory Treatment Order application where there has been no s 16 review
The same comments can be made as for a defended CTO application following a s 16 review. Six hours should be allowed for preparation time plus actual hearing time. On repeat instructions, whether within 4 months or 18 months, 5 hours preparation time should be allowed plus actual hearing time.

Application to a review tribunal
The existing guideline fees allow 6 hours. The proposed fixed fee allows for 4.09 hours, a 32% reduction in time. Yet this is a specialised Tribunal with a Psychiatrist member, lawyer member as Chair and lay person. It requires significant preparation. The proposed fee, and associated timeframe is entirely inadequate. Further, there can be no justification for the fee being less than matters before the Family Court. Seven hours preparation time should be allowed plus actual hearing time. On repeat instructions, whether within 4 months or 18 months, 6 hours preparation should be allowed plus actual hearing time.

Appeal to a review tribunal
The current guideline hours allow for 3 hours. The proposed fixed fee anticipates 2.28 hours, a reduction of 24% in time. The appeal is a vital final check in relation to patients" rights. It is conducted by the Court and is analogous to a s 16 review. Three hours is already inadequate so the proposed fee will be wholly inadequate. Three hours preparation time should be allowed plus actual hearing time

Paternity
Application(s)/Order(s)
An application for a Paternity Order is usually straight forward, and in these circumstances the proposed fee may be sufficient. It is suggested that the activity/task should include the need the payment of the fee for the DNA test.

Formal Proof hearing
The proposed fee for a formal proof hearing for Paternity is $90.00 whereas for General Family it is $140. It is not clear why there is a difference. The proposed fee of $90 is insufficient. For this activity the lawyer will need to meet with the client, draft and file an updating affidavit, prepare for and brief client, and attend formal proof hearing. Under General family there is also a separate activity for actual hearing time. This should also be provided under Paternity.

Defended Application/hearing
The proposed fee to prepare for a defended hearing is completely insufficient. It is not at all clear why under other areas of work there is provision for "pre-hearing matters" but not under Paternity. The work involved is largely the same, other than receipt of specialist reports (although a DNA diagnostic testing report may be received). The Pre-hearing Matters activity from General Family should be replicated under Paternity.

Post Defended Hearing
There is also no provision under Paternity for post defended hearing activities. If there is a defended hearing then there will be additional work involved following receipt of the judge's decision. A post defended hearing, including the additional work that will be required, should be included as a separate step under this category.

Personal & Property Protection Rights (PPPR)
Application(s)/Order(s)
Welfare/Property Interim/Final Order

The proposed fee of $570 is completely inadequate. These proceedings can be extremely complex due to the nature of the application and the inquiry involved to bring an application to the Court. Taking instructions, preparing and filing the proceedings can take anywhere between 3 to 10 hours, depending on the complexity of the matter and the number of people involved. In addition a specialist report is required with the application regarding the subject person's lack of capacity. The following "tasks" should also be included under this step:

- obtaining medical evidence;
- obtaining consents, where appropriate;
- receiving Lawyer for Subject Person's report;
- consulting with Lawyer for Subject Person;
- taking further instructions from the client; and
- receiving directions from Court as to service and any further steps required

With the addition of these tasks and the time involved to complete them it is clear that a higher initial fee is required, or additional activity steps are required.

Defended Hearing

Defended Hearing - Preparation

Defended hearings in this area of law are rare. As such, and given the level of expertise and skill required (for example, specialist medical evidence may need to be challenged), the 'complex' case category should apply to all defended hearings under this category. If tasks and a fixed fee do remain, then consulting with Lawyer for the Subject Person must be included.

Post Defended Hearing

There is no provision under this step for post defended hearing activities. If there is a defended hearing there will be additional work involved following receipt of the judge's decision. A post defended hearing, including the additional work that will be required, should be included as a separate step under this category.

Property Relationships

The general consensus is that relationship property is not suitable for a fixed fee framework particularly given in it often results in cost recovery. Under the existing steps, 7 hours is available for pre-proceeding negotiations. With the proposed removal of this step counsel only have the new fixed fee of $470 under the Pre-proceeding settlement available. This is short sighted. Property negotiations are often extremely fraught and the time involved in negotiating between counsel and clients is often lengthy. The existing 7 hours should remain for property negotiations.

Application(s)/Order(s)

First/only proceedings

The proposed fee of $570 for this initial step, which equates to 5.38 hours, is manifestly inadequate. Under the existing steps, counsel receive 7 hours at their guideline rate ($770 at the minimum hourly rate through to $938 at the higher rate) for this work. This equates to a 23% reduction in time.

Proceedings under the Property (Relationships) Act 1976 (PRA) are generally complex. Resolving division of relationship property is normally achieved through negotiation and the signing of a Separation and Relationship Property Agreement. Proceedings under the PRA can be the most demanding area of family work, requiring high levels of competence, but is proportionally a small percentage of the work done. There can be multiple applications for disclosure/discovery, and expert witnesses as valuations of assets is required if proceedings are filed. Litigation under the PRA should be remunerated in a way that recognises the level of expertise and competence required. In addition the PRA and the Family Courts Rules require the filing of 2 affidavits, a PR1 and a narrative affidavit. In these circumstances all litigation under the PRA should be dealt with under the complex cases category and remunerated at the hourly rate of $134 for complex cases.

Second and Third Proceedings
There are not the same efficiencies with relationship property work as there can be with proceedings under the Domestic Violence Act and the Care of Children Act. Proceedings under the PRA are generally filed exclusively. Additional grounds may be added, but these are within the original application. Counsel will not be able to gain additional funding through this process to meet their shortfall.

S21 Agreements
It is unclear whether the reference to section 21 only, and the omission of section 21A, is simply an oversight, or whether it is the intention that only agreements made under section 21 (that is, during the currency of a relationship) are to be covered by legal aid, and that agreements made under section 21A (that is, after separation) will not be covered.

Both sections 21 and 21A must be able to be covered by legal aid.

Whether under section 21 or section 21A, the tasks listed under this activity cannot be completed within the proposed fee of $140, which equates to 1.32 hours. In light of the comments above regarding the reduction in the fee for pre-proceedings, the work involved in obtaining a client's instructions, preparing the agreement and certifying it cannot be completed within the proposed fee.

The work involved consists of the lawyer meeting with their client to obtain detailed instructions regarding all assets and debts. Disclosure from the other party is required, and once this is completed a further attendance on the client will be necessary to go through the disclosure received, and to ensure that their client is properly advised so that a division of relationship property can be determined. An agreement will then need to be drafted and sent to counsel for the other party to ensure that they are happy with the draft agreement. Once the content of the agreement is finalised counsel will need to attend their client again to advise them and certify the agreement. The onus on counsel in certifying that they have explained the legal effects and implications of the agreement is high. This attendance is normally at least 45 minutes, even when the client is familiar with the content of the agreement. Following this there may be settlement matters to attend to, as well as the tasks already listed such a reporting to the client and the ministry.

Settlement Conference
While the fee for preparation may be sufficient, it needs to be clear in the task column that counsel will be remunerated at the $53 per half hour for attendance of the actual time of the conference. Proceedings under the PRA should be treated as complex cases.

Memorandum of Consent
The proposed fee of $140 is insufficient for the work involved in preparing a memorandum of consent for proceedings under the PRA. In addition the Court also requires confirmation that the division recorded in the memorandum of consent is an equal division, or a division that is in line with the provisions of the PRA. Therefore, if parties have compromised in reaching agreement, documentation must be filed along with the memorandum of consent to confirm the compromises reached, and requesting that the Court makes the order sought. An appearance may be necessary.

A fee of $318 (three hours) would be appropriate for consent memoranda.

Pre-hearing Matters
Discovery
The proposed fee may be sufficient, but only if discovery is adequately covered with the initial application category. Please refer to the comments in this category under Application(s)/Order(s) *First/only proceedings*.

Interrogatories
These applications are rare so the proposed fee sufficient.

Document Preparation
The fee proposed for the tasks listed is excessive. The amount of $212 would be sufficient. The balance ($498) should be allocated to Application(s)/Order(s) *First/only proceedings* stage to cover the additional costs for the additional work involved.

Interlocutory hearings
The allocation of $190 as a fixed fee for this activity may be sufficient for this work. However, interlocutory applications are not common, and there is no standard template. They involve an application (or more than one application) to compel something to occur. They will need to be accompanied by either an affidavit or a memorandum/submissions of counsel. There is often research involved in preparing an application such as this. It may be sufficient if there is an allocation of time for preparation, such as for defended hearings, related to the amount of hearing time.

It is unclear whether this can be claimed multiple times if there are multiple interlocutory applications and hearings. This needs to be clarified under the steps in this category.

Defended Hearings
Given the level of expertise and skill required (for example, specialist valuation evidence may need to be challenged), the 'complex' case category should apply to all defended hearings under the PRA. If tasks and a fixed fee do remain, then the proposed hourly rate of $134 for complex cases should apply.

Post-Defended Hearing
The proposed fixed fee of $430 is sufficient. However there may be settlement matters to attend to and this should be listed as a separate task for this category.